THE

Complete and Consolidated Digest

OF

INDIAN CIVIL CASES 1901 TO 1908.

Decided by the several Indian High Courts, and reported in the various authorised and unauthorised Law Reports and Publications of Allahabad, Bombay, Burma, (Upper and Lower), Calcutta, Central Provinces, Madras, Oudh, and Punjab.

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THE

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1901 TO 1908

PART II—B to Z.

B.

Babuana Grant.

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Babuana property.

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Babuana property granted by the Maharaja of Durbhanga to the junior male members of the Raj family to be enjoyed by them in lieu of money maintenance, subject to the proprietary rights of the grantor Maharaja and to his ultimate claim as reversioner on extinction of the grantee's descendants in the male line is alienable and liable to sale in execution of decrees against the grantees and his descendants. MAHARAJAH SIR RAMESHWAR SINGH BAHADUR *v.* BABU JIBENDAR SINGH. **9 C. W. N. 567.**

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Babuana property granted in accordance with the *kulachar* or family custom of the Darbhanga Raj is property granted to the junior male members of the family to be enjoyed by them in lieu of money maintenance, subject to the proprietary rights of the grantor, and his ultimate claim as reversioner on the extinction of the grantee's descendants in the male line. The grantor remains responsible for the payment of the Government revenue and retains his position as the recorded propietor of the property assigned. The grantee has the right to alienate the property subject only to the contingent interest of the grantor. 9 *W. N., Cal.*, 567; *S. C.* 32 *Cal.*, 683, *followed.* Such property is ancestral property in the hands of the grantee, and his sons acquire interest in it at their birth.

When property under attachment is released by an order made on an application under section 278 of the Civil Procedure Code and the order is subsequently set aside no fresh attachment is necessary to bring the property to sale.

And the undivided property of a number of a joint Hindu family may be sold when it was attached during his lifetime and the order of release was obtained by him, but the order was set aside by a decree after his death, as the effect of the decree in such cases is to maintain the attachment originally made. L R 6 I A, 88; 23 Cal, 829, followed. RAM CHANDRA MARWARI *v.* MUDESHWAR SINGH, **10 W. N. C. 978=33 C. 1158.**

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2 *Bailment—Entrusting for repair the driving beam of a sewing machine to copper-smith—Degree of care—Burden of proof. Contract Act IX of 1872 Ss. 151, 152, 154.*

Plaintiff entrusted a driving beam of his sewing machine to defendant who was a copper-smith, for repair. He wanted a broken tip foldered with copper. Defendant undertook to do the repair. He employed another copper-smith to do the work under his instructions. In the course of the soldering, excessive heat was applied, and the other tip of the driving beam was melted, rendering the driving beam useless.

Held in a suit for damages, that S. 151 of the Contract Act governed the case, and that the section required from the defendant the care of a skilled copper-smith.

Held, also, that, if a man undertakes, whether for reward or not, to do something requiring special skill, he may be fairly called on, if things go wrong, to prove his competence. S. M. L. J. 1 167, U. B. R. 1897-1901 P. 337, 3, H. and C. 596 referred to. MAHOMED ALI *v.* NGA PE. **U. B. R. (1908), 1st quarter, Contract, P. 11.**

Bairagi.

1 *Capacity to acquire property—Property held by head of Mutt—Presumption. 26 M. 79.* See Part. I Col. 744.

2 Bairagees—*Succession—Custom—Right of preceptor's Preceptor—Hindu Law.*

Found that, by custom prevalent amongst the *Bairagees* Preceptor's preceptor of the deceased is entitled to succeed to his property and to obtain Letters of Administration to his estate. THE COLLECTOR OF DACCA *v.* JAGAT CHUNDER GOSWAMI. **5 C. W. N. 873=28 C., 608.**

Balambhatta, vale of the Commentaries of.

Hindu Law—Succession—Competition between full sister and half-brother's son—Mitakshara—Sister's place in the line of heirs—Vyavahara Mayukha, views of, on the point—Value of the commentaries of Balamphatta and Nanda Pandita—Conflict between Mitakshara

Balambhatta vale of the Commentaries of (*Contd.*)

and Vyavahara Nayukha-Rule as to harmonising the difference.

In cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that where the competition is between her and a half-brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha.

The interpretation put by Westropp, C. J., upon Balambhatta's texts in *Sakharam Sadashiv Adhikari* v. *Sitabai* (1879) 3 Bom. 353 commented upon and dissented from except in cases where the Vyavahara Mayukha alone is applicable.

Rudrapa v. *Irava* (1903) 28 Bom. 82, explained.

Per Chandavarkar, J.—The commentary of Balambhatta on the Mitakshara is not regarded in this Presidency as an authority to be accepted in the interpretation of the former work without question. These observations apply more or less to Nanda Pandita also.

It is a well established rule of the Bombay High Court that where the Mitakshara is silent or obscure, the Court must, generally speaking, invoke the aid of the Vyavahara Mayukha to interpret it, and harmonise both the works, so far as that is reasonably possible. BHAGWAN *v.* WARUBAI. **32 B. 300.**

Balance of account.

1 Suit for balance of account.—*See Act IX of 1908 (Limitation Act) S. 64 Part I. Col 1850, 1851.*

2 Suit on balance of account. Fresh promise to pay barred debt. Contract Act S. 25—102 P. L. R. 1908.—*See Part I. Col. 1780.*

Balcony.

Municipality—District Municipal Act, Bombay (VI of 1873, Bombay), Section 33, Caluse (3)—Bye-law 7—Power of Municipality.

The plaintiff sued to obtain a perpetual injunction restraining the Ahmedabad Municipality, the defendant in the suit, from removing a balcony with overhanging eaves which the plaintiff had constructed over the *otta* of his house.

The defendant contended that the plaintiff was permitted to build the balcony subject to the condition that it should not extend to the east beyond a point five feet from the northern extremity of the eastern wall of the plaintiff's house, that the plaintiff had disregarded this condition, and that, therefore, under sub-clause 3 of section 33 of the late Bombay District Municipal Act VI of 1873, and by a bye-law No. 7, framed by the Municipality, the Municipality were entitled to

Balcony *(Contd.)*

require the removal of the structure completed in contravention of their orders.

It was contended for the plaintiff that the defendant, Municipality, had no power to order that the balcony should not be constructed over the space to which the Municipality referred in its prohibiting order and the plaintiff also alleged that as that space was not a public street, he was legally entitled to build the balcony over that space. It was found that the space on which the plaintiff's house abutted, which the balcony in question overhang, was not a public street

Per Batty, J.—That the Municipality's orders being inconsistent with the provisions of the Act and in excess of the powers which it authorised the Municipality to exercise, the plaintiff's claim should be allowed.

Per Chandavarkar and Aston, JJ.—That the order of the Municipality was within the jurisdiction of the Municipality under the provisions of the Bombay District Municipal Act of 1873, and the plaintiff's claim should be dismissed. TRIBHOVAN CHUNILAL *v.* THE AHMEDABAD MUNICIPALITY. **5. B. L. R. 48=27 B. 221.**

Bandhus.

1. Mitakshara—*Daughter's son of first causin a* bandhu—*Heir.*

The list of *bandhus* given in the *Mitakshara* is only illustrative, and not exhaustive. Hence, a person who alleged himself to be the daughter's son of the first cousin of the *prepositus* is a *bandhu* and capable of inheriting. (12 M. I. A. 448 and Tagore Law Lectures, p. 713, refd. to.) BISHAN PRASAD *v.* BINAIK PRASAD. **2 A. L. J. 458.**

2. Mitakshara—*Succession—Father's sister's son*—Bandhu—*Son's daughter not a preferential heir.*

Females not expressly named in the *Mitakshara* do not inherit. 3 A. 45, 5 A. 311 followed.

According to the *Mitakshara*, as understood in these provinces, the son of a father's sister is entitled to succeed as a *Bandhu* to the estate of a Hindu in preference to the daughter of a predeceased son who is not so named. (22 A. 338 followed.) NANHI *v.* GAURI SHANKAR. **2 A. L. J. 654=A. W. N. 1905, p. 242=28 A. 187.**

3. *Hindu Law—Succession—Joint family*—Stridhanam—*Maternal uncle's estate. Devolution of*—

Held, by the Full Bench, that according to the Hindu Law sons of a woman who succeed to her *stridhanam* and who are at the time the succession opens members of a joint family with their father take as co-owners or tenants in common.

Held, also, that the estate of a male which devolves by inheritance on his sister's sons who at the time the succession opens happen to be undivided members of one and the same joint Hindu family governed by

Baudhus *(Contd.)*

the *Mitakshara* Law is taken by them as tenants in common or co-owners without benefit of survivorship. 25 *Mad.*, 678, *considered.* (1) KARUPPAI NACHIAR *v.* SANKARANARAYANAN CHETTY. (2) SANGILIVEERA NACHIAR *v.* SANKARANARAYANAN CHETTY. (3) NALLAPUREDDI NARASIMHA REDDI. **M. L. J., 1903, p. 398=27 M. 300**

4 *Hindu Law*—Bandhus, *preference among*—*Male* Bandhus *entitled to preference over female* Bandhus, *though nearer in degree—Accretions, what are—Accretions pass with estate—Adverse possession, title acquired by—Party holding under a deed or will which is invalid cannot set up a higher right than that claimable under the deed or will.*

It is settled law in this Presidency that a male *Bandhu* is entitled to preference over a female *Bandhu* even though the latter is nearer in degree. Where additions are made to an estate by a limited owner with the intention that they should form part of the estate such additions pass with the estate and not to the heirs of such owner, though made with funds over which such owner has absolute powers of disposal. Where a female, having the limited interest of a daughter or widow in an estate, spends the income which is her absolute property in the erection of buildings on lands belonging to the estate, it must be presumed that she intented the buildings to be an accretion to the estate and to devolve, as such, on the persons who would be entitled to succeed to the estate. A person holding land under a deed or will, which, however, does not operate in law to pass the land in question, cannot, by such possession for more than twelve years, acquire an interest in the property different from that which he would have taken if the deed or will had been valid and operative. *Balton v. Fitzgerald*, (*L.R.*, (*1897*), 2 Ch. D, 86 at p. 93) referred to. A, who was entitled to an estate and to the management of a temple as hereditary trustee or *dharmakarta*, gave his widow B, by will, the estate 'because according to the law (Dharma Sastra) the kartaship (heirship) vests in my wife,' and he further directed her to conduct the dharmakrtaship of the temple. B gave, by deed, both the estate and dharmakartaship to her daughter C 'as according to Hindu Law, you are the *chief heir* after me':

Held, that B, under the terms of the will of A and C, under the terms of the deed of B, took no more than a woman's limited estate under the Hindu Law both in the estate and in the dharmakartaship; and that neither B nor C could acquire by possession an interest in the property higher than that which they would have taken if the property had passed by deed or will. RAJAH VENKATA NARASIMHA APPA RAO *v.* RAJAH SURENANI VENKATA PURUSHOTHAMA JAGANNADHA GOPALA ROW. **31. M. 321.**

Bania and Zemindar.

Dealings between banias and agriculturists—Interest—Undue influence 13 P R 1905. *See Part I Col 258.*

Banianship—Agreement Lien.

Receiver—Liability of estate in his charge to creditors—Lien—Bania's lien on good— A creditor's dealings with executors or trustees carrying on a business for the benefit of an estate in their hands but which esate is not under the direct control or management of the Court are not quite in the same position in relation to that estate as the dealings of creditors with a Receiver acting under direct orders of the Court. In the latter case creditors deal with the Court through its Receiver and the Court imposes obligation on the estate through the Receiver for protection of creditors dealing with the Receiver. It doubtless is the law that in carrying on a business under directions of the Court a Receiver must necessarily incur personal obligation but in incurring these personal obligations he necessarily and under the authority of the Court imposes obligations on the estate for the benefit of those creditors with whom he has dealt and which obligations the Court ought to and does give effect to, and it is in this respect that a Receiver occupies a position towards an estate in his hands different from that of an executor or trustee. The latter not acting through or under directions of the Court do not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors and the power of Receiver to bind an estate in his hands in favour of creditors dealing with him so long as he acts within his authority, is as necessary a consequence of the Court's managing or carrying on a business through a Receiver as the personal responsibility of the Receiver in acting under that authority.

In the event of a Receiver being sued for acts done by him as such he would doubtless be entitled to rely on his right indemnity as against the estate and in order to try this question of indemnity it would be necessary to secure the presence of as parties to the suit, the beneficiaries or others who are interested in questioning the authority of the Receiver. But it is not necessary to resort to the doctrine of the creditor's right to the benefit of the Receiver's indemnity as a foundation for the right to sue the estate for a debt incurred by the Receiver. A right to maintain such a suit is founded on the just and equitable principle that as the acts of a Receiver so long as they fall within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them.

The banians have the right to hold if so advised after cessation of the banianship, the entire amount of the goods which

Banianship-Agreement Lien *(Contd.)*

may have come in their hands when they ceased to act as banians as security for the total amount of their claim. The banain's lien is indivisible and extended over every portion of the goods for the entire debt and they have the right to insist upon retaining the entire quantity of the goods in their possession until the entire amount of their claim is paid. (*Mussammat*) MOHARI BIBI *v.* (*Mussammat*) SHYAMA BIBI. **7 W N C 799=30 C 937.**

Bank of Bombay.

1. *Presidency Banks Act (Act XI of 1876), section 37—Power to lend money on equitable mortgage.*

Held, that the Bank of Bombay is entitled to lend money on the security of deposit of title-deeds of immoveable property.

The effect of section 37, Presidency Banks Act, 1876, is merely a restriction of the general powers of the directors of the bank and not of the bank. TURNER *v.* THE BANK OF BOMBAY, **25 B 52.**

2. *Presidency Banks Act (XI of 1876), section 50—Bank of Bombay—Right of a shareholder to inspect register of shareholders of the Bank—Object of such inspection—Common law—Right of member of corporation to inspect books of the corporation—Companies Acts (X of 1866), section 231, (VI of 1882), section 256.*

The respondent as a shareholder in the appellant Bank claimed a right to inspect copy and make extracts from the register of shareholders which the Bank refused to allow, but offered to furnish him with the list he asked for if he could satisfy them that he required it for use in his own interests as a shareholder. Without accepting this offer the respondent brought a suit against the Bank in which he based his claim on irregularities which he alleged existed in the management of the Bank, in the election of Directors and in other matters, and stated that he claimed inspection of the register to enable him to communicate with the other shareholders and obtain their assent to resolutions for improvement in the Bank's management to be proposed at a future meeting. The first Court dismissed the suit, for the High Court on its Appellate Side reversed that decision and passed a decree giving the respondent without any restriction the right to inspect, copy and extract from the register which he had orginally demanded from the Bank.

Held, by the Judicial Committee that the suit should be treated according to the principles regulating an application for a writ of mandamus, and in that view the respondent was not entitled to succeed unless he showed clearly that he had the specific right to enforce which he asked for the interference of the Court, that he had claimed the exercise of that right and none other, and that his claim had been refused.

Bank of Bombay *(Contd.)*

In this case there was no statute giving him an unrestricted right, the appellant Bank (which was incorporated under Act XI of 1876) being by section 231 of the Companies Act, 1866, and section 256 of the Companies Act, 1882, expressly exempted from the operation of those statues.

The result of the authorities as to the nature and extent of the common law right which every member of a corporation has to inspect the documents of the corporation was that "the privilege of inspection was confirmed to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object."

Taylor on Evidence, 10th Edition (1906). Volume II, paragraph 1495, referred to.

On the evidence the respondent had not brought himself within the principles so laid down and his claim should therefore not be allowed.

Rex v. *Merchant Tailor's Company* (1831) 2 B. and Ad. 115 followed.

He was not entitled to the extended right given him by the decree of the appellate Court, and the limited and qualified right contended for in the suit was never put forward or insisted on before action brought nor was any claim based on it ever refused. BANK OF BOMBAY *v.* SULEMAN SOMJI, **32 B. 466.**

Banker and Customer.

1 *Relation between them—Current accounts—Essentials of acknowledgment—29 A. 773—* See Part. 1 Col. 1778,

2 *Banker—Payment on forged cheque—Negligence—Liability of customer.*

When a banker makes payment on a forged cheque, he cannot make the customer liable except on the ground of negligence imputable to the customer. BHAGWAN DAS *v.* C.REET. **31 C 249.**

3 *Banker and Customer—Entries in pass-books—Effect of—Estoppel.*

On the 10th March 1900, the plaintiffs sold to the Hope Mills 600 bales of cotton at Rs. 278 per *candy* for the March *viada*, 15th to 25th March, and six delivery entries in due course addressed to the plaintiff's *mukadam* were given by the plaintiffs in favour of the Hope Mills. On the 19th March the Hope Mills put their stamp on the bales. On the 20th March the plaintiffs demanded payment from the Hope Mills by letter but no reply was sent thereto. On the 21st or 22nd March one *Shridhan* bought the 600 bales from the Hope Mills at Rs. 243-8-0 per candy. It was agreed between the plaintiffs and the Hope Mills Company that the company should pay the plaintiffs the difference of price. The company on the 23rd March sent to the plaintiffs a cheque for Rs. 9,500 drawn by them on the Commercial Bank. The cheque was post dated the 3rd April. On the 4th April the cheque was sent to the defendant Bank by the plaintiffs and was credited in the pass-book which was received back from the Bank by the plaintiffs about 4-30 o'clock in the afternoon.

One hundred bales of cotton were delivered by the plaintiffs to *Shridhan* in the afternoon of the 4th April and the rest were delivered the next day. On that date the plaintiffs were informed by the defendant Bank that the cheque was dishonored. It appeared that 400 bales were delivered by the plaintiffs to *Shridhan* after they had been informed of the dishonor of the cheque by the defendant Bank. The defendant Bank declined liability for the amount of the cheque.

Held, that the defendant Bank were not liable. The entry in the pass-book was not intended to be an acknowledgment of the cash received, and the Bank were exonerated from liability by proving non-payment of the cheque, it being not established that in delivering the 600 bales of cotton to *Shridhan* the plaintiffs *bona fide* relied on the representation made by the defendant Bank by the entry in the pass-book that payment of the cheque had been received by them. MOWJI SHAMJI *v.* NATURAL BANK OF INDIA. **25 B. 499.**

4 *Charge—Mortgage—Banker and Customer—Interest—Payment from customer's current account—Appeal to Privy Counil. Record for—Irrelevent matter not to be included in the record.*

Where no direction was given by the customer mortgagor to his banker mortgagee to charge the amount of the mortgage against his current account.

Held, that no objection could validly be made to the charge of the interest by the banker upon the mortgage-debt until the customer gave directions that it should be paid off out of the mortgagor's current account.

The parties to an appeal in compiling a record for appeal to the Privy Council should exercise a great discretion in excising from it anything that is not material to the subject matter of the appeal. THAKUR JAWAHIR SINGH *v.* LACHMAN DAS. **9 C. W. N. 745 (P. C.)**

Banker's Book, Evidence Act.

Evidence Act (I of 1872), Sections 74 and 76—Banker's Books, Evidence Act—Loan Register of Bank of Bengal—Public documents—Right of inspection and to take certified copies.

Held, that the Loan Register of the Bank of Bengal was a public document within the meaning of section 74 of the Evidence Act.

Under section 76 of the Evidence Act all those persons have the right to inspect public documents and obtain their copies who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given. CHANDI CHARAN DHAR *v.*

Banker's Book, Evidence Act *(Contd)*

BOISTAB CHARAN DHAR. **8 W. N. C., 125=31 C. 284.**

Bankers' Books Evidence Act (XVIII of 1891) Section 6—Procedure.

When a party desires an order under section 6 of the Banker's Books, Evidence Act, 1891. in his own behalf the court ought to grant it *ex-parte.*

When he applies against the other party the Court ought not make the order without notice to that other party.

When the Court is not satisfied that the application is not for the purpose of obtaining inspection beyond what is allowed under the ordinary procedure, the Court ought to refuse the application under this section, TRICUMLAL SAKARCHAND *v.* LAKHMIDAS NARONJI. **5 B. L. R. 865.**

Bankruptcy Act 1883.

1 *S. 43, 118—Insolvency—Concurrent proceedings in different Courts—Bankruptcy Act,* 1883, *Section* 43 *and* 118*—Adjudication by different Courts-Procedure—Position of Official assignee—Trustee appointed by English Court* —Locus standi *to contest order passed in India.*

On the 30th January 1904 a receiving order was made in England in respect of the insolvents (William Watson & Co.) and an official Receiver appointed upon the debtors' own petition. On the 1st February on their own application they were adjudged bankrupts and under section 54 of the Bankruptcy Act, 1883, the estate of the bankrupts vested in the Official Receiver. On the 16th February a trustee was elected by the creditors and his appointment having been certified by the Board of Trade the property of the bankrupts vested under section 43 of the same Act in the trustee as from the 30th January 1904.

In India, on the 1st February, previous to the adjudication in Bankruptcy in England, the debtors were upon the petition of their Manager and constituted attorney adjudicated insolvents by the Insolvent Court in Bombay and the usual vesting order was made.

And on 2nd February on the petition of a creditor to the High Court of Calcutta the debtors were adjudged insolvents by that Court and vesting order was passed. On the 13th April the Bombay High Court set aside their order passed on the 1st February.

The trustee in Bankruptcy in England of the insolvents applied to the High Court of Calcutta to set aside order passed on the 2nd February 1904 adjudicating the debtors insolvents and purporting to vest their porperty in the Official Assignee of the High Court.

Held, that the trustee had no *locus standi* to make the application.

That the orders passed on the 2nd February were valid and the High Court had jurisdiction to pass them notwithstanding

Batkrupty Act 1883 *(Contd.)*

the prior adjudication in Bankruptcy in England.

That when there is a prior bankruptcy or insolvency in another country the High Court has a discretion to allow or refuse an adjudication when the conditions of the Insolvency Act are satisfied and there is no valid reason to the contrary.

That the official Assignee could not be treated as a trespasser by reason of the orders passed in England and Bombay as he was bound to take possession of the local assets of the debtors declared insolvents by the High Court.

That upon the facts proved there was an act of insolvency upon which the High Court could and did adjudicate the debtors as insolvents.

That as it may not be just or equitable to allow insolvency proceedings in more than one Court going on concurrently one Court should yield to another having regard to the question of convenience.

The High Court declined to consider an order passed under section 118 of the Bankruptcy Act, 1883, as in the present application, the High Court was not asked to act under that order. *In the matter of* WILLIAM WATSON. **8 W. N., C., 553=31 C. 761.**

2. *Insolvency Act (Stat. 11 and 12 Vic., c. 21), Section 40—English Bankruptcy Act—Rules under, Applicability of.*

As to the question whether the limit to the time within which a creditor can seek to substantiate before the Commissioner in Insolvency a debt rejected by the Official Assignee is that prescribed by the English Bankruptcy rules—

Held, that the reference to "conditions and provisions" in section 40 of the Indian Insolvent Act does not import mere rules of procedure, but only general rules of bankruptcy law applicable for the time being to the proof of debts in England. *In re* KALIDAS *v.* PESTONJI JEHANGIR HORMUSJI. **4 B. L. R., 351.**

3 *Civil Procedure Code (Act XIV of 1882) Section 17—Carrying on business—Agent—Manager of joint family.*

A manager of a joint family property is not an agent for the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such person is not that of principal or agent, or of partners, it is much more like that of trustee and *cestui que trust.* ANNAMALAI CHETTY *v.* MURUGASA CHETTY **7 W. N., C, 754=5 B., L. R., 494 =26. M. 544.**

Barrister.

1 Advocate and client—Recovery of fee paid by client for professional services to advocate—Revision. 25 A. 509. *See Part 1, Col. 1330.*

Contra 4 L. B. R. 1907; P. 55 *infra.*

2 *Capacity of advocate to sue or be sued in*

Barrister *(Contd.)*

connection with professional services--Barrister-at-law—General practitioner--Indian Contract Act, S. 11.

A Barrister-at-law who has been admitted as an Advocate of the Chief Court and who combines the various functions performed by legal practitioners of every class in England must be considered to act in this country not in virtue of his membership of the English bar, but in virtue of his office as an Advocate. He is therefore capable of suing for fees for professional services and of being sued for negligence. *The Land Mortgage Bank of India, Ltd.* v. *Elmes.* (1876) 25 W. R., 332, followed. *Queen* v. *Douire,* (1884) L R 9 A C 745; *C Ross Alston* v *Pitambar Das* (1903) I. L. R. 25 All., 509; *Kennedy* v. *Broun,* (1863) 13 C. P., N. S. 677; referred to. *Grey* v. *Diwan Lachman Das,* (1895) P. R., 219, dissented from. A. P. PENNEL AND MAUNG THIN *v.* J. A. HARRISON AND OTHERS. **4 L. B. R. 1907, P. 55.**

3 *Advocate--Misconduct—Publication of articles in a newspaper by the Advocate defaming Judges—Rules 2, 180, 182, 183 and 197 of the Rules of the Court—Section 8 of the Letters Patent.*

The right of any Barrister to appear in the N.-W. P. High Court rests upon his being admitted to the Roll of Advocates to the Court and not upon his being called to the Bar.

Section 8 of the Letters Patent gives the Court power to make rules for the qualification and admission of proper persons and empowers the Court to remove or suspend from practice on reasonable cause Advocates so enrolled. The High Court can on reasonable cause remove or suspend from practice not only an Advocate who has been enrolled as such under Rule 183 of the Rules of the Court, but also any other Advocate who has been enrolled under any other rule of the Rules of the Court.

Under Rule 2 of the Rules of the Court a Bench of three Judges is empowered to hear and decide all charges against Advocates in respect of professional or other misconduct for which an Advocate may be removed or suspended from practice. Rule 197 provides for cases in which the Chief Justice and Judges may for good cause and without charge or trial suspend or remove from the roll of Court any Advocate of the Court.

Any act which tends to discredit or bring into contempt the order of Advocates or the Court amounts to misconduct of which the High Court can take notice. Acts which on the part of a private individual offend against the dignity of the Court or are calculated to prejudice the course of Justice and are in his case contempts of Court do not cease to be acts of misconduct because they are committed by an Advocate. Rather are they aggravated inasmuch as the Advocate is bound to uphold and maintain the dignity of the Court. Acts which scandalise the Court as libels on its integrity, or the integrity of its Judges, officers and proceedings are all instances of such misconduct. L. R., 2 Q. B. D. 439, 3 Mont. D. and D. 523, L. R. 9 Q. B., 219, 2 Myl. and Cr. 316 referred to.

Hence when an Advocate published in a paper published by him articles throwing discredit upon the Judges of the Court in various ways, and his defence *inter alia* was that he had done so in his capacity of Editor and not in his capacity of Advocate of the Court.

Held, that he was guilty of professional misconduct and the High Court had power to deal with him under section 8 of the Letters Patent and Rule 2 of the Rules of the Court. IN THE MATTER OF MR. SARVADHICARY, AN ADVOCATE. **3 A L J 592=W N A, 1906, P 226 (F B)**

4 *Suit against an Advocate--Client and Counsel—Back-fee—Suit for return of back-fee is not maintainable against a barrister.*

Held, by the Full Bench, that a barrister cannot be sued for return of a back-fee. THAKUR DAS *v.* BEECHEY. **106 P. L. R. 1906=49 P. R. 1906 (F. B.)**

5 Advocate—Making reckless imputations against Court—Misconduct. L. B. R. 1903, P. 130 (F. B.) *See Part I, Col. 902.*

6 Advocate—Agreeing to do clients work for half fees. 34 C. 729. *See Part I, Col. 902.*

7 Barrister and Client. *See Barrister.*

Bastu land.

1 Suit against tenant of Bastu land—*Protab Chandra Das* v. *Biseswar Pramanick See Bengal Tenancy Act VIII of 1885 S. 61, 182.*

2 *Bengal Tenancy Act (VIII of 1885). Applicability of—Landlord and tenant—Enhancement of rent*—Bastu *land, subject of tenancy, situate within a Municipality—Notice to quit.*

In a suit for enhancement of rent the subject of tenancy was a piece of *bastu* lands situated within the Boalia Municipality to which the provisions of the Bengal Tenancy Act were not applicable.

Held, that the suit could not be brought without first giving a notice to the tenant to quit the land or to pay rent at a certain rate. 23 W. R., 61, 24, W. R., 413 referred to. KRISHNA KANT SAHA *v.* KRISHNA CHANDRA ROY. **9 C. W. N. 303.**

Batta

1. *Company's Batta—Abwab.*

A claim for Company's Batta which represents the conversion of *Sicca* into Company's rupees is not an abwab but properly forms a part of the rent. If it is proved that Company's Batta has been paid without dispute for many years and its legality is questioned by the tenant, the onus is not upon the landlord to prove that the rent was originally fixed in *Sicca* rupees. RAM KHELWAN SINGH *v.* KUMAR RAI. **6 C. L. J 667.**

2 *Abwab.*

A claim for Company's Batta is not ne-

Batta *(Contd.)*

cessarily a claim for an abwab. If the rent was fixed in *Sicca* rupees and *Batta* is claimed so as to make the demand equivalent in current coin, the demand is illegal. RAM SARAN SINGH *v.* GYAN SINGH. **6 C. L. J. 637.**

3 *Bengal Tenancy Act (VIII of 1885), Section 74—Cess—Right to recover—Right to additional rent—Recurring right.*

Section 74 of the Bengal Tenancy Act declares void all stipulations and reservations, past and future, for the payment of *abwab*, *mahtub* and other like impositions. The only way in which the landlord can recover any such cess is by showing that it is not an *abwab* but part of the rent.

When the lease stipulates that the tenant would pay additional rent for increased area, if any be found on measurement, the right is a recurring one, and the landlord is entitled to exercise it whenever he finds it necessary to do so. JOTINDRA MOHAN TAGORE *v.* CHANDRA NATH SAFUI. **6 C. W. N. 360.**

4 Payment of Batta—Step in aid of execution. Malukchand *v.* Bechar. 3 B. L. R. 275—25 B. 639 and VIJIARAGHAVALU NAIDU *v.* SRINIVASALU NAIDU. **28 M. 399.** *See Act (IX of 1908) (Limitation Act) Art. 182—Art. 179 (4), Part 1.*

5 Batta—Whether an *abwab*—Whether claim for enforceable at law—7 C. L. J. 202. *See Part I col. 944.*

Batta Memorandum—28 M. 399. *See Act IX of 1908 (Limitation Act) Art. 182—Art. 179 (4) Part I.*

Bed of navigable river—Assessment of revenue—30 C. 291. *See Alluvion and diluvion Part I.*

Belchambers rules and orders.

1 *Rule 71—Civil Procedure Code (Act XIV of 1882), Section 622—Revision—Orders passed by Presidency Small Cause Court, Calcutta—Jurisdiction of High Court on the Original side to revise—Belchamber's Rules and orders—High Court Rules Appellate Side—Rule IVA, Part I, Chapter II—Advocate—Vakil.*

Applications for revision against the orders passed by the Presidency Small Cause Court, Calcutta, must be filed on the Original Side of the High Court and by an Advocate and not a Vakil of the Court.

Under Rules IV, Part II, Chapter II of the High Court Rules, Appellate Side, the Original Side practice to hear and determine these applications is to be continued and such application should not be made on the Appellate side of the Court. SURAT CHANDRA SINGH *v.* BRAJO LAL MUKERJI *Sub-nom* Re-APPLICATION OF A VAKIL OF THE APPELLATE SIDE. **7 W. N., C. 843 = 30 C. 986.**

2 *Rules 476, 477, 605—Mortgage—Interest up to date of payment—Practice—Belchamber's Rules 476, 477 and 605—Civil Procedure Code (Act XIV of 1882), Section 209—Transfer of Property Act (IV of 1882), Sections 88 and 89.*

Belchambers rules and orders *(Contd.)*

Held, that having regard to the constant practice on the original side of the High Court the decree for interest at six per cent. after the expiration of six months allowed for redemption of a mortgage in accordance with Rule No. 605 of Belchambers' Rules and Orders is a decree for the payment of money, and that the rule is not void.

The Court may award interest at the agreed rate up to the date of expiry of six months allowed for redemption of the mortgage and at a lower rate for the subsequent period till realization of the mortgage-money —21 All., 361; 19 All., 174; 1 C. W. N., 550; s. c., 24 Cal., 766; 26 Cal., 39; 5 C. W. N., 137 and 653; 20 Cal., 360, referred to. JOGENDRA NATH MUKERJEE *v.* METHANA ABRAHAM. **6 C. W. N. 769.**

3 *Rules 615 and 617—Report—Exception to Fraud, surprise or mistake.*

The practice laid down in Rule 615 of Belchambers' Rules and orders is one which ought to be rigidly adhered to, 2 C. W. N. 57 s. c. 24 Cal., 437, followed.

Rule 617 does not permit an application to be made to vary a report, if notice of motion to discharge or vary a report is not given in due time.

The filing of the exceptions to a report is not a compliance with the terms of Rule 615.

The words fraud, surprise, mistake or other special ground in the rule refer to fraud, surprise, or mistake or some other special ground, incident to, or connected with, or which has resulted in the making of the Certificate or Report itself, and not to something which has occurred quite outside and independent of the Certificate or Report. A mistake in not following the course of procedure laid down in Rule 615 is not a special ground. THE ROYAL INSURANCE COMPANY *v.* AKHOY COOMAR DUTT. **5 W. N. C., 337 = 28 C. 272.**

4 *Rules 780, 785—Taxation—Practice—Attorney and client's costs payable out of estate—Counsel's fee excessive—Disallowance on taxation—Belchambers' Rules and Orders, 780, 785.*

Where on a motion for discharge of guardians the Court ordered the guardian's costs of opposing the application to be taxed as between attorney and client and paid out of the estate.

Held, that the Taxing Officer was right in disallowing as against the estate an excessive fee paid to counsel for appearing on the application, and should only allow the excess even as against the client, when it was manifestly shown that the client knew that the fee was excessive and that he might be called upon personally for the excess. The duties of a Taxing Master explained. IN THE MATTER OF THAKUR DASSEE DASSEE. **33 C. 827.**

Benami.

1 *Benami Conveyances—Rights of owner to repudiate.*

Benami *(Contd)*

Where a colorable conveyance is executed for the purpose of enabling the transferor to defraud his creditors, the transferor is entitled to recover back his property before the fraud is actually carried out and there is a '*locus penitentiæ,*' until a creditor has been actually defrauded.

But when the intended fraud has been wholly or partially carried into effect a different state of things arises, and the Court will not lend its aid to assist a transferor, who has defrauded a creditor by making a colorable transfer of his property to get it back from his transferee. In this case it was held that the plaintiff was not precluded from claiming the property. 23 Cal., 962; 27 Cal., 231; L. R. 1 Q. B. D., 291; 3 B. L. R. (F. B.) 15; 14 M. I. A. 496, referred to. GOVINDA KUAR *v.* LALA KISHUN PROSAD. **28 C. 370.**

2 *Plea of fraud—Party to a fraud—Estate conveyed to a benamidar—Plaintiff not entitled to rely upon his fraud—Defendant not entitled to rely upon his fraud in defence.*

When a fraud has been carried into effect a party to it cannot as plaintiff plead the fraud to vitiate the transaction; nor is it open to him as defendant to plead his own fraud as an effective answer to a claim to immoveable property conveyed by him to a benamidar. SHIDLINGAPPA GANESHAPPA *v.* HIRASA TUKASA. **9 B. L. R. 542; 31 B. 405.**

3 Benami purchase—23 A. 175. A. W. N. 1901, P. 44. *See Part I. Col. 1175.*

4 Execution of decree—Benamidar 27 A. 443. *See Part I Col. 1175.*

5 Suit against a certified purchaser—23 A. 34. *See Part I Col. 1176.*

6 Certified purchaser buying benami. 3 O. C. 329 col. 1176 p. I.

7 Suit against certified purchaser. 5 B. L. R. 329 col. 1177 p. I.

8 Benami purchaser certificate holder. 8 O. C. 306 col. 1177 p. I.

7 Benami purchase. 5 C. W. N. 341 col. 1173 p. I.

8 Suit against certified purchaser. 26 A. 82 col. 1173 p. I.

9 Purchase by decree holder—Benami. 29 A. 557 col. 1174 p. I.

10 Certified purchaser—Suit against benamidar. 27 A. 194 col. 1174 p. I.

11 Suit against assignee from certified purchaser. 18 M. L. J. 305 col. 1174 p. I.

12 Suit against benamidar. No fraud. 3 P. R. 1906 col. 1174.

13 Suit against assignee from certified purchaser. 4 P. R. 1904 col. 1175 p. I.

14 *Purchase benami—Revenue sale.*

The law does not preclude a person from contending that the purchase was made for him *benami* by a purchaser at a Revenue sale (25 M. 655 ref. 29 M. 473 foll.) VENKATACHALAM PILLAI *v.* PURSHOTAMA NAICKER. **4 M. L. T. 316.**

15. Benami purchase—Application to set aside sale—29 C. 682 Col. 1549. P. I,

Benami *(Contd.)*

16. *Benami purchase—Revenue Recovery Act (II. of 1864, Madras), Sections 38 and 39—Sale—Jurisdiction of Court to enquire if purchase was benami.*

A sale under Act II of 1864, (Madras) vests the property sold in the purchaser as named in the notification published under section 39 of the Act. It is not open to anyone to contend subsequently that such purcharser was a *benamidar,* and that the real purchaser was some one else. NARAYANA CHETTIAR *v.* CHOKKAPPA MUDALIAR. **25 M. 655.**

17. *Benami purchase—Revenue Recovery Act (II of 1864, Madras) Sections 38, 39—Sale—Revenue sale—*Benami *purchase—Estoppel.*

Per Subrahmania Aiyar, Offg. C. J.—When a person is let into possession by another person he is estopped from denying the latter's title without first surrendering possession.

When lands are sold to realize revenue under Act II of 1864, and a person purchases them in the name of another person he is not precluded from proving the *benami* character of the purchase. *14 M. I. A., 496, referred to; 18 Mad., 470: 20 Mad., 494 followed; 25 Mad., 656, dissented from.* MATHUNAIYAN *v.* SINNA SAMAVAIYAN. **M. L. J., 1905, p. 419=28 M. 526.**

18. *Revenue Recovery Act (Madras) II of 1864, S. 49—*Benami *purchases in revenue sales.*

A purchaser in a revenue sale can be shown to be only a *benamidar* for another. *28 Mad., 526 approved, 25 Mad. 655 overruled, 14 M. I. A. 496, referred to.* NARAYANASAMI PADAYACHI *v.* GOVINDASAMI PADAYACHI. **29 M. 473=16 M. L. J. 505.**

19. *Execution of decree—Sale—Irregularity of procedure—Sale of property of persons not party to proceedings—Representation of estate of deceased debtor—*De facto *manager of Hindu family—Mortgage—Mortgagee buying equity of redemption after obtaining money decree—Liability of mortgagee.*

Sales in execution of decrees cannot be treated as void or be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them.

The Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. *1 Marsh 647 followed.*

The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that

Benami (*Contd.*)

there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named is *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control.

A mortgagee cannot, by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage. KHAIRAJ MAL *v.* DAIM. **2 A. L. J. 71=9 W. N. C. 201.**

20 Purchase by public officer. 27 A 73 --Col: 283. P. I.

21 *Benami Sale Deeds—Minor—Collusion—Declaratory decree—Money advanced by mortgagee in good faith—Stridhan—Limitation—Sufficient enquiry by mortgagee—Constructive notice.*—THAKUR JAGAN NATH BUKHSH *v.* THAKURAIN DHIRAJ KOER, **3. B. R., 104=4 O. C., 192.**

22 *Sale by real owner, under fictitious deeds—Purchase by third person from the fictitious vendees with consent of, and on representations made by, the real owner—Real owner's right to set up his title against second purchaser—Estoppel.*

The real owner of some property conveyed the same to his wives under fictitious sale-deeds, and then brought about a sale of the same properties by his wives (the vendees under the fictitious deeds) in favour of a third party, who purchased the same on the representations made by the real owner and on the latter's attesting the sale deeds.

Held, under the circumstances, that the real owner was precluded from setting up his title against the last purchaser; the sale to the latter had the effect of conveying to him the interests of the real owner, which he had purported to convey to his wives under the fictitious deeds of sale and this even as against the holder of a decree against him (the real owner). In such a case, it would be necessary to find whether the last purchaser was a purchaser for valuable consideration and whether he purchased on the strength of the representations made by the real owner and by reason of his assent to the transaction. TULSHI RAM *v.* MUTSADDI LAL, **2 A. L. J. 97.**

23 Suit by real purchaser against benamidar 3 P. R. 1906.—*See Col. 1174 P. I.*

24 *Fraudulent conveyance—Benami transaction for purpose of defrauding creditors—Deed of conveyance not in real purchaser's name—Suit by real purchaser against benamidar for possession.*

The plaintiff alleged that he had bought a piece of land, but had caused the conveyance to be executed in the name of defendant (his mother). This was done fraudulently for the purpose of protecting the property against the claims of plaintiff's creditors. He now sued his mother for possession of the land.

Held, that whether the intended fraud was carried out or not, the suit must be dismissed.

Fadu Nath Poddar v. *Rup Lal Poddar*, (1906) 10 C. W. N. 650 ; *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*, (1874) 21 W. R. 422 ; dissented from.

Chenvirappa v. *Puttappa*, (1887) I. L. R. 11 Bom., 708 ; *Yaramati* v. *Chundru*, (1897) I. L. R. 20 Mad. 326 ; followed.

Symes v. *Hughes*, (1870) L. R. 9 Equity, 475, referred to. MA LE *v.* PO TAIK. **3 L. B. R. 1906 P. 245.**

25 *Onus—Benami—Proof—Onus—Husband and wife.*

A judgment creditor who obtained a decree against a person attached properties standing in the name of the judgment-debtor's wife. The wife puts in a claim petition which was dismissed. She brought a suit for a declaration that the property attached was hers.

Held, that in the circumstances of the case, it lay upon the wife to prove the purchase-money was supplied by her and for her enjoyment, and in the event of a failure to discharge the same, the suit should be dismissed. SANJIVAROYA PILLAI *v.* BALAMBIKI AMMAL. **17 M. L. J. 339.**

26 *Benamidar*—Onus probandi—*Plaintiff giving a different meaning to purchase.*

Held, that the burden of proof is on the plaintiff, who seeks to give to the purchase a different meaning and complexion from those which it bears on its face ; and that burden must be strictly discharged, in other words, that the plantiff, if she is to succeed, must put the Court in possession of legal and satisfactory evidence, and that it will not suffice to point to matters of suspicion or even to plausible conjecture. 11 *M. I. A.* 28 *at p.* 43 *followed.* RAMABAI *v.* RAMCHANDRA SHIVRAM.

27 *Benami transfer for illegal purpose of defrauding creditors—Such purpose not carried out—Suit for specific performance of contract to sell property to third person—Right of transferor to resist such suit on the ground that transfer was* benami.

Where the owner of property transferred it, *benami*, to another for an illegal purpose, *e. g.*, that of defeating creditors, and such purpose was not carried out into execution, *held*, with reference to S. 84 of the Indian Trust Act, 1882, that a suit for specific performance of a contract by the transferee to sell the lands to a third person can be successfully resisted by the transferor, on the ground that the transfer was a mere *benami* transaction. (24 Q. B. D. 742, 33 C. 976 R ; 31 B. 405, D ; 20 M. 326, *considered* ; L. R. 9 Eq. 475 and 1 Q. B. D 291, 18 M. 378 (387), F ; 23 C. 962, refd) MUNISAMI MUDALIAR *v.* SUBBARYAR. **3 M. L. T. 244.**

Benami (*Contd.*)

28 *Decree against* benamidar—*Beneficial owner—Bound by the decree—Subsequent suit for redemption.*

A decree passed against a *benamidar*, in a suit brought against him, binds the beneficial owner, just in the same way as a decree in a suit brought by a *benamidar*. Where a decree gave the *benamidar* an opportunity to redeem, and he did not avail himself of it, *held*, that the beneficial owner could not maintain a suit to redeem, KANIZ FATIMA *v.* WALI-ULLAH, 4 A. L. J. 689=A W N (1907), 272=30 A. 30.

29 *Transaction, whether benami—Oral evidence unsatisfactory—Surrounding circumstances and considerations of probability to be looked into.*

Where the question was whether a document, which, on its face, was a mortgage-bond, was a genuine or a fictitious transaction, but at the trial persons, who might have been expected to be prominent witnesses, were not called, and the evidence that was called was open to much adverse criticism

Held that in the cirumstances, it was necessary to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct. DALIP SINGH *v.* CHAUDHRAIN NAWAL KUNWAR, 12 C. W. N. 609=10 B. L. R. 600=30 A. 258.

30 *Benami transfer—Fraudulent object defeated—Right of owner to recover from* benamidar—*Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 91 and 144.*

Where a *benami* deed of transfer of land was executed with the object of defrauding creditors, but the object failed

Held—That the owner was entitled to recover the land from the benamidar, and that without being required to set aside the deed as a preliminary. (1 Q B D 291, L. R. 9 Eq. 475, (479) and 26 ch D 616 fold. 24 Q. B. D 742 refd).

Art. 144, and not Art. 91, of Sch. II of the Limitation Act therefore applied to the suit. PETHERPERMAL CHETTY *v.* MUNIANDI SERVAI, 12 C. W. N. 562(P. C) =4. B. L. R. 1066=5. A. L. J. 290=7. C. L. J. 528=14. B. L. R. 108=10 B. L. R. 590=18. M. L. J. 277=4. M. L. T. 12=35. C. 551, P. C.

31 Benami *transaction—Fraud—Estoppel—Suit against* benamidar *when maintainable.*

When the intention to commit fraud has not been carried into effect a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him is *benani.*

A judgment-debtor transferred his property to save it from being attached in execution of decree. On appeal the decree against him was set aside. He sued the transferee for a declaration that the transfer to him was *benami.*

Held, that the suit was maintainable. JADU NATH PADDAR *v.* RUP LAL PADDAR 4 C., L. J., 22.=10 C. W. N. 650,

Benami (*Contd*).

32 *Benami—Suit for possession of land—Document, execution of, to defraud creditors—Document, executed, but not carried into effect—Grantor of fraudulent deed, if entitled to be relieved of its consequences—Law. Discussion of*—Bona fide *purchase by third party for value and without notice—Mere execution of deed, if passes title—Estoppel.*

Although where the intended fraud has been carried into effect the Court will not allow the true owner to resume the individuality which he has once cast off in order to defraud others, yet if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another whose retention of it is an act of gross fraud. Where the fraudulent purpose has actually been accomplished by means of the colourable grant, the maxim "*In pari delicto poteori est conditio possidentis*" applies. But where the fraud has not been accomplished the maxim ought not to be applied.

13 M I A 551; 13 M I A 585; 21 W R 422; 18 W R 485; 20 W R 112; 23 W R 42; 24 W R, 391; 9 C L R 64; 23 Cal. 460; 23 Cal, 962, Note; 23 Cal. 962; 27 Cal 231; 28 Cal, 370; 1 All 403; 18 Bom, 372; 8 C W N, 620; 3 Bom 406; Amb, (175) 264; 2 At, 156; 2 Atk, 254; G. Cooper (1815) 250; 2 J. and W. 565, 35 Beav. 208; L R 13 Eq., 485; San. &c., (1837) 459 referred to.

Mere intention, not carried into effect, ought not to be sufficient to deprive the party of the assistance of the Court in enforcing his rights and if he either abandons his fraudulent purpose before it is accomplished or pay his debt to the full value of the property conveyed, the fraud should be regarded as purged. 148 Mass 32; 18 N E Rep. 576; 4 Mass 354 referred to. 11 Bom 708; 20 Mad 323, 326 explained.

Title to land cannot pass by admission when that statute requires a deed, and a mere execution of deed of release does not create any title in the person in whose favour the deed is executed. 102 Am. St. Rep. 959; 62 L R A 552 referred to.

Under certain circumstances, the plaintiff might be estopped from setting up a title in himself; but where, as in this case, the nominal transferee and the purchaser from him were both aware of the true nature of the deed of relinquishment, they can not set up a title by estoppel. 8 M I A 585 referred to. JADU NATH PODDAR *v.* ROOP LALL PODDAR, 10 W. N., C., 650=4 C. L. J., 22=33 C. 967.

33 Benami transaction.

Undue influence—Person of unsound mind—Imaginary consideration inserted in gift deed—Suit to set aside the deed—33 C. 773 Col. 214 P. 1.

Benami transaction—Limited grant—Power of administrator—Onus—5 B. L. R. 484 Col 89 p. 1.

34. *Benami transaction—Estoppel.*

In a suit to recover possession of immovable property a defendant is not debar-

Benami (*Contd*).

red from pleading that a transaction was *benami*, by reason of his having successfully set up the *benami* transaction to defraud his creditors. PREO NATH KOER *v.* KAZI MAHOMED SHAZID. **8. C. W. N. 620.**

35. *Benami transaction—Admission—Onus —9 C. W. N. 89 Col: 162 P. 1.*

36. *Benamidar—Right of suit—Legal title --Trustee or agent on behalf of an undisclosed principal.*

A mere name-lender is not entitled to sue. A benamidar's right of suit does not depend upon the question whether the subject-matter is land or not. A benamidar, in order to be entitled to sue, must show some legal title in him which will give him a right to sue, *i.e.*, either that he is a trustee for the real owner or an agent for an undisclosed principal. The mere fact of a purchase in one's name cannot vest the legal estate in the name-lender. A purchase in the name of a minor cannot vest the estate in the minor as a trustee thereof. KOOTHAPERMAL RAJAH *v.* THE SECRETARY OF STATE. **17 M. L. J. 174=30 M. 245.**

37. *Muhammadan Law--Gift--Possession —Consideration—Burden of proof*--Benami *transaction.*

By the Muhammadan Law a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms; but it is incombent upon those who seek to set up such a transaction to show very clearly that those forms have been complied with. It may be by deed of gift simply or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary) actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in presenti* of the property, and to confer it upon the donee, must also be proved. *L. R. 3 I. A, 291 referred to.*

Held, that the deed in the present case was a *benami* one and was therefore invalid and void. CHAUDHARI MEHDI HASAN *v.* MUHAMMAD HASAN, **3. A. L: J., 405 =8 B. L. R., 387=10 C. W. N. 706 (P. C.)**

Benamidar.

1. *Suit for sale on a mortgage--Decree giving benamidar a right to redeem--Right to redeem not availed of--Subsequent suit for redemption by alleged beneficial owner barred.*

A decree for sale on a mortgage was passed giving a right of redemption to a puisne mortgagee. The puisne mortgagee did not redeem and the decree became absolute.

Held, that no subsequent suit for redemption would lie by a person alleging that he was the real puisne mortgagee and that the person whose name appeared in the decree as puisne mortgagee was merely a benamidar. KANIZ FATIMA *v.* WALIULLAH. **1907 A. W. N. 272=4 A. L. J. 689.**

Benamidar (*Contd.*)

2 Application by benamidar for execution of decree is in accordance with law and saves limitation under Art 179, Limitation Act. ABDUL WAHID KHAN *v.* NAWAB BAKER KHAN. **10 O. C. 263.** *See Col. 2005 P. 1.*

3 *Sale—Vendee described as guardian of a minor—Benamidar—Right of benamidar to sue or appeal in his own name.*

Where property, which had belonged to the members of one family and had been sold by them, was reconveyed by the purchasers to the representatives of the same family, it was *held* that a description of one of the vendee's parties to the reconveyance as "Musammat Inayat Fatima, guardian of her son, Mahmud-ul-Hasan, was to be construed as importing a conveyance, not to the guardian in her own right, but to her son.

A *benamidar* can sue or appeal in his own name on behalf of the beneficial owner 18 A C 9 and 21 A 380 foll. BACHCHA *v.* GAJADHAR LAL. **A W N (1905) 173.**

4 *Mortgage by benamidar with the consent of owner--Benamidar's charge on mortgage property after redemption by him.*

A mortgage was made by the plaintiff for the benefit of the defendant with her consent. The plaintiff discharged the mortgage and claimed a charge on the mortgaged property to the extent of the amount paid by him.

Held, that the claim was valid. The mortgage was a valid encumberance on the property as against the defendant and the plaintiff having made himself liable at the defendant's request for the mortgage debt could not be regarded as having paid the debt officiously or as a mere volunteer. *15 All 304 followed.* SUBBAMMAL *v.* MUTHU PATHAN. **M L J 1903 P 228.**

5 *Execution of Decree--Application for execution by benamidar of purchaser of rights of decree holder—Right of judgment debtor.*

A applied to the Court to substitute his name for that of the original decree hoder alleging purchase. The judgment debtors objected that the real purchaser was B and A was a mere *banamidar* for him. The decision of the Lower Courts went against A. On second appeal, *held*, that there being evidence to justify the finding that B was the purchaser, the judgment debtors were entiled to insist upon the name of the real purchaser being entered on the record whether the name of the *benamidar* remains there or not—MOHAMMED AKBAR KHAN *v.* NAWAB SHAH ARA BEGAM, **7 O C 229.**

6 Realization of money due on a bond by benamidar—Right of beneficiary--25 A. 62 Col. 1847 P. I.

7 Benamidar—Right to sue—Revocation —Authority to Register. 7 C. W. N. 229—30 C. 265, Col. 366 P. I.

8 Right to sue—Money lent out of minor's estate—-Minority—-Negotiable instrument executed in the name of guardian—

Benamidar *Contd.*

Minor not entitled to sue, 28 M. 205, Col. 1741, P. I.

9 Suit against benamidar 4 P. R. 1904, Col. 1175, P. I.

10 *Benamidar, right of suit by—Mortgage —Conveyance without consideration, test of.*

A benamidar cannot bring a suit for recovery of a mortgage debt.

A mortgagee assigned over his interest under the mortgage to the plaintiffs who instituted the present suit against the mortgagors for recovery of the mortgage debt. It was found that the assignment was a *benami* transaction and was intended to put the mortgagors into difficulty.

Held, that the plaintiff's suit was rightly dismissed 32 I. A. 113—27 A. 271—9 C. W.N. 477 Dist, 6 M. I A. 53 P. C., 16 C. 364, 30 C. 265 15 B. L. R. 10—2 I. A. 13 refd.

The mere non passing of consideration is not sufficient to show that a transaction is *benami*. MUNSHI BASIRUDDIN AHMED *v.* MAHOMED JALISH PATWARI. **12 C. W. N. 409.**

11 Right to sue—Suit against certified purchaser. A. W. N. 1903 P. 199—26 A. 82. Col. 1173 P. I.

12 Right to sue—Suit by benamidar—Promissory note. 1 O. C. 10 Col. 1394. P. I.

13 Suit of Mortgage—Rent paid by mortgagee for purchaser of mortgaged property. 34 C. 92 Col. 324 P. I.

14 Suit against benamidar for recovery of money—Rent received by benamidar. 30 M. 298 Col. 1848 P. I.

Beneficiaries.

1 Application to set aside sale—29 C. 682 Col. 1549 P. I.

2 Executor—Suit by beneficiary—Impleading of as party—7 C. W. N. 817 Col. 1609 P. I.

3 Mortgage—Decree for foreclosure against executor—6 C. W. N. 488 Col. 1610 P. I.

4 Dispute as to claim against trustee—Factum of trust—Husband and wife—4 B. L. R. 358 Col. 1610 P. I.

5 Right to beneficiary to intervene compromise by trustee—12 M. L. J. 355 Col. 1611 P. I.

6 Right of beneficiary—25 A. 62 Col. 1847 P. I.

7 Beneficial owner can apply to set aside sale—8 C. L. J 305 Col.1544 P. 1.

Bengal Acts.

1 Act X of 1859 (Recovery of Rent Act).

1 *S. 1—Bengal Tenancy Act (VIII of 1885) Section 3, (10), 21,—Landlord and Tenant Act (X of 1859)—Act VIII of 1869, Bengal—Right of occupancy in urban areas.*

The plaintiff sued for the ejectment of the defendants from a small area of land situate within the Municipal limits of the Dacca Municipality. The suit was dismissed by the Munsiff and the decree was confirmed on appeal by the Subordinate Judge. The Munsiff held that the land was garden land to which the provisions of the Bengal Tenancy Act were applicable and that the defendants had acquired rights of occupancy. The Subordinate Judge allowed the right of occupancy without expressly holding that the Bengal Tenancy Act applied to it. On second appeal.

Held, by *Maclean C. J., and Mitra J.*, (*Rampini, J. dissenting*), that the suit was rightly dismissed under the provisions of the Bengal Tenancy Act. And that even if the Bengal Tenancy Act had no operation in urban areas, the defendants' father had acquired, upon the facts found, a right of occupancy before the Bengal Tenancy Act came into force.

Per Rampini, J.—That the case ought to be remanded for fresh decision according to the provisions of the Transfer of Property Act, for the provisions of the Bengal Tenancy Act do not apply to urban or sub-urban land.

Per Mittra J.—That the term "village" is not confined to non-urban areas. The Bengal Tenancy Act does not expressly exclude from its operation urban areas except the town of Calcutta. It has no operation as regards homestead lands situated in towns or outside towns. A presumption, which may be rebutted, may arise from the fact of the land being within the limits of a Municipality that it is homestead. SYED HASSAN ALI *v.* GOBINDA LAL BASAK. **9 C W N 141.**

2 S. *1—Sale—Irregularity—Unregistered tenant—Locus standi:—No attachment—No publication—Irregularity.*

A private purchaser of a tenure who had not registered his name in the landlords *sherista* (office) and has not been recognised by him, has no *locus standi* to maintain an action to set aside a sale held in execution of a decree for arrears of rent obtained against the registered tenant. The non-attachment and non-proof of publication of the sale proclamation is no ground for setting aside a sale under Act X of 1859. PATIT SHAHU *v.* HARI MAHANTI. **5 C. W. N. 126.**

3 S. *1.*—C. P. C. O. XXIII R. 1 of Act V of 1908 has no application to suits under Act X of 1859. SHEIKH GULAM MOHAMMAD *v.* SIVANDRA PADA BANERJI. **12 C. W. N. 893.**

4 *S. 6—and Act VIII of 1869, Bengal —Bengal Tenancy Act (VIII of 1885), Sections 19, 181,—Raiyat for 12 years before Act X of 1859—right of occupancy—Chowkidari Chakran land—Tenancy on resumption of land*

Where the tenancy upon which the defendants relied was created in *Chowkidari Chakran* land in 1846, that is, more than 12 years before Act X of 1859 was passed.

Held, that, having regard to section 6 of

Bengal Act (X of 1859) *(Contd.)*

Act X of 1859, which is retrospective in its operation, so as to confer a right of occupancy, as soon as the Act came into force, upon tenants who had cultivated or held lands as raiyats for 12 years, it followed that the defendants had acquired a right of occupancy even if they were originally mere tenants-at-will. RAM KUMAR BHUTTACHARJEE *v.* RAM NEWAJ RAJGURU. **8 C W N 860.**

5 S. 6 and Proviso thereto have been repealed. BRAHMANANDA MAHAPATRA *v.* ARJUN RASED. **1 C L J 310.** *See Tenancy Act VIII of 1885. S. 104.*

6 *Ss. 6, 23—Fishery—Jurisdiction—Revenue Court—Rent of tank, suit for—Fishery, right of.*

A suit for recovery of arrears of rent of a tank, which is not a part of an agricultural holding, but is used for rearing and preserving fish, is not maintainable in a Revenue Court, the provisions of Act X of 1859 not being applicable to such a suit. The term "land" in S. 6 of Act X of 1859 means cultivated land, and does not include a tank regarded as land covered with water. Siboo Jelya *v.* Gopal Chunder Chowdhary, (19 W. R. 200); Nidhi Krishna Bose *v.* Ram Doss Sen (20 W. R. 341), Niddee Kristo Bose *v.* Nistarini Dossee, (21 W. R. 386), and Doorga Soonduree Dosee *v.* Oomdutoonissa, (18 W. R. 235), referred to.

Semble :—Where the grant is merely of a right of fishery, the lessee acquires no interestin the sub-soil, nor is he entitled to retain possession, when the water dries up. Duke of Somerset *v.* Fog-well (5 B & C 857 ; 29 W. R. 449), Saroop Chunder Mozoomdar *v.* Jardine Skinner & Co. (Marsh 334); Bessen Lal Dass *v.* Khyrunnissa Begum, (1 W. R. 79) ; Munohar Chowdhry *v.* Nursingh Chowdhry, (11 W. R. 272), Radha Mohun Mundul *v.* Neel Madhub Mundul, (24 W. R. 200), and David *v.* Grish Chunder Guha. (I. L. R., 9 Cal. 183), referred to. MAHANANDA CHAKRAVARTI *v.* MONGALA KEOTANI. **8 C W N 804= 31 C. 937.**

7 *S 10—Bengal Tenancy Act (VIII of 1885), Sections 2 (4), 74, 179—Landlord and Tenant*—Abwab—*Cess—Agreement to pay in addition to rent value of three cocoanuts and render one day's personal service—Regulation V of 1812, Section 3.*

Where upon the construction of a lease executed before the passing of the Bengal Tennancy Act, 1885, it appeared that the permanent tenant agreed to pay a specific amount as rent, and in addition thereto the landlord was entitled to the value of three cocoanuts, and one day's personal service.

Held, that the agreement was of an arbitrary and indefinite character within the meaning of regulation V of 1812 and the payment of value of three cocoanuts and one day's personal service were in their nature *abwabs* as indicated in Act X of 1859, and

Bengal Act (X of 1859) *(Contd.)*

that they were not recoverable by a suit. APURNA CHURN GHOSE *v.* KASAM ALI. **10 C W N 527.**

8. S. 23 —*Abatement of rent. Suit for —Refund of excess rents—Jurisdiction of Civil and Revenue Courts—Joinder of unwarrantable claims. Effect of—*

In a suit brought by *putnidar* for a declaration that he was entitled to an annual abatement of the *putni* rent, in consequence of some lands comprised in the *putni* having been acquired for the purposes of a railway, and also for a refund of the excess rents which he had been compelled to pay for some years—

Held, per Mookerjee, J.—That this was a claim for abatement of rent and for recovery of damages for illegal exaction of rent within the meaning of clauses (2) and (3), section 23 of Act X of 1859. The proper course for the Plaintiff, therefore, was to sue in the first instance for abatement of rent in the Revenue Court which was the only Court of competent jurisdiction for that purpose.

Per Harington, J., contra, treating the case as though it were one of first impression : —Although under section 23 of Act X of 1859, a Civil Court had no jurisdiction to entertain a suit for abatement of rent, still the suit, in so far as it related to a claim for refund of the excess rents paid by the *putnidar*, was properly cognizable by the Civil Court and should not be dismissed for want of jurisdiction, because, one of the steps which plaintiff should have to take in establishing his right to have the money repaid to him, would, if it had stood alone, have entitled him to a decree in the Revenue Court.

Per Mookerjee, J.—The present suit is substantially one for abatement of rent and the prayer for refund is ancillary to the prayer for abatement, because as soon as the amount of abatement is determined, the amount of refund is deducible by simple arithmetical calculation. The Civil Court has no jurisdiction to allow a claim for abatement and is not competent to embark upon precisely the same enquiry for the purpose of allowing a refund.

Per Mookerjee, J.—The following rules are deducible from a review of the authorities on the question.

(1) A suit for abatement of rent, properly so called, is maintainable only in the Revenue Court. *1 W. R. 299, referred to.*

(2) A suit for adjustment of the rent, on the ground that the rent payable under a lease is less than the sum nominally inserted in it, is not a suit for abatement of rent, properly so-called, and is accordingly maintainable in the Civil Court. *1 B. L. R. 93 (F. B.) referred to.*

(3) If the tenant is entitled to sue for abatement in the Revenue Court under Rule (1), the suit for refund lies in the same Court, but if the tenant is entitled to sue

Bengal Act (X of 1859) (*Contd.*)

for adjustment in the Civil Court under Rule (2), the suit for the refund lies in the same Court. The cases, which support the view that a suit for refund lies in the Civil Court, assume a prior determination of the amount of abatement by a Court of competent jurisdiction. *W. R., Gap number (Act X) 46, 11 W. R. 412 relied upon, 16 W. R, 173, dissented from.*

Per Mookerjee, J.—A plaintiff cannot give jurisdiction to or take away jurisdiction from a Court by an unwarrantable addition to his claim and the jurisdiction of the Court ought to be determined with reference to the nature and value of his claim after the additional matter has been struck out. ASUTOSH ROY *v.* HARINARAYAN SINGH DEO. **3 C. L. J. 143.**

9 *S. 23 (4)—Lease for building and mining purposes, etc.*

A suit for recovery of rent upon a lease for mining purposes and for purposes of building, making roads and so forth, the land not being dismissed for agricultural or horticultural purposes, is not a suit for rent under Act X of 1856, and a Revenue Court cannot entertain it. ROOKE *v.* BENGAL COAL COMPANY LD., **5 C. W. N. 840; 23 C. 485.**

10 *S. 23 (5)—Landlord and tenant—Notice to suit.*

Held that the defendant having been put in, occupation of the land situate in the district of Manbhoom where the Rent Act (X of 1859) was in force in 1876 and having continued in possession ever since, had acquired rights of occupancy in the land. Under section 23 (5) he was liable to ejectment on account of a breach of the conditions of his contract. But he was not liable to be ejected without service on him of a notice to quit.

It is a well known rule of law of landlord and tenant that the relation must be determined before the landlord can eject his tenant, and it is also a well known principle of procedure that a cause of action must be complete before the institution of a suit. The relation of landlord and tenant must be determined by means of a notice or in some other way, antecedently to the institution of a suit or in, 25 W. R. 329 S. C. 2 Cal., 146, which overruled, 23 W. R. 400, followed, 23 Cal., 200 referred to. NABIN MAJHI *v.* RAJ KUMAR GOURI BAL SINGH DEO. **6 C. W. N. 199.**

11 S. 23—8 C. W. N. 804.—*See No. 6 supra.*

12 *S. 27 and 108—Rent Recovery Act, X of 1859, Ss 27, 188—Registration of name—Suit, right of.*

The purchaser of a tenant's interest in execution of a money decree has under S. 27 of Act X of 1859 no *locus standi* to maintain a suit for possession of the tenure against a previous purchaser who purchased it at a sale in execution of a rent decree obtained by a co-sharer landlord under the Act, unless the former gets his name registered as a tenant in the sherista of one of the landlords. BICHITRANANDA ROY *v.* BEHARI LAL PANDIT. **5 C L J 89.**

13 *S. 92—Execution, application for—Struck off—Second application 3 years after the date of judgment—Continuation.*

The petitioner brought a suit against his tenant, the opposite party, for rent under the provisions of Act X of 1859 and obtained a decree on the 22nd January 1903. On the 28th August 1905 he made an application for execution of the decree, praying for the attachment of both movable and immovable property. The Deputy Collector struck off the execution case on the ground that it was more than 6 months old. On the 22nd February 1906 the decree-holder put in another application which was dismissed on the 9th April as barred under the provision of S. 29 of Act X of 1859.

Held,—the application of the 22nd February 1906 is one in continuation or furtherance of the former application of the 28th August 1905 and hence the execution proceedings are not barred. The word " issued " in S. 92 of Act X of 1859 should not have a strict legal interpretation put upon it. It means "sued out" or " applied for with success," that is, that no application for a process of execution shall be successful unless the application for it is made or is sued out, within a fixed time. 13 W. S. 3 F. B. followed.

It is sufficient to save limitation under S. 92 of Act X of 1859, if the application for execution was made within 3 years from the date of the judgment. 3 Cal. 547 ; 1 C. L. R. 149 followed. RAJAH SHYAM CHANDRA MADRA RAJHARI CHANDAN RAJA OF NILGIRI *v.* INKAILU RAM PROSAD BHUYAN. **6 C. L. J. 146.**

14 S. 103 5 C. L. J. 89.—*See No. 12 supra.*

15. *S 153—Final order of Collector—Appellate order—High Court's power to interfere in revision*

S. 153 of the Act does not preclude revision by the High Court of an order of a Collector, which is final within the meaning of that section. MOHANT GOBIND RAMANUJADAS *v.* LAKHUN PARIDA. **8 C. L. J. 43=11 C. W. N. 112.**

16. *Ss. 160, 161—Order refusing to rehear an appeal decided* ex-parte—*Appeal against such order—Civil Procedure Code (Act XIV of 1882), ss. 560 and 588.*

An appeal, which was preferred under section 160 of Act X of 1859, was heard *ex. parte*; an application to set aside the *exparte* Judgment was dismissed by the Appellate Court. Against the order of dismissal, on an appeal to the High Court, a preliminary objection being taken that no appeal lay

Held, that by virtue of sections 560 and 588 of the Code of Civil Procedure, which were applicable to appeals under Act X of 1859, the appeal lay to the High Court. HARE KRISHNA MAHANTI *v.* BISHNU

Bengal Act (X of 1859) *(Contd.)*

CHANDRA MAHANTI. **7. C. L. J. 426= 12 C. W. 888=35 C. 799.**

(2) Act XI of 1859 (Revenue Sale Law).

1 *S. 1 Revenue sale—Rules made by the Board of Revenue for payment of revenue by* kists—*Right of the Zemindar to pay the whole demand on the date fixed for the last* kists.

Where an estate was sold for arrears of about Rs. 5 and 2 pies, the amount said to be in arrears on the 12th of January, 1896, and it was contended for the defaulting proprietor that as the Board of Revenue had, by rule, fixed the 12th of January and the 28th of March of each year as the latest dates for payment of arrears of revenue due from the estate, he was not bound to pay arrears on the 12th of January, and the estate could not be sold for arrears due on that date, and that he was at liberty to pay up to the 28th of March—the date fixed for the last *kist*.

Held, that the plaintiff was not at liberty to pay the whole demand of one year in one *kist* on the 28th of March, and that the Revenue authorities had every right to sell the estate on a date subsequent to the 12th January. KALI PROSUNNO BOSE *v.* KRISHNA CHUNDRA, **7 C. W. N. 570.**

2 S. 1—Saleable interest of the judgment debtor continues in him until the Revenue sale has been held. 2 C. L. J. 506—*See Col. 1556 P. I.*

3 *S. 1 Sale under—Setting aside sale—Appropriation of payments by Collector—Contract Act (IX of 1872) Ss. 59 and 60.*

A revenue sale was set aside on the ground that there was no arrear inasmuch as the Collector ought to have appropriated the amount sent by the owner to the payment of the January *kist* for which the sale was held and not to the following March *kist*.

Whether Ss. 59 and 60 of the Contract Act apply to the appropriation of land revenue sent to the Collector discussed, 33 C. 119 and 10 C. W. N. 948 diss. JOGENDRA MOHAN SEN *v.* UMA NATH GUHA. **12 C. W. N. 616=8 C. L. J. 41=35 C. 633.**

4 S 1. Suit to set aside sale of joint residuary estate, death of one of several respondents substitution not made within time—Abatement of appeal. 5 C. L J. 393—11 C. W. N. 501. *See col. 1283 p. I.*

4 a 6 C. L. J. 472. No. 31 *infra.*

5 *S. 3. Dates of payment of kists of revenue—New Rules under s. 3—Notification of circulars of Board of Revenue—Partition of estate.*

This was a suit to set aside the sale of an estate for arrears of revenue said to have been due on account of September *kist* of 1898. The estate which was sold originally formed part of another estate which was partitioned and two new estates were created out of it. One of the new estates fell to the share of the plaintiffs and the revenue fixed on it was Rs. 26. The plaintiffs contended that according to rules issued by the Board of Revenue under the powers conferred on them by s. 3 of Act XI of 1859, estates paying an annual revenue exceeding Rs. 10 but not exceeding Rs. 50 shall pay the revenue in two *kists* on the 12th January and 28th March. The revenue originally payable on the parent estate was Rs. 305-3. There is a revenue circular issued by the Board of Revenue to the effect that after an estate is partitioned and new estates formed out of it with revenue less than Rs. 100, the rule as to dates of payment of *kists* applicable to the parent estate still applies to the new estates. This circular was not duly notified in the *Gazette* as required by s. 3 of Act XI of 1859.

Held, that the sale must be set aside inasmuch as the circular not having been duly notified as required by section 3 Act XI of 1859, could not fix new dates for payment of *kists* of revenue on new estates formed after partition and consequently there were no arrears of revenue. MAHOMED JARIF *v.* SHYAMA SUNDARI DASSI, **8 C. W. N. 826.**

6 *Sections 3, 7, 6, 18, 25, 28, 33—Sale—Irregularity—Collector ordering exemption from sale—Conditional order. Effect of—Notice of sale—Irregularity in issue and service of notice—Onus of proof—Evidence Act (1 of 1872), section 114 (e)—Act VII of 1868, Bengal, section 8—Substantial injury—Grounds for exemption for sale—Court's power to examine.*

The plaintiffs sued to set aside a sale held for arrears of revenue. He was in arrear in 1898 with the June *kist* when Rs. 46-8-6 was due. The last day of payment was June 28th 1898. On the 19th August 1898 they remitted to the Collector by postal money order a sum of Rs. 39 1 0 on account of the revenue of the mehal without specifying for which instalment it was intended. It was credited in the Collectorate books against the September instalment of Rs. 30-1-0 on account of revenue, the last date of payment of which had been fixed for the 28th September 1898. On the 3rd September following, they presented an application to the Collector in which they prayed that the amount remitted might be received on account of the June instalment and the estate released from liability to sale. The total amount of Government dues upon the estate at the time, including revenue, cesses and other fees was Rs. 46 8-6. The Collector on the 16th September passed the following order "...... accept all dues if paid within three days and exempt." Six days later, the following further order was made by the Collector "Application has not appeared since, so payment not accepted." The fact of the

Bengal Act (XI of 1859) (*Contd.*)

payment of Rs. 30-1-0 by postal money order was not brought to the notice of the Collector when he made his order on the 16th September. On the 22nd September 1898, the estate was put up to auction by the Collector and was purchased by the defendants for a sum considerably less than its real value.

Held, that as no unconditional order of exemption was made by the Collector under section 18 of Act XI of 1859 the sale was rightly held.

Per Mookerjee, J.—It is not open to a person to appeal to the Commissioner in a suit to set aside a sale held for arrears of revenue on the broad general ground that the sale has been made contrary to the provisions of the Act; to impugn the sale before him on the basis of certain specific alleged irregularities and then to seek to annul the sale by a suit under section 33 on the allegation of other irrigularities. 9 *C.*, 271 *referred to.*

A Civil Court is not competent to examine the reasons of an order of a Collector purporting to be made under section 18 of the Revenue Sale Law and to hold that the Collector ought to have made an order different from the one that was made.

The *onus* is on the person who seeks to have the sale set aside, to establish that the requirements of the statute had not been complied with by the Collector. The fact that the notice required by section 7 of Revenue Sale Law to be served on a conspicuous part of the estate was not duly served, does not relieve him to prove that the substantial injury he has sustained has been by reason of such irregularity. SHEIKH MOHAMMED AGA *v.* JADUNANDAN JHA. **2 C. L. J. 325=10 C. W. N. 137.**

7 *S. 5, 6—Sale Notification of—Irregularity in—Specification of property to be sold—Inadequacy of price.*

Where a notification of sale under Act XI of 1859 described the property to be sold thus:—"According to Act XI of 1859, the joint share, excepting the separate shares (is to be sold). Save and except these, all other shares are exempted from sale."

Held, that, as Section 6 of the Revenue Sale Law contemplates that the specification of the estate or shares of estate to be sold should be such as to inform intending purchasers, what may be the precise property that is to be sold, the notification was wholly in sufficient under the law.—2 C. W. N. 479 (1892), *followed.*

Where there was no proper notification of sale so as to inform intending purchasers what was the precise property to be sold and the property was sold for a very inadequate price, a Court of Justice may reasonably and legitimately, infer that it was due to that irregularity that the property was sold at an inadequate price. HEM CHANDRA CHOWDHRY *v.* SARAT KAMINI DASYA **6 C. W. N. 526.**

7 (*a*) *Ss. 5, 6—Chowkidari Act, S. 55, Schedule Form D—Jurisdiction of Collector to sell for three years assessment—Irregularities.*

Where a sale was held for the arrears of Chowkidari assessment for three years by a Collector under section 55 of the Chowkidari Act and a notice was served under S. 6 of Act XI of 1859

Held, that it was a mere irregularity which did not render the sale a nullity—MAHARAJA BAHADUR SIR JOTINDRA MOHAN TAGORE *v.* JOGENDRA NATH ROY. **6 C. L. J. 99=11 C. W. N. 1107.**

8 *Ss. 5, 6, 7, 14, 17.—Year—Current year—Irregularities—Notice—Publication.*

The "current year" in the Revenue Sale Law is the official year within which the different *kists* of the revenue have to be paid. S. 5 excludes cases of estates managed by a common manager appointed by judicial authority under the Bengal Tenancy Act of Act XI of 1859. The Collector is not, by the Act, bound to give notice to the co-sharers under S 14 of the declaration that the whole estate would be sold if they did not pay up the arrear due from the defaulting share. All that is necessary under the Act is that the declaration should be made. It need not be notified. Non-publication of notice under S. 7 does not affect the sale, the objects of the section being merely to prevent the raiyats and under-tenants from paying rent to the defaulter. A certificate is conclusive evidence of due service and publication of notice, and Courts are precluded from going behind it. S. 14 does not direct publication of a notice, nor does it require any notification of the declaration which is to be made. BHAWANI KOER *v.* AFZAL HUSSAIN. **5 C L J 425=34 C 381.**

9 *Ss. 5, 6, 7, 93—Bengal Act VII of 1868, S. 8—Certificate of sale—Onus of proof—Notice—Irregularity and illegality in form and service.* 30 C. 1. See Col. 235, Part I.

10 *Ss. 6, 7 and 33—Act VII of 1868, section 8—Suit to set aside sale for arrears of revenue—Irregularity in publishing sale—Inadequacy of price realized—Evidence—Presumption as to service of notices—Evidence Act, section 114, illustration (e)*—Onus.

The plaintiffs were proprietors of a 14 annas 6 pie odd share in a certain *taluk*, and the defendants Nos. 4 to 8 were proprietors of the remaining 1 anna 5½ pies odd share. The estate was put up for sale for arrears of Government revenue, and was purchased for Rs. 1,200, by defendants Nos 1 to 3. Plaintiffs appealed to the Commissioner, but their appeal was dismissed. They then instituted this suit to have the sale set aside.

Held, (1) That it was not of much importance to decide whether the plaintiffs had proved that notices, under section 7 Act XI of 1859 were not duly served, as it would be hardly possible to prove that that omission to serve the notices, under section 7, the only object of which was to prevent the tenants from paying rents to the de-

Bengal Act (XI of 1859) (*Contd.*)

faulting proprietors, could in any way affect the price which intending bidders would offer for the property, and especially as the plaintiffs had not proved that the inadequacy of price realized was the result of the omission to serve the notices.

(2) That after the issue of the sale certificate to the purchasers, the provisions of section 8 of Act VII (B. C.) of 1868 barred the plaintiffs from raising in this suit the question whether the notices under section 7 were duly posted and served.

(3) That the amount of revenue assessed on the estate and deeds produced by a party to prove instances in which other shares in the same estate have been sold are good evidence to indicate the value of the property sold.

(4) That the fact, that the inadequacy of the price is the result of the irregularity, may either be established by direct evidence or be inferred, where such inference is reasonable from the nature of the irregularity and the extent of the inadequacy.

(5) That in the case of a sale for arrears of Government revenue, the notices are served, in the ordinary way, through the officers of the Revenue Court, and the presumption under section 114, illustration (*e*) of the Evidence Act, would arise in respect to the service of such notices until the contrary were proved. The *onus* of proving that there has been an irregularity in the preparation, service, or posting of the notice, rests on the person who seeks to have the sale set aside, and section 33 of Act XI of 1859 provides that no sale shall be set aside by a Civil Court upon any such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under section 25 of Act XI of 1859. There is no analogy between the case of the sale of a *patni taluk* and the sale of an estate for revenue. Section 8 of Act VII of 1868 applies to the serving and posting of the notices under section 6 of Act XI of 1859. SHEO RATAN SINGH *v.* NET LAL SAHU. **6. C. W. N. 688.**

11. *S. 5, 10, 33—Separate shares, sale of —Notification of sale—Specification of shares —Material irregularity—Proof of substantial injury resulting.*

Act XI of 1859 requires that the estate or share to be sold must be specified; the question, whether in any particular case the notification sufficiently specifies it, must depend upon the terms of the notification. The connection between an irregularity in publishing or conducting a sale under Act XI of 1859 and inadequacy of price must be established by evidence; the amount or nature of the evidence required, in any case, must depend upon its own circumstances.—ISMAIL KHAN *v.* ABDUL AZIZ, **9 C. W. N. 343=1 C. L. J. 14=32 C. 502 (F. B).**

12. *S 5, 6, 10, 33—Separate shares, sale of—Notification of sale—Specification of share —Residue—Setting aside sale—Material irregularity— Substantial injury resulting, proof of.*

The non-specification in a notification under S. 6 of Act XI of 1859 of the exact share to be sold, in a case where separate accounts had been opened under S. 10 of the Act, is not a material irregularity, if the notification was sufficient to give notice to an intending purchaser as to what was about to be sold. *Ram Narain Koer* v. *Mahabir Prasad Singh,* (I. L. R., 13 Cal. 208) followed. Where there is no evidence direct or otherwise, on which the relation of cause and effect between a material irregularity and an inadequacy of price could be held to be established, it cannot, under the provisions of S. 33 of Act XI of 1859, be inferred that the one was due to the other.

Per Rampini J. *Semble*: Such relation must be proved by direct evidence. *Macnaghten* v. *Mahabir Pershad Singh,* (I. L. R., 9 Cal. 656; L.R, 10 I.A. 25); *Arunachellam* v. *Arunachellam* (I. L. R. 12 Mad. 19; L. R. 15 I. A. 171); *Tasadduk Rasul Khan* v. *Ahmad Hussain,* (I. L. R. 21 Cal. 66; L. R., 20 I. A. 176) referred to.

Per Mitra J.—It is open to a Court to consider whether upon the whole case, having regard not only to the irregularity and to inadequacy of price but to other circumstances, there could be a necessary inference of substantial loss resulting from the irregularity.—ISMAIL KHAN *v.* ABDUL AZIZ KHAN. **9 C. W. N. 348=1 C. L. J. 91=32 C. 509.** *See also No. 7 and 10 supra.*

13 *Ss. 56, 10, 21, 56—Separate shares—Notification of sale—Specification of share—Residue—Material irregularity—Substantial injury resulting, proof of—Evidence—Ben. Act VII of 1876, s. 70.*

Where separate accounts had been opened under ss. 10 and 11 of Act XI of 1859 and section 70 of Ben. Act VII of 1876 and the sale notification did not specify the share to be sold as required by section 6 of Act XI of 1859 but merely described it as the residue, and stated the amount of the revenue of the entire estate and that of the share to be sold.

Held, that as the amount of revenue would not correspond with an *aliquot* share of the lands in the estate, the sale notification was insufficient, and the non-specification was a material irregularity. *Ram Narain Koer* v. *Mahabir Pershad Singh* (I. L. R., 13 Cal. 208); *Dil Chand Mahto* v. *Baij Nath Singh* (8 C. W. N., 337) distinguished. *Annada Charan Chowdhry* v. *Kishori Mohon Rai* (2 C. W. N., 479); *Hem Chandra Chowdhry* v. *Sarat Kamini Dasya* (6 C. W. N. 526) followed. The question whether the relation of cause and effect between an irregularity and a substantial injury is proved, is essentially one of fact. The connection must be established by evidence. The presumption of cause and effect from circumstances irrespective of direct evidence may occasionally be so viodent as to exclude the

Bengal Act (XI of 1859) (*Contd.*)

hypothesis of any other cause and may thus be *prima facie* proof *Saadatamand Khan* v. *Phal Kuar* (I L. R 20 All. 412) referred to.—NIBARAM CHANDRA CHOWDHRY *v.* CHIRANJIB PRASAD BOSE. **9 C. W. N. 487=32 C. 542.**

14 *Ss. 5, 6, 13, 33—Suit to set aside sale—Fraud of co sharer—Remedy—Equitable relief cannot be granted where there are bona fide purchasers—Notice under section 6—Names of proprietor not necessary—Notice under section 13—Specification of share exempted not necessary—Notice under section 6 not necessary—Plea not taken before Commissioner—Consequent inadequacy of price not proved.*

Where the plaintiff was told by one of his co-sharers about 2 days before the sale, that the arrears would be paid up by the latter and the plaintiff was induced to believe in this but the said co-sharer never paid up the arrears, though the Collector agreed to receive them and on the contrary himself bought the share in arrears at a grossly inadequate price and where it had also been proved that the plaintiff was present at the sale and must have known that the arrears had not been paid, it was *held* that no such fraud was committed by the said co-sharer as to render the sale void as it was not a fraud that brought about the sale which would have taken place irrespective of any communication between the parties. The plaintiff may have a good claim against the said co-sharer for damages for breach of contract or for reconveyance but he has no right to have the sale set aside. *Amirunnessa Khatoon* v. *Secretary of State* (I. L. R. 10 Cal. 63) followed. Neither is the plaintiff entitld to equitable relief as was given in *Bhooban Chandra Sen* v. *Ram Soondar Surma* (I. L. R. 3 Cal. 300), as many of the defendants are innocent and *bonafide* purchasers who are no parties to the fraud and against whom the plaintiff have no right to equitable relief. According to law, it is not necessary to enter in a notice under s. 6, the names of any proprietors at all. So the entry in such a notice of the name of a deceased proprietor cannot be such an illegality as renders the sale an entire nullity. *Ram Narain Koer* v. *Mahabir Prasad Singh* (I. L. R. 13 Cal. 208) referred to. When in the notice under s. 13, the details of the shares to be sold are fully given and it is explained in a note at foot that "when in columns 5, 7 and 9, there is an entry that only a share is to be sold then it ought to be understood that there is a separate account in respect of such a share and that other share or shares of the *Mehal* will be exempted from sale," the provisions of the section is fully complied with even where there is no mention of the separate account of shares which are excluded. Issue of a notice under s. 5 is not a condition precedent to the sale taking place, non-compliance with which makes the sale no sale. The non-issue of such a notice would seem to be an irregularity. *Balkissen Das* v. *Simpson* (L. R. 25 I. A. 151) followed. *Mahabir Pershad* v. *Collector of Tirhoot* (15 W. R. 137) explaind and *Rajah Gobinda Lal Roy* v. *Ram Janam Misser* (L. R 20 I. A. 165) referred to. Before a plea of non-issue of a notice under s. 5 can be taken in a suit to set aside a sale, it must be specified in the appeal to the Commissioner as is required by S. 33 No relief can be granted when inadequacy of the price is neither proved nor can be inferred to be the result of want of notice under s. 5. DEONANDAN SINGH *v.* MANBODH SINGH. **8 C. W. N. 757=32 C. 1[illegible].**

15 *Ss. 6, 33—Secretary of State not a necessary party in a suit to set aside sale—Putnidar, right of, to sue—Revenue Recovery Act (Ben. Act VII of 1868). S. 8—Presumption—Appeal to Commissioner.*

The Secretary of State is not a necessary party in a suit to set aside the sale of an estate for arrears of revenue. *Balkishen Das* v. *Simpson.* (I. L. R., 25 Cal. 833), referred to. The wording of S. 33 of Act XI of 1859 is not restrictive so as to debar a person, who has a substantial interest in the property sold which is liable to be affected by the sale, from instituting a suit to set aside the sale. So a putnidar may bring such a suit. *Gobinda Lall Roy* v. *Biprodas Roy*, (I. L. R., 17 Cal. 398), approved. The expression "Current year" in section 5 of the Revenue-sale Law refers to the year in which the latest date of payment falls as fixed under section 3 and not to the year in which the sale actually takes place. When a Revenue-sale is sought to be set aside on the ground of irregularity, section 8 of the Revenue Recovery Act (Ben. Act VII of 1868) does not debar the Court from admitting evidence to prove that the notice under section 6 of the Revenue-sale law was not served 30 days before the sale. The presumption arises only about the due service and posting of the notice. No Revenue-sale can be annulled on any ground which has not been declared and specified in an appeal before the Commissioner. JANHOVI CHOWDHURANI *v.* THE SECRETARY OF STATE FOR INDIA. **7 C. W. N. 377.**

16 *Sections 5, 28 -Act VII of 1868 (B. C.), section 8—Notice, omission to issue, if cured—Fact of attachment, strictly to be proved—Attachment, if partial—Defaulter may purchase.*

Omission to issue the notification prescribed by section 5, Act XI of 1859, is not remedied by the issue of the certificate of sale under section 28 of that Act, and the Civil Courts are not precluded by section 8 of Act VII of 1868, (B. C.) from investigating the question.

When a revenue-sale is impeached on the ground that a notice under section 5 of Act XI of 1859 ought to have been issued, because the estate was under attachment by order of a judicial authority, it must be proved that there had been actual attachment effected strictly in accordance with

Bengal Act (XI of 1859) *(Contd.)*

the requirements of section 274, C. P. C. It is not sufficient to produce the order-sheet in the Execution-case, containing a recital that the attachment had been effected, which does not affect either the Collector or the purchaser of the revenue-sale, who are strangers to the proceedings in execution.

A notice under S. 5 ought to issue even where a portion only of the estate in default is under attachment.

The object of a notification under S. 5, when the estate is under attachment, is to protect the interest of the attaching-creditors; omission to issue such notice would not *prima facie* lead to any inadequacy of price.

There is no legal bar to a defaulter purchasing the estate, though the default might have been deliberately made, and he cannot be compelled to convey to his co-sharers their shares, unless a case of active fraud is made out. (8 C 300 and 16 C 1904 refd) GONESH PERSHAD *v.* PANDDEY BRIJ BEHARY. **1 C. L. J. 565.**

17 *Ss. 5, 31, 33—Ben. Act VII of 1868, S. 1—"Malikana"—"Land Revenue"—Arrears accruing subsequently to notification of sale—Point not taken in Court below, or before Commissioner.*

Malikana comes under the definition of "Land Revenue" given in S. 2, of Act XI of 1859 and S. 1 of Ben, Act VII of 1868. The Revenue authorities are entitled to calculate them together ; and where part of the arrears for which a sale takes place under Act XI of 1859 is *malikana*. no separate notice under S. 5 of the Act in respect of such portion is necessary. A sale for arrears of revenue is not necessarily bad, because it was held not only for arrears specified in the notice under S 5 of Act XI of 1859, but also for arrears that accrued subsequently. Where it appeared that the Collector had acted under s. 31 of the Act, and that the objection to the sale had not been taken either in the Court below or before the Commissioner, and therefore could not, under S. 33, be taken on appeal, the objection was not sustained. Under the circumstances the High Court held that there had been no irregularity in the sale, and the judgment of the High Court was upheld by the Judicial Committee. BAGESWARI PROSAD SINGH *v.* MAHOMED GOWHAR ALI KHAN. **8 C. W. N. 649=31 C. 256=31 I. A. 52 *(P. C.)***

18 S. 6—See 10 C. W. N. 137, 6 C. W. N. 526, 34 C. 381, 30 C. 1, 6 C. W. N. 688, 32 C. 502, 32 C 509, 32 C. 542, 32 C. 111, 7 C. W. N. 377 No. 6 to 15 *supra* and 8 C. W. N. 337 No. 21. 31 L. 1036, No. 61 *infra.*

19 S. 7, 10 C. W. N. 137 No. 6, 34 C. 381 No. 8. 30 C. 1 No. 9, 6 C. W. N. 688, No. 10, 32 C. 502 No. 11, 32 C. 509 No. 12, 32 C. 542 No. 13 supra and 8 C. W. N. 337 No. 21 infra.

20 *S. 8, 20, 30 - Land Revenue Rules—Rule 29—Sale to recover arrears of revenue—Mistake in* Challan *as to Towzi number and registered owner of estate—Suit to set aside sale*

Bengal Act (XI of 1859) *(Contd.)*

—Duty of Collectorate office—Endorsement on back of money order.

The plaintiff in remitting by a revenue money-order revenue payable in respect of an estate made two mistakes, a mistake in the Towzi number and a mistake in the name of the registered owner, the name of the estate and the amount of the revenue in respect of that estate were correctly stated on the money-order. The revenue reached the Collectorate office in due time but was credited to a wrong estate. The estate in respect of which the revenue was remitted was sold for arrears of revenue and the plaintiff brought the present suit to have the sale set aside on the ground of there being no arrears.

Held, that the claim must be decreed, that it was the duty of the officers of the Collectorate, under Rule 29 of the Land Revenue Rule to give the plaintiff an opportunity of rectifying the mistakes.

That the endorsement on the back of the money-order to the effect that the remitter is to be liable for any mistake and that the Collectorate is to be guided by the Towzi number, did not relieve the Collectorate from doing that which under the Rules their officers ought to have done. *25 Cal.*, 833 (P. C.) *referred to.* HAMID HOSSEIN *v.* MUKHDUN REZA. **9 W. N. C. 300.=32 C. 229**

20 (a) *Ss. 10, 11—Revenue Sale Law—Setting aside sale—Misjoinder of plaintiffs—Misjoinder of causes of action—Specification of share—Names of mouzas—Identification by purchaser—Inadequacy of price whether due to irregularity.*

The *ejmali* share of a certain property was sold for arrears of revenue. A suit to set aside the sale was instituted by the co-sharers, some of whom alleged that the auction purchaser had taken possession not only of the *ejmali* share, but also of certain defined shares belonging to them and in respect of which separate accounts had been opened in the collectorate.

Held, it was clearly a misjoinder of parties and of causes of action. The cause of action with respect to the *ejmali* share accrued on the date of the Commissioner's order dismissing the appeal to him and that in respect of the other shares, on the date when the purchaser obtained possession of them. In specifying the share of a property to be sold it is not necessary to name all the mouzas that appertain to it. It is sufficient if the share be so specified that it can be identified and that it can be understood by intending bidders what is about to be sold. This is so not only in the case of a share held in common as mentioned in S. 10 but also in that of a share consisting of specific portions of land as mentioned in S. 11 of the Act. 13 C 208 foll. A defect in the sale notification is a mere irregularity which does not render the sale a nullity. 21 C. 66 and 32 C. 111 relied upon. Property does not fetch the same price at a forced sale as

Bengal Act (XI of 1859) (*Contd.*)

it would do in a private sale. Every purchaser at a revenue sale purchases property subject to the dangers of litigation, and Courts should not lightly set such sales aside as by so doing they depreciate the value of property through the country. If there is inadequacy of price there must be direct evidence to connect inadequacy with the alleged irregularity in the sale notice before a sale can be set aside. 32 C. 509; 1 C. L. J. 22 foll. BAIJNATH GOENKA *v.* MAHARAJA SIR RAMESWAR PRASAD SINGH BAHADUR. **6 C L J 163**.

(20) b S. 11—See 32 C. 542 No. 13, 6 C. L. J. No. 20 (*a*) *supera*.

21 *Ss. 13, 6, 7—Description of the property*,

Under the circumstances of the present case, the specification of the share to be sold in column 5 of the notification which was as follow: "Rampur moafi 1 Khanapur 1, Begrajpur 1, *Ijmali* share after deduction of the share separated," was held to be sufficient compliance with s. 13 of the Revenue Sale Law. In this respect each case must be governed by its special circumstances. Ram Narain Koer *v.* Mahabir Prosad Singh (I. L. R., 13 Cal. 208) referred to. Annoda Charan Mukhuti (2 C. W. N. 479) and Hem Chandra Chowdhury *v.* Sarat Kamini Dasya (6 C. W. N. 526) distinguished. DILCHAND MAHTO *v.* BAIJNATH SINGH. **8 C. W. N. 337**.

22 *Ss. 13, 14, 28, 29, 37, 54—Share of estate, sale of—Mukurari lease—Purchaser of share of estate—Merger—Encumbrance.*

The sale of a share of an estate for arrears of revenue, under the provisions of Act XI of 1859, does not affect, wholly or in part, a valid *mokurari* lease of lands comprised in the estate, notwithstanding the fact that the lease is held by some of the defaulting proprietors of the share sold, having a fractional proprietary interest therein. Kasinath Koowar *v.* Bankubehari Chowdhry, (3 B. L. R., A. C. 446; 12 W. R., 440), and Madhab Chunder Chowdhury *v.* Promotho Nath Roy, (20 W. R. 264), referred to. AFZUL HOSSEIN *v.* RAJ BANS SAHAI. **I. L. R. 30 C. 1071**.

23. S. *13, 14, 53 and 54—Sale of a share of an estate, effect of—Encumbrance - Mortgage previous—Purchaser at the revenue sale, right of—Difference between language and scope of Ss. 53 and 54 of the sale law—Title of auction purchaser when accrues.*

A purchaser under S. 13 of the Revenue Sale Law (Act XI of 1859) does not acquire merely the right, title and interest of the defaulting proprietor, but he takes the share itself which is exposed for sale, subject to the limitations prescribed in the section.

The words "shall not acquire any right" in S. 54 of the Act refer to the acquisition of rights in respect of interest, such as encumbrances, or the like, which are referred to in the previous phrase of that section (22 C. 641, 29 C. 223, 14 B. L. R. 170, 22 W. R. 449 ref).

Bengal Act (XI of 1859) (*Contd.*)

If a person acquires the interest of the original owner of the estate before the default is made, his interest cannot be said to be an encumbrance, and passes by the sale to the purchaser, because what is sold is in essence his share in the estate.

The words, "purchaser shall not acquire any rights which were not possessed by the previous owner or owners" in S. 54 of the Act, do not mean that the purchaser at the revenue sale shall only acquire the rights possessed by the previous owner or owners at the date of the sale, but that the purchaser shall not acquire any rights not possessed by the previous owner or owners at sometime or another, and shall acquire no more than what was the property of the previous owner or owners.

The purchasr at a sale for arrears of revenue of a share of an estate under S. 13 does not take the property subject to encumbrances created after the date of the default and before the date of the revenue sale (17 C 148, 3 C. L. J. 52 refd.)

A purchaser of the interest of the proprietor, after default and before revenue sale is quite as much bound by the revenue sale as the proprietor himself, because, in substance, he occupies the position of the proprietor.

Although the purchaser does not take subject to any encumbrances created after the default, he takes subject to such encumbrances only as have been created before default and are in actual existence, because undischarged, or though discharged on the date of the revenue sale, may upon equitable principles be allowed to be set up, (31 I. A. 176, 32 C. 27 dist.)

The language and scope of S. 53 are materially different from those of S. 54 of the Act; under the one section, the purchaser takes subject to all encumbrances existing at the time of the sale, while under the other, no encumbrance created after default is binding on the purchaser.

Although an auction purchaser does not acquire a full title till the confirmation of the sale, yet upon general principles, he may have equitable rights, arising out of his purchase before the date of confirmation of the sale (17 B. 375, 19 A. 188, 14 A. W. N. 54, 10 B. 453, 2 C. W. N. 589, 11 C. W. N. 158, 15 L. R. A. 68, 24 L. R. A. 449, 12 L. R. A. 62. Refd.) BHOWAN KOER *v.* MATHURA PERSHAD. **7 C. L. J. 1**

24 S 13—*See* 34 C. 381 No. 8, 32 C. 111 No. 14 *supra*.

25 S. 14—*Sec* 34 C. 381 No. 7, 30 C. 1071 No. 22, 7 C. L. J. 1 No. 23, *supra*.

26 S. 17—34 C. 381 No. 8 *supra*.

27 S. 18—10 C. W. N. 137 No. 6, *supra*.

28 S. 20—32 C 229 No. 20 *supra*.

29 *S. 25—Order setting aside a sale—Review by Commissioner—' Final.'*

Under Act XI of 1859 a Commissioner or any Revenue authority cannot review or set aside an order once legally passed by him. A Commissioner or Revenue authori-

Bengal Act (XI of 1859) (*Contd.*)

ty who has once set aside a sale under Act XI of 1859 has no power to revoke or modify that order passed by him under the Act. An order by a Commissioner reviewing a previous order made by him would be *ultra vires* and of no effect. The word final in Section 25 of Act XI of 1895 means not open to review. 22 C. 419 foll.; 2 C. L. J. 306; 19 B. 113; 20 B. 281; 4 C. L. J. 177; 33 C. 1178 referred to; 30 C. 619; 7 C. W. N. 433 expl. BAIJ NATH RAM GOENKA *v.* NAND KUMAR SINGH. **6 C. L. J., 84; 11 C. W. N. 803; 34 C. 677.**

30 S. 25, 10 C. W. N. 137 No. 6 *supra.*

31 *Ss. 27, 28, 37, 2—Appeal, time for preparing to Commissioner of Revenue—Jurisdiction of Civil Court to re-open the question of limitation.*

The appeal contemplated by S. 2 of Act VII of 1868 B. C. must be preferred to the Commissioner not later than the sunset of the sixtieth day from the day of sale, reckoning that day as one of the sixty. An appeal preferred after the time so limited has expired is not an appeal preferred within the meaning of S. 27 of Act XI of 1859. 21 C. 76 ref. to; 16 C. 250; 7 A. 887; 23 C. 775 explained and distinguished.

Quære:—Whether a Civil Court has power to deal with the question of the validity of the view taken by a Commissioner of Revenue that an appeal presented to him for setting aside a revenue sale was barred by limitation. 25 C. 789 affirmed on appeal, 33 C. 1178 ref. to. An incumbrance or under-tenure is not *ipso facto* avoided by a sale of an estate for arrears of revenue, and is only liable to be avoided at the option of the purchaser at such sale, an option which may be exercised by the institution of a suit under S. 37 of Act XI of 1859, within the time allowed by law, or by actual ejectment by the Collector under S. 29; such ejectment, however, cannot be preserved merely because a writ has been issued by the Collector, and must be established by evidence like any other fact. 9 C. 683; 31 C. 393; 5 C. L. J. 334 refd. to. MIR WAZIRUDIN *v.* LALA DEOKI NANDAN AND SYED GULAM DAREE *v.* LALA DEOKI NANDAN. **9 C. L. J. 472.**

32 *Ss. 27 and 54—Title of purchaser, when vests—Title, when complete—Sale certificate evidence of title—Purchaser takes subject to encombrance—Power of proprietar to deal after default—Mortgage of non-existent property.*

Under S. 27 of the Revenue Sale Law the title automatically vests in the purchaser at the revenue sale by reason of the sale and payment of the purchase money. It becomes complete as soon as the sale became final and conclusive, even though possession is not obtained. The certificate of sale does not create, title it is merely evidence of title. 7 C. L. J. 384 applied.

The purchaser of a share of an estate, under S. 45 of the Revenue Sale Law takes the share subject to encumbrances, which were in existence on the date to which the title relates back, (that is, the day after that fixed for the last day of payment), and were in force on the date of sale.

The power of the proprietor to deal with his property is not lost by reason of the default in payment of revenue; if no sale was held by the Collector on the basis of such default, a mortgage created by the owner after default is not inoperative 32 C. 27 (38) R.

A mortgage of non-existent property, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property the moment it is required, and, in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage. KHOBHARI SINGH *v.* RAM PROSAD ROY, **7 C. L. J. 387.**

33. S. 27—Revenue sale—Arrears of—Government Revenue—Title of purchaser—Date of sale—Appropriation of payment of revenue. 10 C. W. N. 958. *See Col: 313.*

34. S. 28—10 C. W. N. 137 No. 6, 1 C. L. J. 565 No. 16, 30 C. 1071 No. 22, 6 C. L. J. 472 No. 31 *supra.*

35. S. 29—10 C. 1071 No. 22, 6 C. L. J. 472 No. 31 *supra.*

36. S. 30—32 C. 229 No. 20 *supra.*

37. S. 31—31 C. 256 No. 17 *supra.*

38. S. 33—10 C. W. N. 137 No. 6, 30 C. 1 No. 9, 6 C. W. N. 688 No. 10, 32 C. 509 No. 12, 8 C. W. N. 757 No. 14, 7 C. W. N. 377 No. 15, 31 C. 256 No. 17 *supra.*

39 *S. 37—Sale for arrears of revenue—Right to annul incumbrance*—Putnidar *under the auction-purchaser.*

The power given to an auction-purchaser at a revenue-sale to annul under-tenures, under Section 37, is not limited to the purchaser personally but is transmissible to his heirs and assignees. This power can be transmitted to a *putnidar*, and a *putnidar* even of a portion of the zemindari can exercise that power, if the whole of the under-tenure sought to be set aside lies within his *putni*. (15 W. R. 481; 22 W.R. 29 F., 10 M. I. A. 123; 12 M. I. A. 263; 2 C. W. N. 443; 24 C. 334,) Exp. NARAIN CHANDRA KONSABAWK *v.* KASISWAR ROY. **1 C. L. J 579.**

40 *S. 37—Revenue-sale—Avoidance of incumbrance by assignee of auction-purchaser.*

Held, that where an entire estate is sold for arrears of revenue, an assignee of the auction purchaser can avoid incumbrances under section 37 of Act XI of 1859. SHASI BHUSAN MAJUMDAR *v.* KRAMOTULLA SHEIKH. **10 C. W. N. 148.**

41 *S. 37—Revenue-sale—Burden of proof.*

The auction-purchaser of an estate sold for arrears of revenue brought a suit for possession of certain lands within the estate. The defendant contended that he held the lands as *raiyat* within the meaning of Act XI. of 1859, section 37 *proviso* and section 21 of the Bengal Tenancy Act, and so was not liable to ejectment.

Bengal Act (XI of 1859) *(Contd.)*

Held, that the *onus* was on the defendant to prove his contention. AMBIKA CHURN CHAKRAVARTY *v.* DYA GAZI **10 C. W. N. 497.**

42 *S. 37—Revenue-sale Law—Exception—Revenue Sale—Suit to set aside incumbrances—Burden of proof—Presumption backward—"Permanent Settlement*

The plaintiff sued the defendants for recovery of possession of lands in suit on the allegation that the defendants were holding them under leases which under section 37 of Act XI of 1859 had become void and inoperative as against the plaintiff, a purchaser of an entire estate free from all encumbrances created since the Permanent Settlement. The defendants denied the plaintiff's allegation of the creation of their tenures subsequent to the Permanent Settlement, asserted their existence and uniform payment of rent from the Permanent Settlement and claimed protection under the exception to section 37 of Act XI of 1859. It was found that some of the plots in dispute were covered by tenures which were mentioned in the Survey Chitta of 1839 and rents of these tenures had been paid at uniform rates until their sale and purchase by the plaintiff in 1898. Some of the other plots were covered by confirmatory leases of tenures which were mentioned in the Survey Chitta of 1839 and there was no variation of their rents. There was no direct evidence to show that the tenures had existed from the Permanent Settlement of 1793. It was contended for the plaintiff that it was necessary for the defendants to prove by positive evidence the existence of their tenures from the permanent Settlement of 1793 and not merely the Permanent Settlement of 1864.

Held, that the facts found were sufficient to raise a presumption of the existence of tenures from 1793. They were recognised as existing tenures in 1839; they were not avoided on the purchase of Government on sale held under Act I of 1845 and were recognised again in 1864 by the Government. In the absence of proof as to the origin of the tenures and variation of rents at any previous period the Court ought to presume backwards and hold that the defendants had succeeded in discharging the burden of proof which lay on them under section 37 of Act XI of 1859. The case came within the principle of *optimus interpres verum usus. L. R. 31 I. A. 144, S. C., 8 W. N., Cal., 880 followed.*

In section 37 of Act XI of 1859 the expressions "Permanently settled" and "Permanent Settlement" contemplate the Permanent Settlement of 1793. *24 Cal., 887, 24 W. R. 476 referred to.* NAGENDRA LAL CHOWDHURY *v.* NAZIR ALI. **10 C. W. N. 503.**

43. S. 37—*Purchaser of entire estate—Transferee from purchaser—Annulment of under-tenures—Entire lands covered by under-*

Bengal Act (XI of 1859) *(Contd.)*

tenure—Taluqa potta.

The rights acquired by the purchaser of an entire estate at a sale for default of payment of revenue can be transferred and the transferee can avoid an under-tenure created before the sale, when the transfer is by a taluqa potta conferring upon the transferee the right to immediate possession of the lands comprised in the potta. 22 W. R. 29 foll. Where the lands held by the under-tenants include lands not claimed by the purchaser and they hold the entire lands under one potta, their entire holding forms an indivisble tenure which cannot be annulled in respect of a portion only of the lands comprised in the potta.—SOOHARAM BARMA *v.* DOORGA CHARAN DAS. **5 C. L. J. 264.**

44. S. 37—*Act VIII of 1869, Bengal—Bengal Tenancy Act (VIII of 1885)—Landlord and Tenant—Occupancy rights. Acquisition of.*

Under Act VIII of 1869, Bengal, rights of occupancy could be acquired in respect of an undivided share of property and such rights acquired under Act VIII of 1869 were not taken away by any of the provisions of the Bengal Tenancy Act VIII of 1885.

When the original grant was *raiyati* the transfer of possession to sub-tenants has not the effect of changing the original character of the tenure. BAIDYANATH MONDAL *v.* SUDHARAN MISRI. **8 C. W. N. 751.**

45. S. 37—*Bengal Tenancy Act (VIII of 1885), Sections 20 and 21—Right to occupancy.*

There is nothing in the proviso to section 37 of the Revenue Sale Law (Act XI of 1859), to limit its operation to rights of occupancy acquired by the means indicated in Act X of 1859, the proviso should be extended to the rights of occupancy acquired by the extended means indicated in the Bengal Tenancy Act (VIII of 1885). Hence, a purchaser of an entire estate at a sale for arrears of revenue cannot eject a *raiyat* who has acquired a right of occupancy in the manner provided by the Bengal Tenancy Act. SARAT CHANDRA ROY CHOWDRY *v.* ASIMAN BIBI. **8 C. W. N. 601=31 C. 725.**

46. S. 37.

The plaintiffs, purchaser of a share of a tank sold for arrears of Government revenue sued for *khas* possestion of it. It was pleaded that the defendants were protected from ejectment under section 37 of Act XI of 1859.

Held, that upon evidence the share of the tank was an integral part of an agricultural holding and that the defendants did and could acquire a *raiyati* right in it—*25 Cal., 917 referred to. 3 C. L. R. 140 followed.* UMA CHARAN BAROAH *v.* MONI RAM BAROAH. **8 C. W. N. 192.**

Bengal Act (XI of 1859) *(Contd.)*

47 *S. 37—Grant—Regulation XIX of 1793—Sale—Encumbrance—Liability to pay rent.*

Some years before the acquisition of the Dewani by the East Indian Company, the zemindar made a rent-free grant of village P. to one D. Since then D. and after him his heirs, continued in possession of the village, until the institution of this suit. After the acquisition, the Company made an assessment of the lands in the Bengal Province, and village P. was then, and again at the time of the Permanent Settlement, assessed at *sicca* Rs. 80, which assessment was accepted by the zemindar, and he and his heirs continued to pay the assessed amount. In the year 1900 the zemindar made default in payment of the revenue for the September *kist*, and the village was sold under the provisions of Act XI of 1859. The purchaser instituted a suit for recovery of possession or for assessment of rent and mesne profits.

Held that the right created under the grant was an encumbrance, which existed from before the time of the Permanent Settlement; but the plaintiff could not be affected by the laches of the defaulter or his predecessors; he was entitled to hold the estate in the same condition as it was at the time of the Permanent Settlement when the revenue was assessed at *sicca* Rs. 80 and to recover that amount with cesses from the defendants.

Held, further, that s. 37 of Act XI of 1859 does not avoid encumbrances of every kind nor does it allow the purchaser to assess rent at a rate higher than that paid before the Permanent Settlement; the rent is not enhancible according to the law now in force, as the land must be considered to be comprised in a tenure existing from before the time of the Permanent Settlement. *Hurryhur Mookhopadhya* v. *Madhub Chunder Baboo*, 14 Moo. I. A. 152, referred to. BRINDABAN BEHARI LAL *v.* BHAWANI SAHAI. **35 C. 931.**

48 *S. 37 (3), (4)—Suit for khas possession by purchaser—Talukdari tenure created after permanent settlement—Dwelling houses, gardens made on it.*

In a suit for *khas* possession by a purchaser at a revenue sale, it was pleaded by the defendants that the lands in their possession were held as *raiyati* lands created before the permanent settlement and so under excep. 3 of s. 47 of Act XI of 1859, they were not liable to be ejected. The lower appellate Court held that those lands were *taluks* created after the permanent settlement, but as the defendant had built dwelling houses and gardens on them, the suit for *khas* possession must fail.

Held that the defendants were liable to be ejected from the estate except from such portions thereof upon which dwelling houses, gardens, &c., were made. *Kiron Chandra Roy* v. *Niamuddi* (I. L. R. 30 Cal. 498) distinguished. *Gobind Chandra* v. *Joy Chandra* (I. L. R., 12 Cal., 327) followed.

Held also that as the defendants did not adduce evidence to shew the true position of the lands occupied by dwelling houses and gardens, the direction given by the lower appellate Court for ascertaining them in the execution proceedings, were just and proper.

Held further that though a person may fail to prove a defence under excep. 3 of s. 37 of the Revenue Sale Law (Act XI of 1859), it is still open to him to plead that he is protected under excep. 4. NAJEMUD DEEN MOONSHI *v.* SYED HASSAN HYDER CHOWDHURY, **9 C. W. N. 852.**

49 *S. 37 (4)—Permanent building.*

The word 'lease' in sub-s. 4 of s. 37 of Act XI of 1859 does not mean a lease from the zemindar only. KIRON CHUNDRA *v.* NAIMUDDI TALUKDAR. **I. L. R. 30 C. 498.**

50 S. 37 (4)—Houses and tank built by incumbrancer—Suit to avoid incumbrance—Assignee from purchaser—Right of suit. 12 C. W. N. 1029, Col. 1924, Part I.

51 *Ss. 37, 53—Encumbrance, avoidance of—*

A purchased an estate at a sale for arrears of revenue in the name of his servant. Thereupon one of the defaulting proprietors brought a suit against the said servant and other persons, for setting aside the sale and obtained a decree for reconveyance on certain terms. Owing to this litigation, another default occurred in payment of revenue and the estate was again put up for sale and repurchased by A.

Held, in a suit by A to recover *khas* possession by annulling certain alleged incumbrances, that he was not entitled to do so, as the second sale was owing to his default and the case fell within S. 53 of Act XI of 1859. MAFIZUDDIN *v.* KORBAD ALI CHOWDHURI. **I L R 31 C 393; 8 C W N 115.**

52 *Ss. 37, 53—Proprietor—Assignment of debt to creditor—Duty of creditor to recover debt—Privy Council—Appeal to—Fresh opportunity to argue point raised for the first time on appeal.*

When a creditor accepts from his debtor assignment of a debt due to the latter by another person and the creditor makes no attempt to recover the same he may be debited with the amount of the debt when account is settled between him and the debtor.

After default was made in payment of Government revenue in respect of an estate the estate was sold in execution of a decree of the Civil Court and the purchaser at the sale again purchased the estate when it was re-sold for the default in payment of the revenue.

Held, that the latter purchase was subject to incumbrances under section 53 of the Bengal Tenancy Act for the purchaser, when he bought the estate at the Revenue sale was a person purchasing an estate of which he was himself the proprietor.

Bengal (Act XI of 1859) *(Contd).*

The Judicial Committee allowed the parties a fresh opportunity to argue a point that was raised for the first time before them. MUSST. SHAM KUMARI *v.* RAJA RAMESHWAR SINGH BAHADUR. **32 C 27=8 C W N 786.**

53 S. 37—*See* 30 C. 1071 No. 22, 6 C. L J. 472 No. 31 *supra.*

54 S. 51—*See* 8 C. W. N. 115 No. 51 *supra.*

55 S. 53—*See* 32 C. 542 No. 13, 7 C. L. J 1 No. 23, 8 C. W. N. 1152 No. 51, 32 C. 27 No. 52 *supra.*

56 *S. 54—Incumbrance—Right of purchaser at a sale held to realize revenue.*

Held, that section 54 of Act XI of 1859 provides that the purchaser shall not acquire any rights not possessed by the previous owner or owners at some time or another, and shall acquire no more than what was the property of the previous owner or owners. It does not lay down that, if the previous owner has parted with all his rights, before the property is put up for sale for arrears of revenue, the purchaser at such a sale shall acquire nothing. ANNODA PROSAD GHOSE *v.* RAJENDRA KUMAR GHOSE. **6 C. W. N 375=29 C. 223.**

57 S. 54—Sale for arrears of revenue—Charge on sale proceeds. 3 C. L. J. 52. *See Col. 1897, Part I.*

58 *S. 54—Separate accounts—Sale of a share of revenue—Paying estate in possession of Hindu lady as female heir—When interest passes—Reversionary interest if an incumbrance.*

When a share in a revenue paying estate in respect of which a separate account had been opened was inherited by a Hindu lady from her father and was then sold for default in paying Government revenue

Held, that the complete owner's interest and not merely a life-estate in the share passed to the purchaser. The interest of a reversionary heir is not an encumbrance within the meaning of S. 54 of Act XI of 1859. BANALATA DASI *v.* MONMOTHA NATH GOSWAMI. **11 C W N 821.**

59 *S. 54—Purchaser of share—Right to recover from person who has acquired title by adverse possession previous to default.*

Whether adverse possession is completed before or after the date of default, a purchaser at a revenue sale of a share of an estate in respect of which a separate account has been opened in the Collectorate becomes entitled to possession of the share.

If the adverse possession was completed before default, the default must be treated as the default of the person who has acquired title by adverse possession and the sale must be held to pass his interest. KUMAR KALANAND SINGH *v.* SYED SARAFAT HOSSEIN. **12 C. W. N. 528**

60 S. 54, 30 C. 1071 No. 22, 7 C. L. J. 1 No. 23, 7 C. L. J. 387 No. 32 *supra.*

61 *S. 58 and 6—Sale—Arrears of revenue—Procedure—Bid by Collector—Absence of other bidders—Bid by defaulter himself.*

Bengal Act (XI of 1859) *(Contd).*

At a sale held for arrears of revenue the Collector began with a bid of rupee one and the defaulter's agent followed with a bid of Rs. 10. There was no other bidder. The Collector closed the bid and purchased the property for Rs. 10 for Government under section 58 of the Revenue Sale Law.

Held, that the sale had not been held in accordance either with the letter or the spirit of section 58 of Act XI of 1859. HALIMANNISSA CHOWDHRANI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **8 W. N. C. 880=31 C. 1036.**

62 S. 93—30 C. 1 No. 9 *supra.*

(3) Act III of 1864.

Section 87—Limitation—3 C. L. J. 376—*See Act III of 1884 (Bengal Municipality) s. 363.*

(4) Act VIII of 1865 (Bengal Rent Recovery Act).

1 S. 6—*Rent Recovery (under tenures) Act (VIII of 1865 B. C.) S. 6—Decretal amount, payment of—Sale—Bona fide purchaser without notice—Mortgage by owner's son—Mortgagor's representative and execution—Purchaser, binding against—Transferability of a holding.*

Under section 6 of the Act VIII of 1865, any payment of decretal amount after an application for sale has been presented must be made into Court. If the money is paid before the execution proceedings commenced, the sale in execution of a decree for rent is bad and held without jurisdiction. If the decretal amount is paid out of Court after execution proceedings began, the payment would not, under section 6 of Act VIII of 1865, make the sale a nullity.

If the auction-purchaser be a *bona fide* purchaser for value without notice, then good or bad, the sale stands, so far as he is concerned, and the usufractuary mortgagee of the holding cannot recover possession as against him but must seek other remedies.

Semble: A mortgage executed by the son of the owner of the holding at a time when his father was alive, is after the death of the owner, binding on the representative of the mortgagee as also on the execution purchaser from the representative.

The question of transferability of a holding can arise as well between landlord and tenant as between a tenant and a third party. 24 C. 355 referred to. RAM GOPAL ADITYA DEB *v.* RAJAN SADAGAR, **6 C. L. J. 42.**

2 S 12—*Rent for period subsequent to suit—Sale proceeds—Surplus—Charge upon—Priority over attaching creditor—Charge for future rent.*

Under this section a plaintiff, who has obtained a decree for rent, has no charge over the surplus sale proceeds for the rent of subsequent period. SULTAN KHAN *v.* RADHA KRISHNA SINGH. **4 C. L. J. 520.**

Bengal Act (VIII of 1865) (*Contd*).

3 *S. 16—Sale—Purchase—Encumbrances, avoidance of—Estoppel—Plaint—New case—Notice to quit—Maintainability of suit.*

Where a purchaser of a tenure in a sale held under the provisions of Act VIII of 1865 (B. C.) sued the person in possession for rent, and obtained an *ex parte* decree, and then brought a suit, for enhancement of rent, to which the defendant pleaded that he was entitled to hold the land under a *mokarari potta* upon which the plaintiff withdrew his suit and brought the present suit for ejectment:

Held, the plaintiff was not estopped from bringing the suit by reason of his having brought a rent suit against the defendant. Under S. 16 of the Act, he is allowed to avoid encumbrances, and if the defendant would not accept the position of tenant offered him and pay a reasonable rent, the plaintiff is entitled to reject him.

No previous notice to quit need be given for the maintainability of a suit of this nature. (9 C. 683 Foll, 11 W. R. 160 Exp.) ARSALI SADAGAR *v.* RAM SATYA BHAKAT. **7 C J L 191.**

(5) Act X of 1865 (Landlord and Tenant Act).

1 S. 1—Right of occupancy in urban arrears. 9 C. W. N. 141. *See Bengal Act X of 1859. No. 1.*

2 S. 1—Sale—Irregularity. 5 C. W. N. 126. *See Bengal Act X of 1859. No. 2.*

3 S. 6—Right of occupancy. 8 C. W. N. 860. *See Bengal Act X of 1859. No. 4.*

4 Ss. 6, 23—Rent of tank—Suit for. 31 C. 937. *See Bengal Act X of 1859. No. 6.*

5 S. 23—Lease for building and mining purposes. 28 C. 485. *See Bengal Act X of 1859. No. 9.*

(6) Act VII of 1868 (Bengal Revenue Recovery Act).

1 Ss. 1 and 8—Malkana—Land Revenue—Arrears accruing subsequently to notification of sale. 31 C. 256. P. C. *See Bengal Act XI of 1859. No. 17.*

2 S. 2—Appeal—Time for preparing to Commissioner of Revenue. 6 C. L. J. 472. *See Bengal Act XI of 1859. No. 31.*

3 S. 8—Notice—Omission to issue of cured—Fact of attachment. 1 C. L. J. 565. *See Bengal Act XI of 1859. No. 16.*

4 S. 8—Presumption—Appeal to Commissioner. 7 C. W. N. 377. *See Bengal Act XI of 1859. No. 15.*

5 S. 8—Substantial injury—Grounds for exemption from sale—Court's power to examine. 10 C. W. N. 137. *See Bengal Act XI of 1859. No. 6.*

6 S. 8—Certificates of sale—Onus of proof—Notice. 30 C. I. *See Col. 235 P. I.*

7. Act VIII of 1869 (Bengal Rent Act).

1 S. 1—Occupancy rights—Acquisition of. 8 C. W. N. 751. *See Bengal Act XI of 1859. No. 44.*

2 S. 1—Right of occupancy in urban arrears. 9 C. W. N. 141. *See Bengal Act X of 1859. No. 1.*

3 *S. 6—Occupancy raiyat—Transfer of interest by, in holding—Mortgage,* girby, *usufructuary—Transfer of Property Act (IV of 1882), section 58* (d)*—Sub-lease—Ejectment.*

Under the Bengal Rent Law (VIII of 1869, B. C.) when an occupancy raiyat has executed an usufructuary (*girby*) mortgage of his non-transferable holding and has allowed the mortgagee to occupy it for such time as the loan remains unpaid, without the permission of his landlord, the transaction can in no sense be regarded as a sub-lease, but it is an incumbrance and a transfer of the raiyat's interest in the holding, and as such, a breach of the condition under which he holds the land. Under such circumstances, the landlord is entitled to take such *khas* possession of the land comprised in the holding. KRISHNA CHANDRA DUTT CHOWDHURI *v.* MIRAN BAJANIA. **3 C L J. 222=16 C W N 499.**

4 S. 6—*Bengal Tenancy Act* (*VIII of 1885*), S. *116*—Kamat *land—Right of occupancy—Tenant, holding over.*

Where the rights of the parties were governed by Bengal Act VIII of 1869, lands which were *kamat* did not cease to be so by virtue of a *mokurari* settlement of the same.

A tenant of *kamat* land does not acquire a right of occupancy by holding it over after the expiry of the lease. SYED KHALILUR RAHMAN *v.* RUPAN MAHTON. **12 C W N 436.**

5 *Different jotes or tenures—Suit for rent—Sale—Incumbrance—General Clauses Act.*

To enable a raiyat to acquire a right of occupancy under S. 6 of Act VIII of 1869 (B. C.) or under Act X of 1869, his possession must ordinarily be continuous for twelve years over the whole of the land in respect of which a right of occupancy is claimed. 22 W. R. 228 ref. to. The fact that the plaintiff was in occupation of different areas of lands in different years, would not entitle him to a right of occupancy in the whole, unless it was proved that he had a right of occupancy in a portion and the parties intended that the additional lands also should be impressed with the existing rights in respect of the original lands of the holding. Under S. 6 of Act VIII of 1869, a raiyat retains his right of occupancy only so long as he pays rent. But although mere non-payment of rent might not be conclusive evidence of abandonment, non-payment of rent taken with sub-mergence of land, is sufficient to indicate an extinguishment of the right of occupancy. 4 C. 894 foll. ; 13 M. I. A. 467 ref. to. ; 18 All. 290 distinguished. An occupancy holding was diluviated at a time when Act VIII of 1869 was in force and the lands

Bengal Act *(VIII of 1869)* *(Contd.)*

had continued under water for thirteen years before the present Bengal Tenancy Act was passed in 1885.

Held, that whatever right was acquired by the raiyat, was extinguished by non-payment of rent during the period of submergence before the Act of 1885 came into force; as he had subsisting rights in 1885, the provisions of the Act VIII of 1885 could create no new rights in his favour, nor revive those which had already been extinguished. SALIGRAM AUGH *v.* PALUK PANDEY. **6 C. L. J. 149.**

6 *S. 7—Bengal Tenancy Act (VIII of 1885), Section 178 (1) (a), (3), (a)—Landlord and Tenant —Lease—Contract—Lease granted for life-time before passing of Bengal Tenancy Act —Right of re-entry.*

Where before the passing of the Bengal Tenancy Act, 1885, a contract was entered into between the land-lord and the tenant, the landlord granting *mokurari jama* to the tenant for her lifetime reserving the right to re-enter after her death.

Held, that the contract did not fall within the terms of sub-section *(3)*, cl. *(a)* or clause *(a)*, sub-section *(1)* of section 178 of the Bengal Tenancy Act, and was therefore enforcible. BAUL CHANDRA CHAKRAWARTI *v.* NISTARINI DEBI. **10 C. W. N. 533=33 C. 136.**

7 *S. 22—Bengal Tenancy Act Ss. 48, 29 (b), Contract for rate in excess of the maximum prescribed, validity of S. 66—Suit for ejectment for non-payment of rent—Waiver.*

A contract for a rate of rent in excess of the maximum rate prescribed is not wholly void, but nothing in excess of the prescribed rate can be recovered. Such a contract is different from one contemplated by S. 29; cl. b and S. 85, sub-sec. 2 of the Bengal Tenancy Act (26 C. 199 Refd.)

Where a landlord sues for arrears of rent for four successive years; the landlord's claim for ejectment for non-payment of arrears for the first three years must be held to have been waived, and a decree for ejectment can be made for non-payment of the arreare due only for the year immediately preceding that in which the suit is brought (14 C. 33 foll). SITANATH MIDDA *v.* BASUDEB MIDDA, **2 C. L. J. 540.**

See for other facts col 964. P. I.

8 *S. 64—Hindu Law—Female's estate—Female in possession of under tenure—Sale of her interest for arrears of rent—Rights of next heir and auction purchaser.*

When the rights, title and interests of a Hindu daughter in possession of an under-tenure were sold in execution of a money decree for arrears of rent, in a suit brought by some of the co-sharers landlord, and upon her death her next heir sued the auction purchaser for possession of the undertenure—

Held, that the claim was valid.

To make the tenure itself liable to sale in execution, the special procedure required by Bengal Tenancy Act VIII of 1869 would be necessary, and all the co-sharers would have to be made parties to the suit. JIBAN KRISHNA ROY *v.* BROJO LAL SEN. **5 B L R 428=7 W N C 425=31 I A 81 =30 C 550 P C.**

9 *S. 66—Avoidance of encumrances—Jote —Tenure—Presumption—Sale for arrears of rents—Purchaser one of the defaulting co-sharers.*

The fact that a holding has been described as a *jote* does not necessarily show that it was not a tenure and that it was simply an ordinary cultivating *jote* or holding.

In the case of a holding exceeding 100 *bighas*, it is to be presumed until the contrary is shown that the holding is a tenure.

A purchaser's suit to avoid encumbrances must be dismissed where the sale took place to realize the rent which was in default in consequence of non-payment by the purchaser and his co-sharers. SYED NAWAB ALI CHWDRY *v.* HEMANTA KUMARI DEBI. **8 C W N 117.**

10 *S. 66—Landlord and Tenant—"Previous holder"—"Default"—Right to avoid intermediate tenures.*

The expression "previous holder" in section 66 of Act VIII of 1869 includes a person beneficially interested in a tenure who is in a position to protect his interest by paying the rent into Court and yet omits to do so with the result that the tenure is brought to sale by the superior landlord.

"Default," which prevents the section from applying, does not necessarily imply any moral obliquity or any breach of contractual obligation. It simply means non-payment, failure or omission to pay.

A person who, after aquiring a share in a *mokurari* lease, purchases the entire tenure at a sale held in execution of a decree for rent is not entitled to avoid intermediate tenure under section 66 of Act VIII of 1869, Bengal. He is a "previous holder" even if he is not a registered tenant. FAKIR CHUNDER DUTT *v.* RAM KUMAR CHATTERJEE. **8 W.N.C., 721=6 B. L. R., 741=31 C., 901 (P. C.).**

11 *S. 161—Rent suit—Civil court—Second appeal.*

In a suit for rent under Act X of 1859 a second appeal would lie to the High Court against the judgment of a District Judge passed on an appeal in a suit for a sum below Rs. 5,000. S. D. A. for 1861, p. 8 foll. 9 I. A. 174 referred to; 4 C. W. N., 333 dis. SADAI NAIK *v.* SERAI NAIK. **5 C. W. N. 279=28 C. 532.**

(8) Act V of 1870 (Port Commissioner).

*Ss. 5, 6, 31, 38, 39—Land Acquisition Act (X 1870)—Phrase "public purpose" explained—Highway—Statutory Road—Dedication—Public user—*Animus dedicandi*—Power to dedicate, whether the Port Commissioners have any.*

Bengal Act (V of 1870) *(Contd.)*

Certain lands acquired in 1874 for "a public purpose" under the Land Acquisition Act of 1870 in conjunction with the Port Commissioners' Act of 1870, were conveyed to the Port Commissioners for value in 1876. A road constructed on a portion of these lands was used by the general public from the date of its completion in 1876 till 1881.

On the Port Commissioners erecting a fencing in 1903, obstructing access from adjoining premises to the road, a suit was instituted by the owners of the adjoining premises for the declaration of a private right of access to the road as a public highway and for incidental relief.

Held, a public right of way may be created either by Act of the Legislature or by dedication, express or presumed, by the owner of the land, to the general public. The acquisition in suit did not create any public statutory road. The declaration of a "public purpose" did not make the road a public road. The "public purpose" was under Section 38 of the Port Commissioners' Act of 1870, for the purpose of that Act. By the conveyance the land became vested in the Port Commissioners.

In order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an *animus dedicandi* of which user by the public is evidence and no more. 11 *M. & W.*, 827 *followed*.

Quare.—Whether the Port Commissioners had, having regard to the terms of their Act, power to dedicate? 21 *Q. B. D.* 273, *referred to.* AKSHOY KUMAR GHOSE *v.* COMMISSIONERS OF THE PORT OF CALCUTTA. **3 C. L. J. 585=33 C. 1243.**

9 Act VI of 1870 (Chowkidari)

1 *S. 48—Construction of—*

Held, that section 48 of the Act VI of 1870, Bengal, means not that the resumed lands are to be transferred to the zamindar of the village within which they are geographically situate but to the zemindar of the estate to which the lands appertain and of which they form a part and parcel. PRATAP NARAIN MUKHERJEE *v.* SECRETARY OF STATE FOR INDIA. **10 W. N. C. 637=3 C. L. J. 530=33 C. 390.**

2 *Ss. 48, 51, 64—Resumption and transfer—Presumption of fact—Burden of proof—2 C. L. J. 107—32 C. 1107.* See col. 1826 p. I.

3. *S. 50, 55—*Chowkidari Chakran *lands—Presumption—Fresh settlement—Parent estate—Regulation VIII of 1793, Section 41.*

Held, that when *Chowkidari Chakran* lands are resumed by Government, and settled afresh with the *zemindar*, the effect is to detach them from the parent estate, when, therefore, the parent estate is sold for arrears of land-revenue, such lands do not pass to the purchaser at the sale. KASHIM SHEIKH *v.* PRASANNA KUMAR MUKERJEE. **10 W. N. C. 598=5 C. L. J. 299=33 C. 596.**

4. *S. 51—Resumption by Government—Resettlement with Zemindars—Settlement with Putnidars—Putnidars, grant by, of a mokurai lease to a person other than the former durputnidar—Putnidars, right of, to make such settlement—Contract between parties—Intention as expressed therein—Construction.*

The provisions of S. 51 of the Village Chaukidari Act while directing the transfer of the Chaukidari Chakran lands, save all contracts entered already with regard to those lands; and the courts must look at the contract between the parties to see what the intention of the parties was; in regard to such lands where a contract between the putnidar and the durputnidar provided "that the Chaukidars shall, when called upon, perform the work of the Mouza in the same way as they have been performing (such) works from before for the Chaukidari Chakran lands, but if in the furture the Government on resuming the said lands, settles them, then the putnidars shall have the full power to take settlement of the same" and as a matter of fact Government resumed the lands and made a settlement with the Zemindar, who in turn settled them with the putnidar and he again with a third person and not with the durputnidar.

Held (on a construction of the contract that the contract contemplated the probability of Government resuming the lands; that the putnidar had the right to lease the resumed chakran lands to any person he thought fit, that he was not bound to settle the same with the durputnidars; and that the durputnidars had no right under the contract to insist upon a settlement of these lands with them. PURSOTTUM BOSE *v.* KHETRA PRASAD BOSE. **5 C. L. J. 143.**

5. *S. 51—Resumption of chakran land—Lessee from chowkidar, rights of.*

When chowkidari land is resumed and transferred by the Collector to the zemindar, the interest of the chowkidar in the land and, along with it, all rights created by him in favour of others, cease.

S. 51 of the Chowkidari Act does not save rights created by the chowkidar, but refers to contracts made by the zemindar in respect of the village in which the chowkidari land or any portion of it is situate. KRISHNA KINKAR DUTTA *v.* MAHANTO BAHAGABAN DAS. **12 C. W. N. 161=7 C. L. J. 85.**

6. *Ss. 51. 52—Chaukidari Chakran—Resumption and settlement with Zemindar—Right of putnidar to possession—Liability to pay revenue assessed—Resumed land, if forms a separate estate—Regulation VIII of 1879, S. 41.*

Where a putni lease conveyed to the putnidar all the lands of which the zemindar at the time of the execution of the lease was possessed in the Mauzah of which the putni was granted and the Mouzah included Chaukidari Chakran land

Held, that on resumption by the Government and settlement with the Zem-

Bengal Act (VI of 1870) *(Contd.)*

indar under Act VI (B. C.) of 1870, the putnidar became entitled to possession of the Chaukidari Chakran land, subject only to payment to the Zemindar of the extra assessment of revenue imposed on account of the resumed land. 10 C. W. N. 598; 33 C. 596 dist. *Mookerjee*, J:—If in assessing the putni rent the profits of all the lands including the Chakran laud were fully taken into account the putnidar would not be liable to pay additional rent for the Chakran lands when they come into his possession. 4. C. W. N. 814 considered. Whether land resumed and settled under Act VI (B. C.) of 1870 becomes seprarated and is held under a distinct title from the parent estate considered. 10 C. W. N. 598, 33 C. 596 doubted by *Mookerjee J.* KAZI NEWAZ KHODA *v.* RAM JADU DEY. **11 C. W N 201=34 C 109.**

7. S. 55 – Jurisdiction of Collector to sell for three years assessment—Irregularities – 11 C. W. N. 1107. *See Bengal Act XI of 1859 No. 7 (a).*

(10)—Act V. of 1875 (Bengal Survey Act).

1. 45—*Kanongoe appointed by a Settlement Officer—Public Servant—Penal Code (Act XLV of* 1860) *Section* 186.

Held, that the Conviction of the accused under section 186 of the Indian Penal Code was illegal where it was alleged that he had offered obstruction to a Kanongoe appointed by a Settlement Officer for demarcating the boundary line of certain *khas* mahal as the Kanongoe was not acting as a Public Servant at the time. MOULA BUX *v.* KING EMPEROR. **6 W. N. C. 120.**

2. 59, 60, 62 *and* 77—*Right of suit—Bar under section 77—Decision of Survey Collector —Civil Court order for possession.*

The parties to the suit were owners of two contiguous estates having a lake between them. The plaintiffs alleged that the boundary line of the zamindaries passed through the centre of the lake which was silted up and the defendant pleaded that the entire ake was included in his zemindari. It was contended on behalf of the defendant that the suit was barred under section 62 of the Bengal Survey Act 1875 and that the decision of the survey authorities should not have been accepted as final.

Held, that the suit was not barred under the provisions of section 61 of the Bengal Survey Act, for the order of the Survey Collector in a boundary dispute case has the force, not of a decree of a Civil Court determining the rights of parties, but an order of a Civil Court declaring the parties to be in possession of the land in accordance with boundaries determined. Where the suit is brought for establishment of the plaintiffs' title and for possession upon the basis of such title it does not require any reversal of the survey order but gives it its

Bengal Act (V of 1875) *(Contd.)*

full effect and seeks relief upon a higer basis than possession, upon which such an order is based.

Held, further that where evidence as to possession is conflicting, the right presumption is that possession followed title. BABU KASTURI SINGH *v.* RAJKUMAR BABU BISSUN PRAGAS NARAIN SINGH. **8. C. W. N. 876**

(11) Act III of 1876—(Bengal Irrigation Cess Act).

1 S. *1 and* 6—*Validity of Notifications under*

On the 27th December, 1881, an order was made and published in the *Calcutta Gazette* extending the Bengal Irrigation Act to the District of Burdwan to take effect from the 1st January, 1882. On the same date a notification under Section 6 was made that it was the intention of the Government to apply the waters of certain rivers and channels for the purposes of a particular canal from the 1st day of April, 1882.

Held, that the notification purporting to be under Section 6 could not be made under that section, because the Act was not then in operation in the District of Burdwan, to which the notification related. The acts of the Officers of Government under that notification were without any legal authority.

No order or notification can be made under any Act having the authority of law, until that Act has come into operation. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* NRITYA GOPAL, ADHIKARY. **28 C., 487.**

2 *S. 8—Omission to give notice.*

An omission to give notice under S. 8 Act III. of 1876 does not affect the acts of officers acting under any notification under S. 6 but only affects claims to compensation. THE SECRETARY OF STATE *v.* NRITYA GOPAL ADHIKARY. **28 C. 487 at 492.**

3 *S. 13 (5)—Landlord and tenant, notice to suit—6 C. W. N. 199.*—See Bengal Act X of 1859 S. 23 (5).

(12) Act VI of 1876—(Chota Nagpur Encumbered Estates Act).

1 *Grant by owner under disability*—Khorposh *grant—Legal disability—Ratification.*

The owner of an estate granted a *Khorposh* lease, but at the time the grant was made, the estate in respect of which the grant was made, was under the Chota Nagpur Encumbered Estates Act, and under section 3 subsection (*a*) of that Act the owner was under a legal disability and thus incompetent to make that *Khorposh* grant. After the disability ceased he accepted rent from the *Khorposhdar* under the *Khorposh* grant.

Held, that although he was incompetent at the time the grant was made to grant such a lease, yet as he ratified it subsequently when

Bengal Act (VI of 1876) *(Contd.)*

the disability came to an end, it became a valid grant. ROY *v.* THAKUR RAM JIWAN SINGH. **10 W. N. C. 149=33 C. 363.**

2 S. *3—Suit for land—Specific performance—Agreement to lease—Suit by purchaser—Jurisdiction—Such debts and liabilities—Appeal—Competency to Contract—Perpetuities, law against.*

A suit for the specific performance of an agreement to grant a *putni* lease and for possession of the land covered by the lease is maintainable in the Court of the subordinate Judge, within the local limits of whose jurisdiction a portion of the land, that might be covered by the lease, lies—19 Cal., 859; 1 Cal., 249; 2 Cal., 445 and 5 Cal., 82, *followed.*

The expression 'such debts and liabilities' in section 3, Act VI of 1876, means debts and liabilities other than those in favour of Government and includes every other debts or liabilities. 20 Cal., 609, *followed.*

An appeal in a suit to enforce an agreement outstanding when the estate is taken over by Government is therefore barred.

When a suit is compromised by the proprietor of an estate taken charge of by the Government under Act VI of 1876, such proprietor is not *sui juris* and not competent to enter into an agreement to grant a lease of any portion of his estate at a time when the estate might be released by Government, and such an agreement cannot, therefore, be enforced, even if it had been embodied in the decree drawn up by the Court in terms of the compromise. Such agreement, moreover, is bad as infringing the law against perpetuities, as the estate might not have been released within the period limited by that law. JAGADIS CHUNDRA DEO DHABAL *v.* SATRUGHAN DEO DHABAL, **4 C. L. J., 238=33 C. 1065**

3 S. *3 (3) (c)—Contract by preson subsequently declared to be owner of Eencumbered Estate—Subsequent withdrawat of encumbrance—Revival of validity—Barring of pending suits—'Debts and liabilities,' meaning of.*

A contract, entered into by a person who is subsequently declared to be the heir of a deceased person, whose estate had been at the time of the contract, taken charge of under the Encumbered Estates Act, is void, as such person had no competency to contract.

Even though at the time of the execution of the contract he had not been declared to be the heir, yet, as soon as he was found to be the heir, he became heir from the time of the devolution of the estate, which was admittedly prior to the execution of the contract, and such contract became void for want of capacity to contract.

On the release of the estate from the operation of the Acts, the validity of the contract could not be revived as it was absolutely void.

While the suit was pending, the estate was taken charge of for the second time, and the suit, therefore, became barred.

It does not matter, if the particular liability has not been mentioned in the application under the Act, as 'debts and liabilities,' in section 3, mean 'all debts and liabilities of the holder of the estate taken charge of, other than debts or liabilities incurred to Government.' (20 C 609 and 33 C 1065 foll). RAJA SATRUGHAN DEO DHABAL *v.* RAJA JAGADISH CHANDRA DEO DHABAL, **7 C. L. J. 578.**

4 S. *10—Jurisdiction—Lease of land lying outside Chota Nagpur—Question of law taken for the first time in second appeal.*

Where a certain estate in the District of Manbhum was taken charge of under the Chota Nagpur Encumbered Estates Act and thereupon the Manager proceeded to cancel under that Act a lease of land lying in the district of Bankura:

Held, that the Act had no application inasmuch as the Act applies only to land in Chota Nagpur. The High Court allowed this question to be raised for the first time in second appeal. AJODHYA NATH CHOWDHURY *v.* KESHUB CHANDRA MUKHERJEE. **11 C. W. N. 1127.**

(13) Act VII of 1876—(Land Registration Act).

1. *Suit for rent—Estate—Necessity of registration.*

A Small Cause Court dismissed the plaintiff's suit for rent, on the ground that the plaintiff's name had not been registered under the Land Registration Act.

It was urged on behalf of the plaintiff on revision that the Collector holds this land as a *khas mehal*, and that what the plaintiff pays to the Collector is not revenue but rent, because the Collector is in possession of this *khas mehal* not as representing the Government as the paramount power but as proprietor.

Held, that the contention was good, and there was no necessity for the plaintiff to have his name registered under the Land Registration Act. MADAN MOHAN ROY *v.* LOKHI KANT SEN. **6 C. W. N. 631.**

2 *Co trustee, application by, for registration—Refusal by the Revenue authorities,—Civil Court's authority to direct registration—Suit, maintainability of—Declaration of right to possession.*

Where plaintiff's application for the registration of his name as a co-trustee, under the Land Registration Act, was refused by the Revenue authorities,

Held—That a Civil Court is not competent to direct the action of the Revenue authorities under the Land Registration Act, and a suit brought by the plaintiff with the

Bengal Act (VII of 1876) (*Contd.*)

object of obtaining an order from the Court which would bring about a re-consideration of the order passed by the Revenue authorities so as to obtain the registration of the plaintiff's name as a co-trustee is not maintainable.

Held, further, on the construction of a compromise decree on the basis of which the suit was brought, that the plaintiff was not entitled to a declaration of his right to the possession of the trust property jointly with the defendant—this order, however, not affecting the right of the plaintiff or any one else to take action in the case of any malversation by the defendant.—CHHATTRAPAT SINGH DUGAR *v.* MAHARAJ BAHADUR SINGH. **12 C. W. N. 441 (C. P.).**

3 Ss. *42, 44, 78—Suit for rent—Maintainability of—Registration of specific shares in* mouzahs *included in an estate whether necessary—Amicable arrangement amongst co-sharers.*

Held, that the Land Registration Act while providing for the registration by proprietors of their shares in an estate does not make it incumbent upon them to register their shares in specific *mouzahs* or other portions of land within the estate—8 W. N. C. 193 concurred. DEOKI SINGH *v.* LAKHAN ROY. **8 C. W. N., 196=30 C. 879.**

4 S. 42 *and* 78—*Rent. Suit for—Registration of shares in separate* mauzahs *in estate whether necessary—Co-sharers—Amicable arrangement between them to recover rent—Acquiescence to such arrangement by tenants if bar to their claim—Partition Act, Section* 12—*Bengal Tenancy Act* (*VIII of* 1885), Section 153 (*a*).

The plaintiffs sued to recover from the defendants an 8 annas share of the rent due from them for certain years. Under an amicable arrangement with their co-proprietors, the plaintiffs were in possession of an 8 annas share as their *khanabari* and collected the same share of the rents from all the tenants, including the defendants, previous to the year for which present claim was made. The Munsiff gave the plaintiffs a decree for an 1a. 10g. 1c. 1ka. share only of the rent against the defendants, that being the share which they held in the estate and for which only they were registered as proprietors. On appeal the Subordinate Judge set aside the decree of the Munsiff and decreed the plaintiffs' claim. On second appeal it was contended by the appellants that under section 78 of the Land Registration Act of 1876, in such cases tenants are not bound to pay any co-sharer more than the amount which bears the same proportion to the whole of his rent as the extent of the interest in respect of which the co-sharer is registered bears to the entire estate. They further contended that under section 42 if plaintiffs by any arrangement with their co-sharers came into possession of an 8 annas share they were bound to have had their names registered in respect

Bengal Act (VII of 1876) (*Contd.*)

of that share before they could recover an 8 annas share from the tenants.

Held, that the contentions were not valid. The Land Registration Act requires the registration by the various proprietors of their shares in the estates only and does not contemplate a registration of shares in separate *mouzahs* in the estates. The provisions of section 42 of the Land Registration Act have no application to the case of a co-sharer who has by an amicable arrangement between the co-sharers been placed in possession of a larger share than his registered share in some *mouzahs* and of a less share or no share in others, when the total interest which he holds in all the *mouzahs* represents his registered interest in the whole estate. Such an arrangement is contemplated by section 12 of the Partition Act.

Held, also that the defendants having acquiesced in the arrangement by paying rent in accordance with it for 8 or 9 years previously were now debarred from disputing the plaintiffs' right to a half share of the rent.

A preliminary objection, under section 153 (*a*) of the Bengal Tenancy Act to the competency of the appeal on the ground that rent which the plaintiffs sought to recover was under 100 rupees, was overruled because the question raised and determined in the case was not merely the amount of the rent payable to the plaintiffs but whether they had a title to recover 8 as. share of the rent; the case fell under the exception mentioned in the section. *17 Cal.*, 489 *referred to.* SRIMUTTY PORESH MONI DASSYA *v.* NOBO KISHORE LAHIRI. **8 C. W. N. 193=30 C. 773.**

5. S. 44—*30 C. 879 No. 3 supra.*

6. *S. 52, 55, 62—Reference to Civil Court, conditions of—"Possession," meaning of, in S. 55—Mahomedan widow—Dower, claim for—Jurisdiction—Revision by High Court, power of.*

When a person alleges that he has by succession acquired an interest in an estate and is in possession of such interest, and on this basis, seeks registration of his name, if his claim is disputed by any other person, who sets up a conflicting claim in respect of the same interest, the Collector must enter into the question of possession. If he finds that possession is with the applicant and that the title set up is also proved, he may enter his name in the register. If, however, it is not proved to his satisfaction that any person is in possession of the disputed interest, he may either determine summarily the right to possession and deliver possession accordingly or he may make a reference to the Civil Court, which may determine summarily the right to possession and deliver possession accordingly. When a Mahomedan widow has obtained possession of the undistributed property of her deceased husband lawfully and

Bengal Act (VII of 1876) *(Contd.)*

without force or fraud, she is *prima facie* entitled, as against the other heirs of her husband, to retain possession, until her dower-debt, or any portion of it, which is due and unpaid, is paid. The jurisdiction, which the Civil Court acquires upon a reference to it under S. 55 of the Land Registration Act, is that of a Civil and not of a Revenue Court, and its decision is subject to revision by the High Court. UMATUL MEHDI *v.* KULSUM (1907), **8 C. L. J. 245=12 C. W. N. 16=35 C. 120.**

7. *S: 55—Bengal Tenancy Act 1885, Section 60.*

In a suit for rent by the proprietor registered under the Land Registration Act the tenant is precluded from pleading as a defence that the rent is due to a mortgagee, whose name is not registered. HEM CHANDER MISRI *v.* RAJAH SIR SOURINDRA MOHAN TAGORE. **V. W. N. C. 1901, p. 482.**

8. *S. 55—35 C. 120 No. 6 supra.*

9. *S. 56, 89—Dispossession.*

The rejection of an application for registration under the Land Registration Act, does not necessarily constitute dispossession so as to entitle the defeated party to maintain a suit for recovery of possession; the effect of the order may be merely to entitle the party to sue for declaration of his title. SHYAMANAND DAS *v.* RAJ NARAIN DAS, **4 C. L. J. 558=11 C. W. N. 186.**

10. *S. 59 and 63—Power of High Court to revise order made by a Civil Court under S. 59, Land Registration Act—Jurisdiction.*

The High Court has, under S. 622 of the Civ. Pro. Code, jurisdiction to revise the order of a Civil Court under S. 59 of Act VII of 1876, S. 62 of that Act makes an order of the Civil Court final and not subject to appeal or order for review. It does not prevent the High Court from revising the order either under S. 622, C. P. C., or under the Charter Act (*a*).

The competency of a Court consists in territorial as well as pecuniary jurisdiction. Hence where a Court has only territorial jurisdiction, but no precuniary jurisdiction, it is not a competent Court within the meaning of S. 59 of the Act.

As soon as the certificate is sent to the Collector and the Collector registers the names of the persons, who are successful in the Civil Court, the function of the Civil Court ceases. The High Court connot, therefore, further interfere in the matter (35 C. 120 foll). REMESHWAR SINGH *v.* RAGHUNATH SINGH. **35 C. 571.**

11 S. 62 35 C. 120 No. 6 *supra.*

12 S. 63 35 C. 571 No. 10 *supra.*

13 *S. 78—*Milkiat *property—Such property entered in register of revenue-free estate—Distinction—Registration whether necessary for ordinary* milkiat *property not so entered—Regulation II of 1819.*

Bengal Act (VII of 1876) *(Contd.)*

A *milkiat* property which is covered by an entry in the Collectorate in the general register of revenue-free estates, released after proceedings held under Regulation II of 1819, is distinct from an ordinary *milkiat* property not so registered. Where the *milkiat* property is not already included in the general register of revenue-free estates, there need be no registration under Bengal Act VII of 1876; and, if no registration be necessary, S. 78 of the Act does not apply; the disqualification in bringing suits for rent being one, which attaches only, to revenue-free estates already entered in the general register, if the proprietor, or manager, or mortgagee fails to register his name. PITAMBER SINGH *v.* SUKRIM. **35 C. 747.**

14 S. 78—Under section 78, of the Land Registration Act 1876, the landlords' names must be registered in respect of their share before they can sue for arrears of rent; mere order of the subordinate Judge for registration of their names is not enough. UGRA MOHUN THAKUR *v.* BEDESHI ROY. **5 W. N. C. 360.**

15 *S. 78—Malikana, claim for—Malikana, not rent.*

S. 78 of the Land Registration Act is no bar to a claim for mailkana, which is not a claim for rent (4 L. B. R. 29 foll). SYED SHAH NAJAM-UD-DIN HYDER *v.* SYED ZAHID HOSSEIN. **8 C. L. J. 300.**

16 *S. 78—Registration during pendency of suit.*

If the name of a proprietor is rgistered under the Land Registration Act, during the pendency of a suit for rent by him, and the registration decree is produced in the course of the trial, it must be held that there is sufficient compliance with the requirements of the Act. RABIA KHATUN *v.* RANI BILASHMANI DEBI. **8 C. L. J. 299.**

17 S. 78—30 C. 879 No. 3, 30 C. 773 No. 4 *supra.*

18 *S. 82—Public Demands Recovery Act (I of 1895, B. C.), Section 7—Costs in land-registration proceedings.*

Where in land-registration proceedings between certain parties an order for costs has been made, the Deputy Collector has no jurisdiction to make and file a certificate for the realization of the amount of those costs under the provisions of the Public Demands Recovery Act (I of 1893, B. C). MAJIR BAKSH CHOWDHURY *v.* SADAGAR MIA. **7 C. W. N. 568.**

19 S. 89—11 C. W. N. 186 No. 9 *supra.*

14—Act VIII of 1876 (Bengal Estates Partition).

1 *Joint landlords—Partition—Effect on holding—Division of holding—Act V of 1897 (Bengal), S. 81.*

An estate having been partitioned between the plaintiff and his co-sharers under Act VIII of 1876 (Bengal), a portion of a holding, which, formerly, appertained to the joint estate fell within plaintiff's share.

Bengal Act (VIII of 1876) *(Contd.)*

Held, that the partition had the effect of dividing the holding so that the plaintiff became the sole landlord with regard to the portion of the holding that fell within his share of the estate (5 C. 273, 27 C. 836, ref. 1 C. W. N. 160 and 160, 2 C. L. J. 369 dist).

Act VIII (C. C.) of 1876, whilst it did not provide for the division of holdings, did not also contain any prohibition against such division. PROTAB CHANDRA DAS *v.* KAMALA KANTA SHAHA. **10 C. W. N. 818.**

2 *Sections 9, 24, 26, 149—Title, question of—Extent of interest—Civil Court—Jurisdiction.*

If in the course of proceedings under the Act for the partition of an estate, in which proprietors are in possession of specific lands, as representing their interest in the entire estate as contemplated by section 9, cl. (b) of the Act, a dispute arises as to which of the proprietors is entitled to certain specific lands, a suit is maintainable in the Civil Court, under sections 24 and 26, for the determination of the question, because it involves a question of right or title; such a suit is not barred by s. 149, cl. (d) of the Act.

Per Mookerjee J. A suit of this description is cognisable in the Civil Court, not merely because it involves a question of right or title, but also because the question is one of the extent of interest. RAGHUNATH PERSHAD NARAIN SINGH *v.* KHAJEH MOHAMMAD GAWHAR ALI, **2 L. J. 351.**

3 S. 116—Suit to set aside order under section 116 of the Estates Partition Act—6 C. W. N. 92—*See Col. 1828 P. I.*

4 S. 116—Suit for possession—32 C. 716 Col. 1828 P. I.

5 S. 116—Collectors order excluding properties from partition—33 C. 693 Col. 1829 Part I.

6 S. 149—2 C. L. J. 351 No. 2 *supra.*

(15) Act XVIII of 1876 (Bengal Alluvion and diluvion Act).

Section 4 (2)—River, tidal or non-tidal—9 C. W. N. 889—27 A. 665 P. C. Col. 2142 P. I.

(16) Act II of 1877 (Bengal Cess Act.)

Sections 2, 4—Cess, new imposition of—Notification, date of—Publication, date of.

A lease executed on 13th June, 1877, contained the following: "Whatever new cess imposed by the Government on the said lots will be borne by you" (lessee). The notification as to imposition of Public Works cess in the *Calcutta Gazette* was dated the 6th June 1877. It was published in the *Gazette* of the 13th June 1877 and it was declared therein that the liability of porperty in certain districts to pay Public Works cess would accrue from

Bengal Act (II of 1877) *(Contd.)*

the year beginning with the 28th June 1877.

Held, that the lessee is liable under the contract to pay the entire amount of the Public Works cess payable on account of the tenure, as it was imposed after the execution of the lease. BHOLA NATH LAHIRI *v.* CHUNDER MADHUB GHOSE. **6 C. L. J. 212.**

17 Act I of 1879 (Chota Nagpur Landlord and Tenant Procedure Act).

1 *Execution of decree—Second appeal against orders in execution—Act V of 1903, Local, Section 41.*

There is nothing in Act I of 1879, Bengal, to indicate that a second appeal lies from orders passed in execution, and the amending Act V of 1903, Bengal, was not intended to allow second appeals against such orders. *Raja* ISSUR LAL SINGH *v.* PATROO SAHU SINGH **10. C. W. N. 234=33. C. 378.**

2 *S. 34—Registration, omission to apply for—Forfeiture—Alienation—Resumable tenure.*

When a tenure has been created by a deed, which makes it resumable upon the failure of the heirs of the grantee, the interest created is not inalienable and the tenure is resumable only upon the contingency specified (1. B. L. R. 170, 22 W. R. 17 ref) and not on the ground of forfeiture by reason of alienation, (22 M. 383 P. C. and 10 A. 275 P. C. foll).

Omission to register the name of the successor or heir of the original grantee under S. 34 of Act I of 1879 (B. C.) does not work a forfeiture of the tenure.

Under S. 34 of Act I of 1879 (B. C.) two conditions must be satisfied before an application for registration can be made, *viz.*, the applicant must be in possession and must be a transferee by succession or inheritance. Where, therefore, the successor of the original grantee had transferred his interest before Act I of 1879 (B. C.) came into force and gave him possession of the property, an application under S. 34 could not be made either by the transferor or the transferee.

When, under such circumstances, an order was made putting the Zemindar in possession of the tenure, such order is not binding on the transferee, who is not a party thereto. S. 4 of the C. P. Code does not bar a suit in the Civil Court by the transferee for declaration that his title has not been affected by such order under S. 34 of Act I of 1879 (B. C.) and for recovery of possession. MAHARAJ KUMAR JAGAT MOHAN NATH SHAH DEO *v.* BRINDA SAHA, **1. C. L. J. 557.**

3 *Sections 37 and 42—Suit by assignee from auction-purchaser of permanent tenure to recover from landl rd, if possessory suit—Limitation—Limitation Act (XV of 1877), Sch. II Arts. 138 and 142, section 14—Exclusion of time if must be asked in plaint—Civil*

Bengal Act (I of 1879 (*Contd.*)

Procedure Code (Act XIV of 1882), section 50.

A suit by a transferee from a purchaser of a permanent tenure at a rent sale to recover possession of the tenure from the landlord who denied the title of the plaintiff on the ground that on the death of the previous tenant, the land reverted to himself, was not a possessory suit to which the provisions of section 37 of the Chota-nagpur Landlord and Tenant Procedure Act could apply.

Art. 138 of Sch. II of the Limitation Act refers more to questions between the auction-purchaser and the judgment-debtor, and the present case fell under Art. 142 of Sch. II of the Limitation Act.

The special limitation provided in sec. 42 of the Chotanagpur Landlord and Tenant Procedure Act did not apply to this case.

The period during which a was suit prosecuted *bona fide* in a Court without jurisdiction was properly excluded in computing the period of limitation although the plaintiff in this plaint did not expressly ask for an extension of time on that ground. (31 C. 195 dist.) RAGHU NATH BHAGAT *v.* SYED SAMAD SHAH, **12 C. W. N. 617.**

4 *S. 123, 125—Rent, consolidation—Onus—Decree how far binding—Right of auction-purchaser of share in tenure.*

A decree for the consolidated rent of several tenures held by the same tenants does not bind the tenures or any of them. Where a tenure was sought to be sold in execution of a decree for rent obtained against one of the tenants, after the shares of the other tenants had passed by auction sale to a stranger on the allegation that the tenant against whom it had been obtained was the sole recorded tenant of the landlord.

Held, that whether this was so or not was a matter specially within the knowledge of the landlord and the onus was on him to prove it. BAIKANTA NATH ROY *v.* THAKUR DEBENDRA NATH SAHI, **11 C. W. N. 676.**

5 *Ss. 135, 136, 137, 144—Landlord and Tenant—Execution of decree—Rent decree—Appeal—Revision—Order of Court without jurisdiction—Consent of parties—Jurisdiction of Court.*

Under Act 1 of 1879 (Bengal Council) as it stood before its amendment by Act V of 1903, an order made by a Deputy Collector relating to the execution of a decree for rent was open neither to appeal nor revision.

An agreement of parties cannot authorise a superior Court to revise a judgment of an inferior Court in any other mode of proceeding than that which the law prescribes.

A judgment of a Court which has no jurisdiction over the subject matter of the litigation must be treated as null and void, and need not be adjudged to be such by a formal and direct proceeding to have it vacated and reversed.

On the 13th May 1899, the appellant obtained a decree for rent against the respondent under Act I of 1879 (Bengal Council). On the 5th February 1902, the appellant applied for execution of his decree, but no steps were taken and the application was struck off on the 15th March 1902. On the 10th March 1903, the appellant presented a second application for execution; and it was dismissed by the Deputy Collector on the ground that it was time-barred. The decree-holder thereupon took the matter before the Divisional Commissioner who, though doubtful whether he had jurisdiction to revise the order, on the 1st August 1903 passed an order that the application was not barred. On the 8th August 1903 the decree-holder presented a third application for execution, upon which no action was taken. On the 23rd December 1903 the decree-holder presented a fourth application for execution: To this it was objected that the application was time-barred.

Held, that the last application was time-barred. That the Divisional Commissioner's order was without jurisdiction and must be treated as a nullity.

That it was not necessary to have the order set aside. GOLAB SAO *v.* CHOWDHURY MADHO LAL. **2 C. L. J. 384=9 C. W. N. 956.**

(18) Act VIII of 1879 (Act defining and limiting Powers of settlement officers)

S. 10 Landlord and tenant—Permanent lease—Part of holding resumed by Govenment and settled with landlord—Transfer of part of holding by landlord—Effect on tenant, liability,

The defendant held an estate from the landlords on a permanent lease on a fixed rent. A portion of the holding was resumed by Government, but settlement was made with the landlord. One of the heirs of the landlord sold the resumed portion to the plaintiffs who sued the defendant for rent due in respect of the portion of the holding transferred on the basis of the settlement. A transferree of the interests of one of the heirs of the landlord in the permanent estate was not made a party to the suit. The High Court on second appeal dismissed the suit on the ground that without impleading such transferee as party to the suit the plaintiff's suit was not maintainable.

Held, upon appeal to the Privy Council that the judgment of the High Court was correct.

Held, also, that the defendant was only liable for the rent fixed in the lease for a lump sum and not under the settlement and that section 10 of Act VIII of 1879 had no application to the case. PRIANATH DAS *v.*

Bengal Act (VIII of 1879) (*Contd.*)

RAM TARAN CHATTERJI **7 C. W. N. 901 =30 C. 811.**

(19) Act IX of 1879 Bengal Court of Wards Act).

1 *S. 57, 35, 51--Guardian 'ad litem'-Appointment how long subsists--Property not taken charge of--Court of Wards--Guardian.*

Where a person is named as the guardian *ad litem* in an application for execution and notice under S. 248, C. P. C., is issued upon him as such guardian it must be presumed that he has been appointed guardian by implication by the Court. His appointment subsists so long as the *lis* is pending, and until it is formally revoked by the Court. When the manager under the Court of Wards has not taken possession of a certain property, the Court is not in charge of such property and cannot deal with it, and in a litigation with respect to suit property, the manager of the Court of Wards need not necessarily be made the guardian or the next friend of the ward. KRISHNA PERSHAD SINGH *v.* GOSTA KUNDU. **5 C. L. J. 434.**

2 *S. 6, 10—Act XXXV of* 1858, *Section* 9, 10 *and* 11.

The Judicial Commissioner of Chota Nagpur considering it would be for the interests of the estate of a certain *jagirdar*, who was adjudicated a lunatic under Act XXXV of 1858, authorised the Court of Wards to take charge of the management of the estate and of the person of the *jagirdar*. On appeal it was contended that the properties of the lunatic not being properties paying revenue to Government, the Judicial Commissioner had no jurisdiction to appoint the Court of Wards the guardian of the person and the property of the lunatic.

Held, that the authority of the Court of Wards to take upon itself the management of the property of a lunatic was not dependent on the nature of the property, and not restricted to property which is subject to the payment of Government revenue. MUKAND KOERI *v.* DEPUTY COMMISSIONER OF CHOTA NAGPUR. **29 C. 638.**

3 *Ss. 6, 27 and 35—Court of Wards, Right to sue on debt bond executed in the name of executor Manager.*

Where a will provided that a certain person who was appointed executor under it is to manage the property of the minor during his minority and the manager after carrying out the terms of the will transferred the management to the Court of Wards, the Court of Wards can sue on a bond executed in the name of the prior executor manager. TARAN SINGH HAZARI *v.* RAMRAT TEWARI. **8 C. W. N. 30=31 C. 89 at 93.**

4 S. 7.—*See* 29 C. 638 No. 2 *supra.*

5 S. 10.—*See* 29 C. 638 No. 2 *Supra.*

6 *S 14 and 39 —Court of Wards—Manager. Power of, to grant lease—Contract—Voidable contract—Landlord and Tenant.*

Per Rampini, J.—That a lease by the Manager of a Court of Wards must be presumed to have been granted with the sanction of the Court under section 39 of the Court of Wards Act (IX of 1879, Bengal), for under section 14 the Manager has a *prima facie* right to grant leases.

Per Mookerjee, J.—That in the absence of proof of sanction of the Court a lease by the Manager of a Court of Wards is voidable at the option of the ward for whose benefit the lease is granted. If the lease is one which, in fact, was necessary for the good management of the minor's property, it is not vitiated merely by reason of the absence of the order of the Court. UMA CHURN MAHALDAR *v.* NARENDRA NATH BASU. **10. C. W. N. 126=33. C. 273.**

7. *S. 14, 39, 40, 48, 49, 50--Pre-emption --Customary right—Hindus of Bihar--Pleadings—Right of pre-emption, assertion of—Proof —Delay in assertion—When to be made—Formalities—Who can perform—Manager of adult female under Court of Wards, right and duties of—Bengal Estates Partition Act (Bengal Act V of 1897), S. 29, 95.*

The Hindus of Bihar have adopted the Mahomedan law of pre-emption for a long time. Fukeer Rawot *v.* Sheikh Emambuksh, W. R. (F. B.) 143, followed. Champaran has from the earliest times been included as one of the districts forming the *subah* of Bihar, and as a judicial district it has all along, till quite lately, been united with Saran, in which the existence of the custom of pre-emption had been judicially recognized. Meethun Lal *v.* Deo Murat 6 Sel. Rep. 197, referred to. When the existence of the custom under which Hindus have the same right of pre-emption under the Mahomedan law as Mahomedans in any district, is generally known and judicially recognized, it is not necessary to assert or prove it. Fukeer Rawot *v.* Sheikh Emambuksh. W. R. (F. B) 134, explained. There must be no delay in the assertion of the claim of pre-emption or *talab-i-mowasibat*, but before the *shafee* or pre-emptor can assert his right to pre-emption, he must be satisfied by evidence, which he holds to be credible, that a sale has been completed. Muhammad Wilayat Ali Khan *v.* Abdul Rab, I. L. R. 11 All. 108, distinguished; and Begam *v.* Muhammad Yakub, I. L. R. 16 All. 344, followed. Under the Mahomedan law, before it can be held that the sale is complete, there must be a cessation of the vendor's right in the property, and the solution of this matter is to be found in determining in each case what the intention of the parties was. Ladun *v.* Bhyro Ram, 8 W. R., 255, referred to. There is no fixed time within which the *talab i-ishtishad* should be performed, and it is a question of fact for the Court to determine, whether it was done within due time. Jumeelun *v.* Luteef Hossein. 16 W. R. F. B. 13, followed. The performance of the *talab-i-ishtishad* is not meant to be done for the information of the vendor or vendee, though

Bengal Act (IX of 1879 (*Contd.*)

no doubt its effect may be to give them information. The formality is insisted on with the object of securing evidence that the pre-emptor has really asserted his right and because evidence is wanted in order to establish proof before the Magistrate, and, unlike the *talab-i-mowasibat*, it must be performed in the presence of witnesses. Rujjub Ali Chopedar *v.* Chundi Churn Bhadra, I. L. R. 17 Cal. 543, referred to. The performance of the ceremony in the *kachari* of the vendor is a sufficient compliance with the law. Mubarak Hussain *v.* Kaniz Bano, I. L. R. 27 All. 160, not followed. A guardian or manager under the Court of Wards can perform, and it is his duty to perform, the ceremonies of pre-emption on behalf of an adult female ward of Court; and from the omission in the Court of Wards Act to confer the right expressly on the guardian or manager, it does not follow that he is not entitled to perform these ceremonies. Abadi Begum *v.* Inam Begum, I. L. R. 1 All. 521, Umrao Singh *v.* Dalip Singh I. L. R. 23 All. 123, referred to. Fabrication is not one of the devices permissible under the Mahomedan law for defeating the right of pre-emption.

Per Coxe J. An order under s. 29 of the Bengal Estates Partition Act has not the effect of dividing the shares of the proprietors finally, until the date specified in s. 95 of the Act, and, until the later date, the right of pre-emption subsists. Wahed Ali Khan *v.* Hunooman Pershad, 12 W. R. 484, referred to. Joobraj Singh *v.* Tookun Singh, 14 W. R. 476, distinguished. JADU LAL SAHU *v.* JANKI KOER. **35 C. 575.**

8 S. 27. See 31 C. 89 at 93 No. 3 *supra.*

9 S. 35. See 5 C. L. J. 434 No. 1, 31 C. 89 at 93 No. 3 *supra.*

10 S. 39. See 33 C. 273 No. 6, 35 C. 575 No. 7 *supra.*

11 S. 40—35 C. 575 No. 7 *supra.*

12 S. 51—5 C. L. J. 434 No. 1 *supra.*

20 Act VI of 1880 (Bengal Drainage Act.)

1 *Ss. 3, 44 (2), 55 and 56—Collector—Delegation of powers to Deputy Collector.*

Held, that a Deputy Collector, who has not been empowered either under sections 55 or 56 of the Bengal Drainage Act, 1880, has no authority to pass an order under subsection 2, section 44 of the Act, final and binding upon the parties.

That a letter of the Collector to the Commissioner proposing to put the Deputy Collector in charge of the drainage office and the reply of the Commissioner to the effect that he agrees to the proposal do not amount to an order under section 56 of Act VI of 1880. GADHADHAR BHATTA *v.* BOSUNKUMAR ROY. **8 C. W. N. 669.**

2. *S. 42 and 44—Bengal Tenancy Act (VIII of 1885), Section 3 Clause 5, Schedule III—Limitation.*

The period of limitation for a landlord to

Bengal Act (VI of 1880) (*Contd.*)

recover a sum of money payable by a tenant under section 42 (6) of the Bengal Drainage Act VI of 1880, begins to run from the date on which the landlord engages to pay the costs with which he is charged under the Act and not from the date on which the Collector has assessed the amount payable by the tenant under section 44.

The word "rent" in Schedule III of the Bengal Tenancy Act includes "money recoverable under any enactment for the time being in force as if it was rent." MON MOHINI DASI *v.* PRIYA NATH BESALI. **8 C. W. N. 640.**

3 S. 42, 44 (b)—Suit for compensation for breach of contract in writing and registered and suit for rent, difference between. 5 C. L. J. 19 Col: 1897 P. C.

4. S. 49, (b) 44—Unlawful consideration. Drainage, recovery of, cost of—Contract. Illegality 32 C. 1019 Col 281 P. I.

5. *Ss. 42 cl. (b) and 44, Sub-sec. (1)—Landlord and tenant—Drainage charges, recovery of, by landlord—Limitation—Bengal Tenancy Act VIII, of 1885, Sch. III, cl. (2), S. 3 Cl. (5)—"Rent"—Waiver of statute by contract—Validity—Limitation, running of, from date other than that on which amount payable.*

A suit to recover drainage charges payable by a tenant to his landlord under S. 42 cl. (b) and S. 44, sub-sec. (1) of the Bengal Drainage Act is governed by cl. (2) of Sch. III of the Bengal Tenancy Act and must be brought within 3 years from the last day of the Bengali year in which the sum claimed fell due.

Drainage charges payable by the tenant to the landlord as above are included within the definition of "rent" in Section 3, sub-sec. (5) of the Bengal Tenancy Act 8 C W N 640 exp. and foll.

Although a sum of money may be payable on a specified date, the limitation for the recovery thereof need not necessarily run from that date.

It is lawful for parties to substitute for their statutory obligation under the Drainage Act a contractual obligation.

Held, in the present case, that the contract merely amounted to a covenant by the tenant to pay drainage charges in accordance with the statute and did not modify or supersede its provisions. (32 C. 1019 App, 19 C. 1 ref.) NAFFER CHUNDRA MAJIE *v.* JYOTI KUMAR MEKERJEE. **11 C. W. N., 57.**

6 *S. 43—Suit to recover defendant's share of cost of drainage of joint-holding—Proper notice under, not given—Maintainability of suit.*

A suit was brought for recovery of the defendant's share of the costs of drainage of a holding owned jointly by the parties and for which the plaintiffs had given an engagement to the Collector. The main defence was that no proper noitce under S. 43 of the Act had been served.

Bengal Act (VI of 1880) (*Contd.*)

Held, the noitce was only a fifteen days' notice, instead of its being a thirty days' notice, as the law required. The notice was a bad one. As the claim was founded upon the noitce, it must fall with it. Suit was properly dismissed. NABIN CHANDRA MUKERJI *v.* AMRITA LAL CHATTERJI. **1 C. L. J. 260.**

7 *S 44—See* 8. C. W. N 669, 8. C. W. N. 640, 5. C. L. J. 19, 32 C. 1019, 11. C. W. N. 57 No. 1 to 5 *Supra.*

8 *S 55—See* 8 C. W. N. 669 No. 1 *Supra.*

9 *S 56—See* 8 C. W. N. 669 No. 1 *Supra.*

(21) Act VII of 1880, (Public Demands Recovery Act).

1 *Sale—Suit to partially set aside sale not maintainable.*

A property sold under the Public Demands Recovery Act was purchased by the defendants who owned shares in it. The plaintiff their co-owner sued to set aside the sale in respect of the share belonging to him.

Held, that the suit was not maintainable. The plaintiff might have asked for the setting aside of the sale of the whole property or he might have allowed the sale to stand and might merely have prayed that the defendants purchasers should reconvey his share to the plaintiff. 3 Cal. 300 referred to. BIDESHAR JHA *v.* SRIKISHEN JHA. **9 C. W. N. 805.**

2 *Sale under certificate—What passes.*

When a certificate under the Public Demands Recovery Act is filed in a Collector's Office and notice issued to the judgment-debtor, it can only be enforced against the property of the person whose name is entered on such certificate, as if it were a personal debt of his.

Held, that the plaintiff purchaser in execution of a sale under such certificate, was entitled to the right, title and interest of the person whose name was entered in the certificate, and the interest of the other joint tenants was not effected by the sale—10 Cal. 996; 26 Cal., 677; 19 Cal., 783; 14 Cal., 9, referred to. RUPRAM NAMASUDRA *v.* ISWAR NAMASUDRA. **6 C. W. N. 302.**

3 S. 2—Right of suit to set aside sale held in enforcement of certificate under Public Demand Recovery Act.

Held, by the Full Bench (Rampini J., dissenting).

A civil suit lies for setting aside a sale held in enforcement of a certificate issued under the Public Demands Recovery Act VII (B. C.) of 1880, on the ground that the sale was vitiated by a material irregularity leading to substantial injury, the irregularity complained of being that one property was advertised for sale and a different property sold. An appeal to the Commissioner under Section 2 of Act VII (B. C.) of 1868 is not the only remedy open to the party whose

Bengal Act (VII of 1880) (*Contd.*

property has been sold. 14 Cal. I, and 23 Cal. 641, *overruled.* RAM TARACK HAZARA *v.* DILAWAR ALI. **5 W. N. C., 1901, p. 521=29 C. 73.**

4 S. 2, 7, 8, 10, 19—Sale under certificate. 29 C. 537. Col. 618, Part I.

5 S. 6 *-Penal Code 1860, Section 206—Removal to prevent seizure in execution of a certificate under Public Demands Recovery Act—Criminal Procedure Code 1898, Section 537—Want of sanction.*

Held, that a certificate under the Public Demands Recovery Act, Bengal Act I of 1895, Section 6 (l), has the force and effect of a decree of a Civil Court, as regards the remedies for enforcing the same. A person who removes property to prevent its seizure in execution of such certificate is guilty of the offence described in Section 206 I. P. Code.

Unless the want of sanction has occasioned a failure of justice conviction of the accused is not bad. SUNDAR DOSADH *v.* SITAL MAHTO. **5 W. N. C., 291=28 C. 217.**

6 S. 7—Costs in a proceeding under the Act. 7 C. W. N. 568. *See Bengal Act VII of 1876, S. 82.*

7 *Ss. 7, 8—Parties—Sale—Suit to set aside sale.*

Held, that the Secretary of State for India in Council was a necessary party to a suit to set aside a sale effected under the provisions of the Public Demands Recovery Act (I of 1895, Bengal). GOBINDA CHANDRA SHAHA *v.* HEMANTA KUMARI DEBI **31 C. 159.**

8 *Ss. 7, 10, 16, 19, 31—Certificate—Signature as Collector—Notice, service of; by registered post—Certificate, execution of—Proclamation of sale—Signature as Judge—Irregularity in publication—Suit to set aside sale—Civil Procedure Code (Act XIV of 1882) Section 244—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 12 (b).*

A certificate under section 7 of the Public Demands Recovery Act, drawn up on an old form where the word "Collector" occurred, but which was signed by a person, who obviously was the Certificate Officer, and who had in another part of the document signed himself as such, is not invalid.

Under the proviso to section 31 of the Public Demands Recovery Act, service of notice required by section 10 can, in the first instance, be made by registered post addressed to the judgment-debtor's last known residence, though no other mode of service has been previously resorted to.

A sale proclamation, when issued by the properly qualified officer, is equally effectual whether he signs himself as "Certificate Officer" or as "Judge".

Whether there is credible evidence of the service of the sale proclamation, and there has been a considerable lapse of time, it is to be presumed that all the necessary formalities were complied with.

Bengal Act (VII of 1880) *(Contd).*

Section 19 of the Public Demands Recovery Act, as amended by Act I of 1897 (Bengal Council), renders section 214 of the Civil Procedure Code applicable in its entirety to proceeding in execution of a certificate, and a separate suit to set aside a sale held in the enforcement of such certificate is not maintainable. 28 C, 813 *referred to.*

The present suit, if regarded as one to set aside a certificate under section 7 of the Public Demands Recovery Act, is barred by section 16; and if as one to set aside the sale is barred by Art. 12 *(b)* of Schedule II of the Limitation Act. BARHAMDEO NARAYAN SINGH *v.* BIBI RASUL BANDI. **32 C. 691.**

9 *S. 7, 15, 31—Civil Procedure Code (Act XIV of 1882) Section 244—Sale for arrears of rent—Suit to set aside sale—Grounds of—Separate suit when barred.*

Under section 17 (1) (6) of the Public Demands Recovery Act a certificate shall not be cancelled except when no part of the amount stated in the certificate was due by the judgment-debtor under the certificate. A certificate can only be modified on such a ground provided that a suit for such purpose is not barred.

A sale held under the provisions of the Public Demands Recovery Act can be set aside on the ground of the invalidity of the proceedings which are alleged as the foundation of the sale and for fraud or irregularity in the execution proceedings themselves. If the sale is impeached on the ground of irregularity the judgment-debtor must proceed under section 20 of the Act. In such a case section 244 of the Civil Procedure Code bars a separate suit. UMED ALI BHUYAS *v.* RAJ LAKSMI DEBYA. **10 W. N. C., 130=33 C., 84.**

10 *S. 7—See* 29 C. 537 No. 4 *supra.*

11 S. 8—Certificate under—Omission to published notice under section 6 of Act XI. of 1859, 30. C. 1—*See* Act XI. of 1859 section 6 No. 9.

12 *S. 8, 10—Notice, non-service of—Certificate, effect of—Sale.*

When the notice under section 10 of Act VII of 1880 (B. C.) is not served, the certificate does not acquire the force of a decree and is not binding upon the judgment debtor, and the sale held in execution of such a certificate is necessarily bad in law and may be set aside by a suit if brought within the statutory period allowed by the Limitation Act. GOPAL DAS *v.* HARDE DAS **5 C W. N., 86.**

13. S. 8—See 29 C. 5 37 No. 4, 31 C. 159 No. 4 *supra.*

14. S. 10—See 29 C. 537 No. 4, 32 C. 691 No. 8. 5 C. W. N. 86 No. 12 *supra.*

15. *Ss. 15, 19, 33—Public Demands Recovery Act (I of 1895, Bengal), Sections 19 and 33—Sale. Setting aside of—Review—Revision.*

Sub-section 4 of section 19 of the Public Demands Recovery Act (I of 1895, Bengal), in saying that any order made by the certificate officer under the section shall be final, only means and intends that it shall not be open to appeal, such as is provided by section 32; the intention is not to make the order absolutely final so as to make it not open to review or revision. MATANGINI DEBI *v.* GIRISH CHANDRA CHONGDAR. **7 C. W. N. 433=30 C., 619.**

Bengal (Act VII of 1880) *(Contd).*

16. S. 15—33 C. 84 No. 9 *supra.*

17. S. 16—32 C. 691 No. 8 *supra.*

18. S. *17, 24. Applicability of, to cases of road and other cesses—Cess Act (IX of 1880, Bengal)—Sale. Suit to set aside—Commissioner—Board of Revenue. Revisional powers of—Limitation law not applicable to proceedings on revision—*Exparte *order against absent party.*

The plaintiff brought the present suit to set aside a sale of a village held under the Public Demands Recovery Act (VII of 1880, Bengal), in execution of a certificate granted in respect of a fine imposed on the plaintiff for failure to comply with a notice issued under Section 16 of the Cess Act (IX of 1880 Bengal).

After the purchaser was put in possession of the village the palintiff had made a petition to the Commissioner to cancel the sale as fraudulent and irregular and the Commissioner after hearing Vakils for both parties admitted the petition. The purchaser having appealed to the Board of Revenue against the Commissoner's order the Board held that the fine was unjust " and had no hesitation in setting aside the certificate for its recovery. " The Commissioner subsequently set aside the sale.

The suit was decreed and the purchaser's appeal to the High Court was dismissed. On appeal to the Privy Council it was contended (1) that the revenue authorities had no jurisdiction to make the orders on which the decree of the Civil Court was based, (2) that the appeal to the Commissioner was barred by limitation, and (3) that the defendant was not allowed to adduce full evidence in support of the case.

Held, (1) that sections 17 and 24 of Bengal Act VII of 1880, were applicable to the cases of road and other cesses and the revenue authorities had jurisdiction to pass the orders; (2) that the Commissioner acted in the exercise of his revisional jurisdiction under section 17 of Act VII of 1880, Bengal, and it would defeat the object of the legislature if the periods of limitation applicable in ordinary cases were held binding upon him when so acting; and (3) that the proper remedy of the purchaser, if he felt aggrieved by the order of the Commissioner having been made in his absence was to apply to the revenue authorities for a rehearing and that it was too late to ask for a remand on this ground.

It is an elementary principle binding on all persons who exercise judicial or *quasi* judicial powers that an order should not be made against a man's interest without there being given to him an opportunity of being heard. GANESHWAR SINGH *v.* GA-

Bengal Act (VII of 1880) (*Contd.*)

NESH DAS. (LALITESWAR SINGH *v.* RAM KISHEN DAS). **10 W. N. C. 969 =8 B. L. R. 719=M. L. J. 1903, p. 365 =4 C. L. J. 177=3 A. L. J. 698=33 C. 1178 P. C.**

19. S. 19—Suit to set aside sale—Misdescription in sale proclamation—6 C. W. N. 246—29 C. 91—Col 921 P. I.

20. S. 19—32 C. 691 No. 8, 30 C. 619 No. 15 *supra.*

21. S. 24—33 C. 1178 No. 18 *supra.*

22. S. 31—32 C. 691 No. 8, 33 C. 81 No. 15 *supra.*

23. S. 33—30 C. 618 No. 15 *supra.*

(22) Act IX of 1880. (Bengal Road and Public Works Cess Act)

1. *S. 4—Cultivating raiyat—Tenure-holder.* Under Section 4 of Act IX of 1880 (B. C) a 'cultivating raiyat' is a person cultivating land and paying rent therefor not exceeding Rs. 100 per annum; and 'tenure' includes every interest in land, whether rent paying or not, it does not include the interest of a cultivating *raiyat.* A. CASPERSZ *v.* KUMAR SINGH. **V. W. N. C. 1901 P. 535.**

2. *S. 4, 20, Explanation, and S. 20 (a) and (b) Road cess return—Conversion of Nakdi into Bhaoli rent shortly before return submitted—Annual value how to be assessed—Alteration in area of holdings and tenures by reason of exchange amongst tenants, if must be specified in return:*

The plaintiff, who had a share in a Mouzah had is share separated by petition in 1300 F. S. Subsequent to the partition the defendants who were tenants and were paying *nakdi* rent agreed to pay bhaoli rent from the beginning of 1302 F. S. It also appeared that after the partition the tenants of the whole estate agreed amongst themselves to respectively hold lands in that share only in which they held homestead lands and in this way an exchange of lands took place between them. On the 4th of Assia 1302, F. S., the plaintiffs submitted a road cess return in respect of their separated share in which the nakdi rents which prevailed up to the end of 1301 F. S. and not the recently settled bhaoli rents were mentioned. Further, the statement of land-holding or tenure given in the return, corresponded with the state of things as they existed prior to the exchange effected between the tenants. Plaintiffs having sued the defendants for bhaoli rent calculated on lands held by them since the exchange, the defendants objected that the provisions of Cls (*a*) and (*b*) of S. 20 of the Road and Public Works Cess Act had not been complied with.

Held,—That as there was no enhancement of rent but only conversion of nakdi into bhaoli rent and as no calculation of annual value based on the average money value of three years bhaoli rent as con-

Bengal Act (IX of 1880) (*Contd.*)

templated in the Explanation to S. 4 of the Act was possible in this case, the plaintiffs had substantially complied with the provisions of S. 20 Cl. (*b*) of the Act; that Cl. (*a*) of the section had also been complied with inasmuch as all the lands for which rent was payable were mentioned in the return, although it appeared that by reason of the exchange of lands amongst the tenants the land for the rent of which each of the defendants was sued in this case, was greater than that shown in the road cess return.—JOWRI SARAN MAHTO *v.* MOULVI MAHOMED LATIF. **11 C. W. N. 211.**

3 *Ss. 4 and 41—Mela, profits of, if assessable, with road-cess—"Annual value"—"Rent"—"Tenure-holders stall-holder and vendors at mela, if tenants or mere licensees—"Immoveable property" mela—Levy of cess over and above income-tax, if legal.*

It cannot be affirmed as a general proposition that the liability to pay income-tax carries with it as a necessary consequence exemption from Road and Public Works cesses. (28 C. 647 Exp.)

A *mela* is annually held for 20 days from the 5th to the 25th Falgun, on lands which are included in the *jotes* or holdings of agricultural tenants (but on which no crops are standing at the time the fair is held), under an arrangement between the zamindar and the holders of the *mela*, to which the tenants are not parties. The Collector assessed Road and Public Works cess, not only on the rents paid to the zamindar by the raiyats, but also on the profits realised by certain *ijaradars* under the *mela* holders from the stall-holders and vendors of live-stock, etc., at the *mela.*

Held, that these profits are not rent payable by either cultivating raiyats or by other persons in the actual use or occupation of land, within the definition of 'annual value' in s. 4 of the Cess Act, and cannot be assessed with road-cess.

Per Rampini, C. J. The profits of a *mela* may come within the definition of rent paid for the actual use and occupation of land by persons other than cultivators, or of immoveable property as defined in section 4 of the Cess Act. But whether in any particular case they do so or not will depend on the terms of the lease in that case.

Per Brett and Woodroffe J. J. A *mela* or fair does not come within the definition of immoveable property in s. 4 of the Cess Act.

The holders of the *mela* in this case or the *ijaradars* under them are licensees and not tenure holders within the Act.

Per Rampini, C. J.—The definition of tenure-holder in the Act is very wide and may include persons in the enjoyment of the profits of a *mela.* But whether in any particular case such persons are tenure-holders or not, will depend on the terms of the lease.

Per Brett and Woodroffe, JJ. (*Rampini,*

Bengal Act (IX of 1880) (*Contd*).

J. and Mookerjee, J., contra)—The definition of "annual value" contemplates that the rent shall be payable by persons in occupation *during the year*, not by persons occupying the land for 20 days during each year.

Per Mookerjee, J.—The Stall-holders and other persons attending the *mela* for the purpose of selling articles of merchandise are licensees and not tenants.

Per Rampini, C. J.—The sums payable by stall-keepers may come within the definition of rent. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* KARUNA KANTA CHOWDHURY. **11 C. W. N. 1053 (F. B.) =6 C. L. J. 342=35 C. 82.**

4 *S. 5, 6, 72, 81—"Annual net profits of mines," meaning of—"Owner," "Occupier," meaning and difference—Return, liability of both to submit—"Sources of income," meaning of.*

Per Rampini, J.—The word "owner" in S. 72 of the Road Cess Act (IX of 1880, B. C.) is not restricted to the actual worker or the lessee of a mine. It is applicable to the proprietor of the land in which mines have been excavated and who is in receipt of a share of the annual profits in the form of royalty. The lessees under such proprietors, especially if they hold leases for only limited terms, cannot be considered the owners of the mines. The word "owner" used in the section is not necessarily the same person as the "occupier" and is not restricted to the "occupier." A proprietor of land in which mines are situated and who is in receipt of royalties of a certain specified sum for the working of the mines is in enjoyment of annual net profits of mines and is as such liable to pay road cess in accordance with the provisions of S. 6 of the Road Cess Act. S. 72 of the Road Cess Act does not contemplate the service of only one notice on the owner or occupier of a mine, the submission of only one return by him, and the levying of only one assessment on the annual net profits enjoyed by him. The terms of that section read with S. 14 (2) of the Bengal General Clauses Act, applies as well to two notices and to two returns as to one. The submission of separate returns having regard to Ss. 72 and 81 of the Road Cess Act and the making of separate assessments on the "owner" and "occupier" are not necessarily illegal under the Act, as they are not expressly prohibited by the Act. The "annual net profits" from a mine is a quantity which is independent of the circumstance whether the mine is worked by the owner himself or by lessees or adventurers holding the property under him; the difference between the gross earnings and the working expenses which constitutes the net receipts is the net annual profits from the mine. If the mine is worked by the owner himself, the whole of the net receipts is taken by him as the net profits. If the mine is worked by a lessee from the owner the whole of the net receipts becomes divisible between landlord and tenant according to the terms of the Contract Act which regulates their

Bengal Act (IX of 1880) (*Contd.*)

rights. In such a case when the landlord takes a rent and royalty the amount received by him represents a portion of the annual net profits from the mine, and the royalty received by him is liable to be assessed with cesses and the balance left in the hands of the tenant constitutes his share of the annual net profits from the mine. S. 6 of the Cess Act of 1880 makes the cess leviable upon the annual net profits from a mine, no matter whether such profits are taken entirely by the owner or are distributed between the owner and the lessee who is in actual occupation of the mine. The Legislature contemplates in S. 72 of the Act the service of one notice and the submission of one return in respect of the whole of the net annual profits from the mine and not in respect of any portion of the same. The term "owner" in S. 72 is used in a limited sense; it means an owner who is in possession of the mine or who has control over it, or in whom the mine is, for the time being, beneficially vested and who has the occupation or control or usufruct of it. 46 L. J. Q. B. 559, 7 Ad. and Ell. 124, 46, 164; 80 R. R. 507 and 3 Q. B. 449; 61 R. R. 249 ref. to.

Quære: Whether S. 424 of C. P. C. is limited in its application to cases of what might be called torts or wrongs 25 C. 239 ref. to. MANINDRA CHANDRA NANDI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **5 C. L. J. 148=34 C. 257.**

5 *S. 5, 99—Cess—Liability of owner after sale.*

The plaintiff purchased a revenue paying estate belonging to the defendants in execution of a mortgage decree against them. The defendants had not paid to the Collector the amount of cesses due under Act IX of 1880, Bengal, and after the purchase the Collector proceeded to realise the same under section 99 of the Act. The plaintiff had to pay the amount and he then instituted the present suit for recovering it from the defendants. The lower Courts held that the amount of cesses payable by the holder of an estate under Act IX of 1880, Bengal, was a charge on it and the plaintiff having purchased subject to all existing charges was not entitled to be re-imbursed by the defendants.

Held, that the view of the law taken by the lower Courts was wrong.

Under section 99 of the Bengal Cess Act the Collector has the power to recover any sum due under the Act from the tenants in an estate after recording a proceeding and giving notice to the tenants to that effect. It is a power in the nature of a right to attach the rents payable to the person from whom the dues are recoverable. The Collector by recording a proceeding under section 99 constitutes himself a Receiver for the collection of dues to the estate. He has no power to realise the amount by sale of the estate as if it was a charge having a pri-

Bengal Act (IX of 1880) *(Contd.)*

ority over other charges. NAWAB ASSANULLAH BAHADUR *v.* MANJURA BANU. **8 C. W. N. 357=30. C. 778.**

6 S. 6—34 C. 257 No. 4 *supra.*

7 S. 16—Sale—Suit to set aside—10 C. W. N. 969—33 C. 1178 (P. C.) *See Bengal Act VII of 1880 No. 18.*

8 S. 20—11 C. W. N. 211, No. 2, *supra.*

9 *S. 29.—Suit for rent by one share—Alternative claim—Bengal Cess Act S. 29.*

A suit is maintainable by one of several joint landlords for recovery of balance of rent due from a tenant, and, in the alternative, for recovery of the sum which may have been collected by his co-sharers in excess of their legitimate share. So far as the claim against the co-sharers is concerned, S. 20 of the Cess Act has no application. 4 C. 350 applied. SHAM SINGH *v.* KISHUN SATAI. **6 C. L. J. 190.**

10 Ss. 36, 41—Competent Court—Road Cess. 28 C. 109. Col. 1002, Part I.

11 *S. 41—Scope of—Bengal Tenancy Act (VIII of 1885), Section 74—Road-cess—Abwab.*

A contract by which a tenant, as between himself and his landlord, undertakes to pay the whole road-cess, is not illegal.

Section 41 of the Cess Act is neither exhaustive nor prohibitive and does not invalidate such a contract.

Road-cess is not an abwab within the meaning of section 74 of the Bengal Tenancy Act. 4 Cal. 576 followed. ASHUTOSH DHAR *v.* AMIR MOLLAH. **3 C. L. J. 337.**

12 *S. 41—Construction of deed—Cess, liability to pay—Mokurari lease.*

A perpetual *mokurari* lease implies that the tenancy is permanent, heritable and transferable, and that the rent is fixed in perpetuity.

It is open to the Zemindar and the tenure-holder to contract themselves out of the provisions of S. 41 of the Bengal Cess Act.

Where in a perpetual mokurari lease the rent was fixed by a clause which runs:—At varying *jamas*, to wit, at an annual uniform *jamas* of Rs 1,580 from 1,284 to 1,291 (Fasli), and at an annual consolidated *jama* of Rs 1,585 of the current coin from 1202 (Fasli) together with *abwab* such as *selami* for Dusserah and Holi, Purkha, Sair, Road cess, Public Works cess, &c., all of which are included in that very sum of Rs 1,585.

Held, that the contract does not provide for the contingency which happened in this case, namely, an increase in the amount of cesses levied by the State.

Held, also, that if any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden must be regulated according to the statute. MAHANAND SAHAI *v.* MUSSAMMAT SAYEDUNNISSA BIBI. **12 C. W. N. 154.**

13 *S. 41—35, C. 82, No. 3 supra.*

14 *S. 72—34, C. 257, No. 5 supra.*

15 *S. 81—34, C. 257* No. 5 *supra,*

16 *S. 95—Applicability of—Document, admissibility of, not objected to in the lower Court—Decree, not inter partes, admissibility of.*

The plaintiff alleging himself to be a *Khastkar* or holder of a right of occupancy sued the defendants for the possession of the land on the ground that they were in occupation without any right. The defendants produced certain rent receipts showing that the landlords recognised them as *Khastkars.* The plaintiff produced a rent decree of 1869 (which contains a statement contrary to that which appears in the receipts) and road cess returns.

Held that the road cess returns are admissible in favour of the plaintiff and their admissibility is not affected by section 95 of the Road Cess Act. Section 95 of the Road Cess Act has no application to the cess where the parties who tendered road cess returns in evidence were not the persons who filed them, in pursuance of the provisions of the Act.

The decree though not *inter partes* is evidence to show that the landlords recognised the plaintiff as *Khastkar*, and that the rent receipts granted to the defendants were fraudulent. When no objection was taken as to the admissibility of a document in the Court of first instance, it is not allowable to take the objection in appeal. RAMPARSAD ROY *v.* LALA SHAM NARAIN. **6 C. L. J. 22.**

17 S. 99 30 C. 778 No. 5 *supra.*

18 *S. 106—Rules framed under—Liability of profits of a* mela *to road cess.*

Section 5 of the Income Tax Act (II of 1886) exempts from the liability to the income tax incomes derived from agriculture or operations connected wiht agriculure.

Profits of a *mela* cannot be regarded as income derived from agriculture and are not exempt from income-tax. Such Profits are not assessable with road cess. S. III B. Rule 33, printed at pp. 74 5 of the Cess Manual, 1900, framed by the Board of Revenue under Section 106 of the Cess Act (Bengal) is *ultra vires.* UMED RASUL SHAHA FAKIR *v.* ANATH BANDHU CHOWDHURI. **28 C. 637.**

(23) Act II of 1882. (Bengal Embankment Act).

1. *S. 76, Cl. (a) 72—'Shall add to.'*

The words 'shall add to any existing embankments' in S. 76, Cl. (*a*) of Bengal Act II of 1882, include an addition to the height of the embankment. 11 C. 570 overruled.—AJODHYA NATH KOILA *v.* RAJ KRISHTO BHAR. **30 C. 418.**

2. *S. 77—Public embankment—Destruction of embankment.*

An embankment is a bank made or erected by some act of construction and does not include a sand Bank which has arisen by natural causes: and the cutting through or destruction of such sand bank for purposes of cultivation is not punishable as destruction of a public embankment under S. 77 of the Bengal Embankment Act. BUSSUM-

Bengal Act (II of 1882) *(Contd.)*

BHUR SINGH *v.* THE QUEEN EMPRESS. 5 C. W. N. 108.

(24) Act III of 1884 (Bengal Municipalities Act.)

1 *S. 30—Land Acquisition Act (1 of 1894), section 30—Apportionment of compensation—"Burning ground," whether a "ghat"—"Ghat." Meaning of—Maintenance by and control over it—Dedication. Meaning of—Dedication of land, and user of land. Distinction between—Acquiescence—Estoppel— Valid dedication. What constitutes—Abandonment of site, compulsory—Land. Acquisition of—Compensation, to whom payable. Determination of—Valuation. Principles of, when subject to restrictions—Dedication, express or implied.*

A dedication of land to public purposes need not necessarily be expressed but may be implied from the conduct of the owner.

Where the owner sets apart land for the use of the public and formally declares that such is his intention, or where he conveys land to a Municipality or to trustees to hold for the use of the public, the dedication is an express one.

An implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel; it proceeds not upon the principle that a grant has actually been made, but rather on the principle that the owner having allowed the public to enjoy the user for any particular purpose, is estopped from denying the right of the public to the enjoyment of such user.

Exclusive and continuous user by the public with the owner's knowledge and acquiescence for the prescriptive period will raise the presumption of a grant or dedication to the public.—56 *Am. St., Rep.*, 26 ; 57 *Am Rep.*, 346 ; 28 *Am. Rep.*, 464, *referred to.*

A dedication is a devotion to public uses, either of the land itself or of an easement in it, by any unequivocal act of the owner of the fee manifesting such clear intention.

It is not essential to constitute a valid dedication that the legal title should pass from the owner ; nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated.—10 *Peters*, 662 (712); 27 *Am. Dec*, 559 (Notes) ; *L. R.*, 7 *Q. B.*, 47 ; 9 *Cal.*, 75, *referred to.*

One of the essential elements of a good dedication is that it should be made to the public ; that it should be irrevocable ; and that the land should be for ever dedicated for the designated public use.—8 *C. B. N. S.*, 848 ; 42 *California*, 541, *referred to.*

But after a valid dedication has been made, if the use for which the property is dedicated becomes impossible of execution, or if the object of the use wholly fails, there is an abandonment, in consequence of which

Bengal Act (III of 1884) *(Contd.)*

the rights of the public therein fail and a reversion takes place, as the dedication has spent its force when the use ceases.—10 *L. R. A.*, 593 ; 24 *L. R. A.*, 843 ; 8 *C. C. A.*, 27 ; s. c., 59 *Fed* ; *Rep.*, 96 ; 98 *Am., Dec.*, 114, *referred to* ; *L. R.*, 24 *I. A.*, 177 s. c., 25 *Cal.*, 194, *explained and distinguished.*

The determination of the question, who are the persons to whom the amount of compensation awarded for acquisition of land is payable, depends upon the ascertainment of the rights and interests of the several claimants to the property at the time of its acquisition.

There is a substantial distinction between cases in which the question of the principle of valuation of land acquired when it is subject to restrictions as to use arises, and those in which is raised the question as to the principle upon which compensation, when it has been awarded for land subject to restrictions as to use, has to be apportioned amongst persons interested in the property.

The principle of valuation of such land and of apportionment of compensation awarded for it discussed.—*10 C. B. 327*; *L. R. 6 Q. B., 37*; *18 T. L. R., 612*, confirmed on appeal. *19 T. L. R. 363*; *L. R. 9, Eq., 579*; *L. R. 11 Eq.*, 15; *L. R. 11, Eq., 23 referred to.*

The word "*ghat*" ordinarily means a flight of steps made of wood, bricks, stones, iron, etc., for access to the water of a tank or a river ; it also means the place on a river bank (or on a tank) where people ordinarily bathe, or where boats are moored for purposes of a ferry or otherwise, or which is used for the purpose of loading or unloading goods. The word "*ghat*" does not include a tract of land used as a burning-ground.

The word "*ghat*," used in Section 30 to the Bengal Municipal Act, was not intended to include a burning-ground. The term "*ghat*" does not include any portion of the subsoil and cannot consequently apply to the burning ground.—13 *Cal.*, *171* ; *20 Cal.*, *732*, *referred to.*

The phrases "not being private property" and "not being maintained by Government or at the public expense," used in Section 30 of the Act, connected by the conjunction "and," must be taken distributively and not collectively. The section means that all roads, etc., shall vest in the Commissioners ; but road, etc. being private property, shall not so vest ; and roads, etc., maintained by Government or at the public expense, shall also not vest.

But so far as *ghats* are concerned, Sections 30 and 32 of the Municipal Act overlap, and there is an apparent inconsistency. THE CHAIRMAN, HOWRAH MUNICIPALITY *v.* KHETTRA KRISTO MITTER. 4 C. L. J. 343=10 C. W. N. 1044.

Bengal Act (III of 1884) *(Contd.)*

2. *S. 34, 37—Lease taken by Municipality—Execution—Validity.*

S. 34 of the Bengal Municipal Act should be read with S. 37 of that Act.

Where, therefore, a Municipality purported to take a lease of lands involving a value exceeding Rs. 500, but the *Kabuliyat* was signed by the Chairman and was merely witnessed by two other Commissioners, but not signed by them as contracting parties, and further the document was not sealed with the common seal of the Commissioners.

Held—that the lease was not binding on the Commissioners. THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF SOUTH BARRACKPUR *v.* AMULYA NATH CHATTERJEE. **12 C. W. N. 50=34 C. 1030.**

3 *S. 85, 87 (d), 113, 114, 116—Jurisdiction of the Civil Court to question assessment—"Circumstances and property within the Municipality, meaning of.*

Section 116 of the Bengal Municipal Act (III of 1884) does not take away the jurisdiction of Civil Courts in a case in which it is alleged and established that the assessment, the propriety of which is in controversy, is open to objection on the ground that it is *ultra vires*. *Navadip Chandra Pal* v. *Purnananda Saha*, 3 C. W. N. 73, and *Kameshwar Pershad* v. *The Chairman of the Bhabua Municipality*. I. L. R. 27 Cal. 849, referred to. A ratepayer, who occupied a holding within the Municipal limits, was assessed with an annual tax with reference to the salary earned by him within the Municipality. He took exception to the assessment under s. 113 of the Bengal Municipal Act (III of 1884), but his application was rejected by the Municipal authorities without recourse to the procedure laid down in s. 114 of the Act and he declined to pay the sum assessed. The Municipality brought a suit against him for recovery of arrears of tax. Upon an objection taken by the defendant that the assessment was *ultra vires* and that it was not made according to his "circumstances and property within the Municipality".

Held, that the assessment was rightly made and that "the circumstances and property" meant the whole amount he earned, and not what he spent within the Municipality. CHAIRMAN OF GIRIDIH MUNICIPALITY *v.* SRISH CHANDRA MOZUMDAR. **12 C. W. N. 709=35 C. 359.**

4 Ss. *202, 218—Removal of a wall and a privy—Owner or lessee—Requisition or notice to remove—Service on person who has built—Failure to comply with requisition—Liability.*

The notice contemplated by section 202 for the removal of any wall or other obstruction erected or any road or drain should be served upon the person who may have erected the same, and on failure to comply with such requisition, he alone is responsible to a prosecution under section 218 of the Act. So where a wall and a privy were erected by the lessee and not the owner of a land or buildings, the lessee alone is liable to a prosecution for non compliance with a requisition issued to remove such wall or privy. SHAMA BIBEE *v.* JADAB CHUNDER BANERJEE **2 C. L. J. 223.**

5 *Ss. 236 and 273—Building [illegible] to house without permission of Municipality—Permission not necessary.*

The accused was convicted, under section 273 (*1*) of the Bengal Municipal Act, by the Sub Divisional Magistrate, who was also Chairman of the Municipality, for making an addition to his house by commencing to build an upper storey without the permission of the Municipal Board. He was also directed by the Magistrate as Chairman to demolish the addition made to his house.

Held, that no permission was necessary and the conviction and order directing demolition were illegal. The High Court on revision set aside the whole order.

The Building Regulations, section 236 *et seq*, relate to building or re-building a house, and the previous sections relating to alteration of a house contemplate obstruction or encroachments on roads. EMPEROR *v.* MATHURA PRASAD. **29 C. 491.**

6 *S 238, 273—Building—Plan—No order within six weeks—Right to build—Subsequent plan suggested by municipality—Conformity with suggestion—Building—Sanction—Time for Commissioners to pass orders—Computation:—*

A person who submitted complete plans and specification of a building for sanction of commissioners can proceed to build according to his plan if the commissioners passed no orders on the application for a period of six weeks. The builder is not bound by any subsequent order of the commissioners as to the plan of the building and the fact that he accepted some of their suggestions and tried to conciliate their objection does not destroy his right to build according to his own plan; *held* accordingly, that he could not be convicted for not conforming to their order passed after he acquired a right to build on his own plan. The time within which the commissioners have to pass orders on an application for sanction to build should be calculated from the date when the plan and specification are submitted to the commissioners in a complete form so as to be capable of being dealt with by them. SEWNANDAN *v.* VICE-CHAIRMAN OF DARJEELING MUNICIPALITY. **5 C. W. N. 42.**

7 *Ss. 270 (3), 271, 272, 273—As amended by (IV B. C. of* 1894) *Section* 270 (3), 271, 353.

Section 353 of the Bengal Municipal Act lays down; that no prosecution under this Act or any bye-law made in pursuance thereof, shall be instituted without the order

Bengal Act (III of 1884) *(Contd.)*

or consent of the commissioners, and no such prosecution shall be instituted except within three months next after the commission of such offence, in which case a prosecution may be instituted within three months of the date on which the commissioner or the existence of the offence was first brought to the notice of the Chairman of the Commissioners

The offence under section 270 (3) of the Bengal Municipal Act is not a continuous one.

The service of requisitions on the accused should be proved before he can be convicted under section 271. BIDHU BHUSAN MULLICK *v.* THE ASSENSOLE MUNICIPALITY. **6 C. W. N. 167.**

8. *S. 273.*

It was found that the accused kept 7 or 8 ponies, about 4 cows, and some sheep and she let out one carriage and a pair of ponies on a monthly hire and the said carriage and the ponies were kept in her stables. It was also proved that the accused kept other ponies for sale and some sheep for supplying mutton to gentlemen and she also supplied milk to others.

Held that the facts found against the accused did not render her liable within the terms of section 273. of the Bengal Municipal Act. FAIRWEATHER *v.* SURESH CHUNDER DUTT. **5 C. W. N. 331.**

9. S. 278—29 C 491 No. 5. 5 C W N 42 No. 6 *supra.*

10. S. 353—6 C. W. N 167 No. 7 *supra.*

11. S. 363—No difference between Section 87 of Act III of 1864 & Section 363 of Act III of 1884—Limitation—3 C. L. J. 376. *See Bengal Act III of 1864 S. 87.*

(25) - Act VIII of 1885 (Bengal Tenancy Act).

1 *S. 1—Bengal Tenancy Act (VIII of 1885)—Rent suit—Instalment decree, power of Court to make—Civil Procedure Code Ss. 210, 622—High Court's power of revision.*

A decree for rent under the Bengal Tenancy Act can not be made payable by instalments, Ss. 210 of the Civil Procedure Code not applying to such a decree.

Where a Munsif made an order for the payment of the amount of rent decreed by instalments, he committed an error of law only and not an error in the exercise of his jurisdiction, within Secs. 622 Civil Procedure Code. SHIBH NARAIN *v.* BAIKUNTHA NATH. **11 C. W. N. 857.**

2 *S.1—Amendment Act (III B C of 1893) S. 9—Decision of Settlement Office that land held rent free—Resjudicata—Decision under Ch. X of the Bengal Tenancy Act (VIII of 1885) before amendment.*

In a proceeding under Ch. X of the Bengal Tenancy Act before the passing of Act III, B. C. of 1898, the settlement authorities found that lands claimed by the tenants as their rent-free land were not rent free and

Bengal Act (VIII of 1885) *(Contd.)*

they accordingly assessed the same with rents.

Held,—That by the operation of Ss. 9 of Act III, B. C. of 1898, the Civil Court is precluded from adjudicating on the same matter. NABIN CHANDRA *v.* RADA KISHORE. **11 C. W. N. 859.**

3 *S. 1—Landlord and tenant—Co-sharer landlord—Suit for entire rent—Co-sharers made defendants—Maintainability of suit—'Landlord,' who is—Assignee of land as well as of arrears of rent.*

A co-sharer landlord is entitled to maintain as suit for the entire rent, if his co-sharers are, on their refusal to join as plaintiffs, made defendants in the suit. (7 C. L. J. 139 foll.)

The person to whom the land, the rent for which is claimed as also the arrears of rent, is transferred is an assignee of the whole interest of the landlord and is a 'landlord' within the Bengal Tenancy Act. (4 C. W. N. 605 dist.). SASHI KUMAR MIRBAHAR *v.* SITANATH BANERJI. **7 C. L. J. 425.**

4 S. 1—Occupancy holding—Submergence Rent, non-payment of—Extinguishment—6 C. L. J. 149—*See Bengal Act VIII of 1869 S. 6.*

5. *S. 1—*Khas *possession of land—Suit for —Landlord and tenant—Forfeiture—Estoppel.*

In a previous rent-suit between the parties it was decided that the defendants were not the plaintiffs' tenants. On the plaintiffs' filing the present suit to eject the defendants, *held,* that the defendants were estopped by a matter of record from pleading that they were the plaintiffs' tenant; and that being so, the plaintiffs were entitled to take *khas* possession of the land. FAYJ DHALI *v.* AFTAB-UD-DIN SIRDAR **6 C. W. N. 575.**

6. *S. 2, 104, 107—Suit for declaration of nature of rent payable by tenant and that plaint lands were* nij jote *lands—Settlement proceeding fixing certain kind of rent, existence of, whether a bar to suit—Necessity for adjudication as to* nij-jote *or otherwise of land—And C. P. C., S. 13.*

The plaintiff sued for a declaration that the land in dispute, situated in Orissa, was held by the defendants under the plaintiffs on a produce rent and not on a money rent as shown in the settlement records and also for a declaration that the lands were the *nij-jote* lands of the plaintiffs and used to be cultivated before the plaintiffs and their ancestors. Both the lower Courts held that the first question was *res-judicata* by virtue of a settlement proceeding and that there was no necessity for determining whether the lands were *nij-jote* or not.

Held, the Settlement Officer had jurisdiction to deal with the question of fair rents arising between the parties, because a settlement of revenue was being made in the province of Orissa. That being so, the Settlement Officer had jurisdiction under sub. S. 2 of S. 104 of the Bengal Te-

Bengal Act (VIII of 1885) (*Contd.*)

nancy Act. He fixed a money-rent and not a produce-rent as payable by the defendants to the plaintiffs. No objection was preferred under S. 105 and no dispute was raised under S. 106 and, therefore, under the provision of S. 107, the decision of the Settlement Officer in the proceedings for settlement of rent under S. 104 had the force of a decree. Consequently, the plaintiff's claim for rent in kind was barred by rule of *res judicata.*

Held, also that it was quite unnecessary in this case to decide whether the lands were the *nij-jote* land of the plaintiffs or not, for, in Orissa, occupancy right can accrue in *nij-jote* and their accrual is not barred, as in Bengal, under S. 116 of the Bengal Tenancy Act. This section was not extended to Orissa. BRAHMANUNDA MAHAPATRA *v.* ARJUN RAUT. **1. C. L. J. 310.**

7 *S. 2. 11, 17, 18—Transfer of a tenure—Liability of tenant.*

Where the defendant held separately a share of a *sikmi taluq* under the plaintiff, and transferred that share to a third party and served a notice of the transfer on the plaintiff-landlord as prescribed by s. 12 of the Bengal Tenancy Act.

Held that the act of the defendant in making the transfer did not amount to a sub-division of the tenure, and that the defendant was not liable for rent for any period subsequent to the transfer. Chintamoni Dutt *v.* Rash Behari Mondul (I. L. R., 19 Cal. 17), referred to. KALI SUNDARI DEBI *v.* DHARANI KANTA LAHIRI. **38 C. 279=10 C. W. N. 272.**

8 Ss. 2 (4), 74, 179—Abwab—10 C. W. N. 527—4 C. L. J. 527—*See Bengal Act X of 1859 S. 10.*

9 *S. 3—Bengal Tenancy Act (VIII of 1885) Section 3—Landlord and Tenant—Lease—*Putnidar *contracting to pay Government Revenue—Default by* Putnidar*—Payment by zemindar—Amount if recoverable under Putni Regulation (III of 1819), Section 3—Rent not payable to landlord.*

Where by a *putni* lease the annual *jama* (rent) was fixed at Rs. 6,000 and besides the said rent, the *putnidar* (lessee) undertook to deposit into the Collectorate the Government revenue of Rs. 40,156-14-9½ fixed for the share of the estate granted in *putni* and payable by the lessor, kist by kist, failing which, the *putni* lease was to be cancelled and would become null and void and the landlord was to take khas possession.

Held, that the payment by *putnidar* of the Government revenue, though no doubt was a part of the consideration to be rendered by the lessee for the enjoyment of the tenure, it was not money payable to the landlord, and, as such, was not rent within the meaning of Section 3 of the Bengal Tenancy Act and could not be recovered as rent under the special provisions of the Putni Regulation. MAHARAJA BAHADUR SIR JOTINDRA MOHAN TAGORE *v.* BIBI JARAO KUMARI. **10 W. N. C. 201 (P. C.); 3 C. L. J. 7=33 C. 140 (P. C.)**

10 S. 3 (2)—Registered proprietor—Mortgage—Rent. 9 C. W. N. 482. *See Act VII of 1876 S. 55.*

11 S. 3 (5)—Sch. III.—Suit by landlord for recovery of drainage charges from tenant. 5 C. L. J. 19. Col. 1897, P. I.

12 *S. 3 (5)—Limitation—Suit for damages—Suit for rent—Whether a suit for rent payable by tenant under lease to superior landlord is one for rent or damages—Lease, construction of.*

A took lease of certain mouzahs from *B.* in darputnee and seputnee, and covenanted to pay annually Rs. 3,191 to the superior landlords of B direct, and Rs. 1,800 to *B. A* was to take receipts from the superior landlords, make them over to *B* and take receipts from the latter. The whole amount of Rs. 4,991 was described in the lease as annual rent fixed, and in certain eventualities arising out of non-payment by *A* to the supeior landlords, *B* was authorized to realize the amount from *A* by bringing a suit for *arrears of rent:*

Held, upon a construction of the lease, that a suit brought by *B* for realisation from *A* of the amount which the latter failed to pay to the superior landlords under the terms of the lease, was for the purpose of limitation, one not for rent but for damages for breach of covenant. Rutnessur Biswas *v.* Hurish Counder Bose, (I. L R., 11 Cal. 221) followed. Basanta Kumari Debya *v.* Ashutosh Chuckerbutti (I. L. R., 27 Cal. 67) distinguished.—HEMENDRA NATH MUKERJI *v.* KUMAR NATH ROY, **32 C. 169=9 C. W. N. 96.**

13 S. 3 (5)—Rent—Bengal Drainage Act S. 45—Money payable by a tenant under 8 C. W. N. 640. *See Act VI of 1880 S. 42 No. 2.*

14 *S. 3, cl. 9—Holding, meaning of—Undivided share in lands.*

When an undivided share in lands is leased to a raiyat, such share does not constitute a holding within the meaning of the Act. (1 C. W. N. 521; 2 C. W. N. 44, 680 ref.) A purchaser of such share of lands even in execution of a decree for rent, does not consequently acquire any right to annul incumbrances. AHADULLA SHEIKH *v.* GAGAN MOLLAH. **2 C. L. J. 10.**

15 S. 3 (10), 21—Occupancy, right of. 9 C. W. N. 141. *See Act IX of 1859 S. 1.*

16 *S. 3 cl. 16, s. 167—Notice to annul incumbrance—Jurisdiction to issue such notice by a Sub-divisional Officer not specially authorised by Local Government—Collector.*

A Sub divisional Officer, not specially appointed by the Local Government to discharge the functions of a "Collector" under s. 167 of the Bengal Tenancy Act, has no power to receive an application, nor has he jurisdiction to issue notice annulling an incumbrance, under that section. MOHABUT SINGH *v.* UMAHIL FATIMA. **28 C. 66.**

Bengal Act (VIII of 1885) *(Contd.)*

17 *Ss. 3, 171—Landlord and Tenant—Rent decree—Execution of decree—Rent—Payment by under-tenure-holder to avoid sale.*

A decree for malikana rent, cesses and Government revenue with interest was passed against the putnidar upon the basis of a putni pottah according to which a certain sum was payable as the annual permanent malikana rent and the putnidar was bound to pay the Government revenue, the rent of the superior landlord, cesses and dak tax payable in respect of the properties comprised in the *putni*. The tenure in arrear was advertised for sale under Chapter XIV of the Bengal Tenancy Act, when the holder of an under-tenure paid up the decree. After payment the holder of the under tenure claimed the benefit of section 171 of the Bengal Tenancy Act by filing a suit for recovery of the amount paid to avoid the sale. It was contended *inter alia* that the decree not being a decree for rent the under-tenure holder was not maintainable.

Held, that the contention was not valid, for the sums included in the decree for rent were on account of rent or were payable for the use and occupation of the land held by the tenant and might have been made payable to the landlord direct and the holder of the under-tenure was justified in making payment. JANANADA SUNDARI CHOWDHRANI *v.* ATAL CHANDRA CHAKRAVARTI. **32 C. 972.**

18 *Ss. 3, 5, 171—Status of tenure-holder and raiyat, definition of, if exhaustive—Estoppel by conduct—Ejectment, suit for—Origin of tenancy—Raiyati holding or tenure—Tenancy, nature of—Landlord, dealings with tenant—Conduct—Holding, under-letting of, to under-tenants—Right of occupancy.*

S. 5 of Act VIII of 1885 (Bengal Tenancy Act) defines the status of a tenure holder as also of a raiyat, but neither the definition of a tenure-holder nor that of a raiyat, is exhaustive.

A person, who may have orginally acquired a large tract of land, ostensibly with the object of cultivating it himself or by his servants or members of his family, may, by conduct, afterwards, convert himself, so far as third parties (under raiyats) are concerned, into a rent-receiver and give those persons, as against himself, the right to remain upon the land, without being liable to be ejected at his instance. MOHESH JHA *v.* MANBHARAN MIA, 5 C. L. J. 522.

19 *S.* 5 - 5 C. L. J. 522 No. 18 *supra*

20 *S.* 5 *(5)—Tenure-holder—Raiyat—Civil Procedure Code (Act XIV of 1882), section 13—Code. Provisions of—Construction of Statutes.*

Section 5 (5) of the Bengal Tenancy Act provides that where the area held by a tenant exceeds one hundred standard *bighas*, the tenant shall be presumed to be a tenure-holder until the contrary is shown.

Where it was sought to prove by the facts that the *kabuliyat* was written on a printed form which was described as "form of *kabuliyat* for those cultivators who have not been recognized as having occupancy rights" and that a receipt for rent given to the tenant described him as *raiyat* that he was a *raiyat*.

Held, that the tenant was not a *raiyat* but a tenure-holder, as the question was one of substance and not of from, and the evidence produced was not sufficient to rebut the presumption created by section 5 (5) of the Bengal Tenancy Act 4 B. L. R. 793—29 I. A. 186, 6 C. W. N. 825—29 C. 707 (P. C.) See for other facts Col. 933 P. I.

Bengal Act (VIII of 1885) *(Contd.)*

21 *Ss. 5, 20 (3), 26, 79, 82, 85, 178—Non-occupancy raiyati holding—Heritability—Custom—Contract.*

Held, by a majority of the Full Bench (Brett and Mitra, JJ. *dissenting*) that, under the Bengal Tenancy Act, the right of a non-occupancy raiyat is not heritable.

Quaere—Whether the right is heritable apart from the Act. MOHUNT LUKHAN NARAIN DAS *v.* JAINATH PANDAY. **11 C. W. N. 626=5 C. L. J. 457=34 C. 516 (F. B).**

22 *Ss. 5, 49—Holding partly homestead partly agricultural—Sub-lease of the homestead land—Ejectment—Notice to quit.*

An occupancy raiyat whose holding was partly agricultural and partly homestead, let out the homestead portion to the defendant, upon whom he served a notice to quit under the Transfer of Property Act; *held* that the incidents of the agricultural portion of the holding would regulate the incidents of the sub lease created by the raiyat and that the Transfer of Property Act had no application. Notice should have been given under s. 49 of the Bengal Tenancy Act. BABU RAM ROY *v.* MOHENDRA NATH SAMANTA. **8 C. W. N. 455.**

23. *S. 7—Landlord and Tenant—Enhancement of rent—Fair and equitable rent—Construction of* Kabuliyat.

When the liability to pay enhanced rent has not been in any way restricted by the *kabuliyat*, the tenant is liable to pay at enhanced rates under the povisions of section 7 of the Bengal Tenancy Act.

In a suit for enhancement of rent under section 7 of the Bengal Tenancy Act, the Court fixed the rent which was 70 per cent. on the net assets, after deducting collection charges thus leaving the tenure holder 80 per cent. as his profits; the rent fixed being nearly trebled of the previous rent.

Held, that the enhancement was somewhat larger than was called for and it would have been fair and equitable to have allowed the tenure-holders a net profit of 40 per cent. RAM KUMAR SINGH *v.* MESSRS. ROBERT, WATSON & Co., LD. **9 C. W. N. 834.**

24. *S. 7—Enhancement of rent of a tenure—Permanent tenure, evidence of.*

In a suit for the enhancement of the rent of a tenure, it was proved that (I) the tenancy had been created for purposes of reclamation, but when it originated, could

Bengal Act (VIII of 1885) (*Contd.*)

not be determined; (2) the tenancy was not limited in duration and had descended from father to son and from son to grandson; (3) that the rent fixed in respect of the lands originally comprised in the tenancy had never been altered; (4) excess lands reclaimed from time to time had been included in the tenancy and rent had been assessed thereon, but at each settlement the rent assessed at the previous settlement had been left untouched; (5) that the rent was progressive, the full amount being reached in the fourth year and the parties agreeing that the lessee should thenceforth continue to pay the full amount; (6) the lessee was entitled to hold excess lands at a rate fixed in the contract.

Held that from these circumstances the inference might legitimately be drawn that the tenure was permanent, the rent had been fixed in perpetuity and was not liable to be enhanced.—ROBERT WATSON & Co., Ld. *v.* RADHA NATH SINGH. **1 C. L. J. 572.**

25 *S. 7—Sch. III, Art. 2—Rent suit for enhancement of*—8 *C. W. N. 1—30 C. 1333, (P. C). Col. 236 P. 1.*

26 *S. 11—Onus—Tenure-holder—Tenure, Non-permanent if transferable—Transfer of Property Act (IV of 1882), S. 2, effect of.*

In a suit in ejectment, where the defence sets up a tenure by right of purchase from the former tenant, if the plaintiff has proved that he is the owner of the land, it lies upon the defendant to make out that he is a tenure-holder and is entitled to remain thereon.

The provisions of the Transfer of Property Act do not apply to a tenancy created before the Act came into force. A non-permanent tenure created before the passing of the Transfer of Property Act is not transferable. (2 C. W. N. 122 and 32 C. 1023 referred to).

Semble. S. 11 of the Bengal Tenancy Act imports that non-permanent tenures are not to be regarded as transferable. HIRAMOTI DASSYA *v.* ANNODA PROSAD GHOSH. **7 C. L. J. 553.**

27 *Ss. 11 and 12—Release by co-sharer—Stamp—Registration—Non-payment of landlord's fee does not invalidate transfer—Bengal Tenancy (Validation) Act (I of 1903). S. 1—Breach of covenant—Cessor of liability.*

Certain co-sharers in a permanent tenure by a deed, dated 2nd December, 1893, which was registered in Book I, under S. 15 of the Registration Act, relinquished all their right, title and interest and claim in the tenure in favour of the remaining co-sharer who, it was stipulated, was to remain in possession and was to be entitled to sell the tenure. He was also to pay certain debts mentioned in the deed for which the other co-sharers were to be under no liability. The deed was stamped with a five rupee stamp as a release. No landlord's fee was paid as required by S. 12 of the Bengal Tenancy Act.

Held—That the deed was a transfer within the meaning of S. 12 of the Bengal Tenancy Act and the transfer was complete as soon as the document was registered. The non-payment of landlord's fee did not render the transfer invalid owing to the operation of S. 1 of Act I of 1903, B. C.

Held, further, that the liability of the co-sharers under the lease ceased with the transfer. 16 C. 642, 19 C. 17 foll. HEMENDRA NATH MUKERJI *v.* KUMAR NATH ROY, **12 C. W. N. 478.**

28 *Ss. 11, 17, 88.—Dur putni holding—Transfers piece meal—Splitting of the holding.*

A dur-putni-tenure was transferred to the knowledge of the landlord; to different sets of persons on different dates. The landlord sued the original dur-patnidar for rent.

Held, that having regard to S. 17 Bengal Tenancy Act, the transfers were valid as against the landlord and the transferees were jointly and severally liable for rent. Kristo Bulluv Ghose *v.* Kristo Lal Singh (I. L. R., 16 Cal. 642), Chintamoni Dutt *v.* Rash Behari Mondal (I. L. R. 19 Cal. 17), and Jogemaya Dassi *v.* Girindra Nath Mukherjee (4 C. W. N. 590), referred to. Maclean, C. J., accepted the above finding with considerable doubt and held that under S. 88, Bengal Tenancy Act such transfers would not be binding on the landlord unless made with his consent in writing and that it was difficult to see how the original transferror is freed from his original liability.—KISHORI RAMAN KAPURIA *v.* ANANT RAM LAHA, **10 C. W. N. 270.**

29 *Ss. 11, 18, 74 and 179—Mokurari, meaning of—Abwab—Rent.*

The word "mokurari" means 'with fixed rent," that is to say, when applied to a tenure, it means a tenure held at a fixed and permanent rate of rent.

Held, upon a construction of the lease in this case, that it was not a mokurari lease, and that the stipulation in the lease for payment of Rs. 3, instead of delivery of 2 goats, was an abwab, and that the case did not fall within the protection of S. 179 of the Bengal Tenancy Act GAYRATULLA SARDAR *v.* GIRISH CHANDRA BHAUMIK, **12 C. W. N, 175.**

30 *Ss. 11, 18—'Kaimi;' meaning of—Kaimi holding—How far transferable:—*

'Kaimi' does not import fixity of rent and so a kaimi-holding is not transferable under Ss. 11 and 18 of the Bengal Tenancy Act.—FAZEEL SHEIKH *versus* KARAMUDDI SHEIKH. **6 C.W. N. 916 at 919.**

31 *S. 12—Bengal Act I of 1903, S. 1—Non-payment of landlord's fee—Validity of transfer.*

When a decree was passed before the passing of the Bengal Act I of 1903, rendering a transfer invalid under S. 12 of the Bengal Tenancy Act for non-payment of landlords' fee and the Bengal Act was published during the pendency of the appeal, it was *held* that the decree of the Lower Court

Bengal Act (VIII of 1885) (*Contd.*)

was not the final decision of a Court of competent jurisdiction and S. 1 of Bengal Act I of 1903 was applicable. The transfer was not invalid merely by reason of the landlords' fee not having been paid. PEARY MOHAN PAL *v.* ARSED ALI. **8 C. W. N. 239.**

31 *S. 12—Transfer of occupancy tenure, effect of tenant's liability to pay rent—Validity of transfer essential, to pass the liability to the transferee.*

In this suit to recover arrears of rent, the Court of First Instance found that nothing passed on the sale, effected by the defendants, which was only colourable and *benami* and that they, therefore, continued liable even after the sale. The Lower Appellate Court held a contrary view on the ground that, since the tenure was a transferable one, its transfer by a registered *Kobala* was sufficient to discharge the defendants from their liability to pay rent.

Held, that the cases (16 C 642 and 19 C 17 Dist.) relied on by that Court did not relate to transfers which were colourable and *benami* and simply showed that a valid transfer under S. 12 of the Act operates to discharge the transferer from his liability to pay rent and to pass such liability to the transferee. But in order to give such effect to the transfer, it should be a valid one and notcolourable and *benami*. JOY GOBIND LAHA *v.* MONMOTHA NATH BANERJEE. **33 C. 580.**

32 Ss. *12, 13—Landlord's fee—Confirmation of auction-sale—Mistake of Court.*

There was a sale under a decree, and there was an application to set it aside. That application having failed, under S. 312 of the Civil Procedure Code, the sale was confirmed. It was subsequently found that this was done by a mistake on the part of the Court, inasmuch as the landlord's fee not having been paid, the provisions of S. 13 of the Bengal Tenancy Act had not been complied with. The purchaser made an application asking that the sale may be confirmed after payment of the landlord's fee.

Held, that the Court had jurisdiction to pass an order granting the application.—MOHESH CHUNDER DAS *v.* HORI MOHAN CHAKRABUTTY. **7 C. W. N. 388.**

33 S. 12—12 C. W. N. 478, No. 27 *supra.*

34 *S. 13—Sale—Confirmation of—Deposit of landlord's fee—Limitation—Application not in accordance with law—Appeal—Civil Procedure Code (Act XIV of 1882), Section 244.*

There was a sale under the Bengal Tenancy Act on the 24th of January 1888 and an application was made for the confirmation of the sale. The application was discharged with regard to some of the applicants because they had not deposited the landlord's fees. On the 23rd of January 1900 these fees were deposited and the sale certificate issued. The judgment debtor objected on the ground that it was barred by limitation. On appeal by him it was

Held (1) that the order was appealable under section 244 Civil Procedure Code, (2) that there was no limitation in such cases as this and (3) that the lower court was bound to pass the order even if it was moved by an application not in accordance with law. KRISHNA CHANDRA DUTT *v.* ANUKUL CHANDRA. **6 C. W. N. 190.**

35 *Sale of* mokurari *holding confirmed without previous payment of landlord's fee—Application by purchaser to be put in possession under Section 318 Civil Procedure Code. Right of judgment-debtor to object.*

A *mokurari* holding was sold in execution of a mortgage decree and the sale was confirmed without previous payment of the landlord's fee in the manner required by section 13 of the Bengal Tenancy Act. The auction purchaser obtained a certificate and applied under section 318, Civil Procedure Code to be put into possession of the property purchased by him. Upon this, the judgment-debtor whose *mokurari* had been sold, objected on the ground that the certificate was not a valid certificate because the sale had been confirmed without payment of the landlord's fee.

Held, that the payment of the landlord's fee before confirmation of sale does not affect the position of the judgment-debtor but affects the right of the landlord to object to a transfer of a tenant's right without payment of the fee, the object of such payment being to issue notice to the landlord in a case of this description of the transfer of the tenant's right and that it was not competent to the judgment-debtor to raise the objection—26 Cal., 603, distinguished.

Held, also, that the case came within S. 244 of the Civil Procedure Code and a second appeal lay to the High Court—19 Cal., 683, S. C., L. R., 11 I. A. 166, referred to. MOCHANDRA BHUTTACHARJEE *v.* RAM LOCHAN DEY. **7 C. W. N. 591.**

36 S. 13—*See* 7 C. W. N. 388 No. 32 *supra.*

37 *Ss. 15, 16—Debutter property—Permanent tenure—Succession—Notice to landlord.*

Where a person succeeds to a *debutter* property, a permanent tenure, as *shebait*, but does not give notice of the succession to the landlord under section 15 of the Bengal Tenancy Act

Held, that he is precluded by section 16 from getting a decree for rent, the right to possession and management of the dedicated property as well as the right to bring suits for rent being vested in the *shebait* and not in the idol. MABATULLAH NASYA *v.* NALINI SUNDARI GUPTA. **10 C W N 42=1 C L J 377.**

38 S. 16—*See* 10 C. W. N. *42* No. 37 *supra.*

39 *Ss. 17, 88, 161—Permanent raiyati holding—Sale of part—Landlord aware of sale, though transferee not recorded in his sherista—Suit for rent—Transferee necessary party—Subdivision of holding—Decree against recorded tenant, effect of—Purchase of part of tenure, if an incumbrance.*

When raiyats having permanent interest in a holding sold a portion of it and

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the transferees again sold a portion of their purchased interest to one R, and R obtained settlement from the landlord

Held, that, although the transferees took no steps to get their names registered in the landlord's sherista and had paid no rent since their purchase, inasmuch as the landlord had notice of the purchase, under section 17 of the Act, he was bound to bring a suit against the transferors and the transferees jointly.

A sale of the holding in execution of a decree for rent obtained against the transferors only did not therefore affect the transferees' interest in the holding.

The landlord was bound to recognise the transfer, though in the absence of his written consent as required by S. 88 of the Act, he was not bound to recognise the sub-division effected by the transfer.

The interest of the transferees was not an incumbrance which could be avoided by a purchaser at a rent sale. BAISTAB CHARAN CHOWDHRY *v.* AKHIL CHANDRA CHOWDHURY, **11 C. W. N. 217.**

40. *S. 17—See 10 C. W. N. 272 No. 7, 10 C. W. N. 270 No. 28 supra.*

41. *S. 18, 30—Junglebari lease—Kabuliat—Raiyat—Heritable interest- Occupancy rights—Rent, enhancement of—Status of such raiyat.*

E held 50 bighas of land for more than 12 years under a *jungleburi* lease, which provided for a progressive rate of rent and did not expressly provide that the interest of E was to be heritable or perpetual. It did not expressly exclude enhancement on any ground, but expressly provided for enhancement on the ground of increase in the productiveness of the soil effected at the expense of the landlord.

Held that the interest created by the lease was not one covered by S. 18 of the Bengal Tenancy Act, and that E was not a raiyat holding at fixed rates.

Held, (per Rampini, J.) that *E* was a raiyat with occupancy right.—RAJ KUMAR SARKAR *v.* NAYA CHATOO BIBI, **31 C. 960.**

42. S. 18—See 10 C. W. N. 272 No. 7, 12 C. W. N. 175 No. 29, 6 C. W. N. 916 at 919 No. 30 *supra.*

43 S. 19, 181--Raiyat for 12 years before Act X of 1859--Right of occupancy--Chowkidari Chakran land--Tenancy on resumption of land. 8 C. W. N. 860. *See Act X of 1859 S. 6.*

43 a. *Ss. 20, cl. (7) and 180--Chur land--Onus of proof—Presumption of holding chur land continuously for twelve years--Reg. XI. of 1825, s. 4- Raiyat having no pre-existing right to the land—Right to accretion.*

Held, that the presumption, which is created by s. 20, cl. (7) of the Bengal Tenancy Act, in respect of that section could not be applied to s. 180 of that Act. In *dearah* or *chur* land, the person, who alleged that he had been for twelve continuous years in possession, would have to prove that allegation.

Held, further, that s. 4 of Reg. XI. of 1825 could not apply, there being no pre-existing right to the land in the tenants to which any right to the later accretion can be said to be annexed. BENI PERSAD KOERI *v.* CHATURI TEWARY. **33 C. 444.**

44 *Ss. 20 (4), 21--Relinquishment by some, effect of--Co-tenants--Payment of rent--Person in possession as owner--Creation of tenancy.*

Where some lands were held by several occupancy raiyats jointly and some of them relinquished in favour of the landlord :--

Held, the relinquishment did not operate by way of enlarging the rights of the raiyats who remained on the land, by giving them an interest over the whole holding. They could claim a right only over the share originally held by them. Ss. 20 (4) 21 of the Bengal Tenancy Act did not apply to the case. Payment of rent and acceptance thereof do not create the relationship of landlord and tenant when the person to whom the payment is made and who accepts the same is not only not the real owner but not in possession as *de facto* proprietor in good faith. 20 C. 708 dist. PEARY MOHUN MANDUL *v.* RADHIKA MOHUN HAZRA. **5 C. L. J. 9.**

45 *S. 20 and 21--Right of occupancy. Acquisition of--Right of a settled raiyat. Acquisition of--Presumption under section 20 cl. 7.*

To show that a raiyat has, under section 21 of the Bengal Tenancy Act, acquired a right of occupancy in a holding, it is not sufficient to show that he has got other occupancy holdings in the same village ; what is required to be shown is whether the tenants is a settled raiyat or not within the meaning of section 20, and has, as such, acquired a right of occupancy in the *jote* in dispute.

Per Rampini J.—An occupancy right may be acquired by purchase but the right of a settled raiyat can be acquired only by a continuous holding of land in the village for twelve years. The presumption under clause 7 of section 20 of having held the land for twelve years, arises only when the other occupancy holdings are held under the same landlord. KULDIP SINGH *v.* CHHATUR SINGH RAY. **10 C. W. N. 285.**

46 *Ss. 20, 21, 86 & 88—Relinquishment by co-sharer tenant, effect of.*

The relinquishment by some of the several co-sharer tenants in favour of the landlord does not operate by way of enlarging the right of the remaining co-sharer tenants so as to entitle them to the entire holding. Such a case, not being expressly provided for by the Bengal Tenancy Act, or by any other enactment, must be decided according to the principles of justice, equity, and good conscience as laid down in s. 37 of the Civil Courts Act (XII of 1887) Kabil Sardar *v.* Chunder Nath Nag Chowdhury (I. L. R., 20 Cal. 590), referred to. The rule laid down in the case of Binad Lal Pakrashi *v.* Kalu Pramanik (I L R

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20 Cal 708) is based upon the assumption that the tenant entered upon the land and held under a *de facto* proprietor, who might not be the real owner, in good faith. Cases like that are exceptions to the general rule and are not applicable so as to create a new tenancy by possession by payment of rent where it is collusively made. Upendra Narain Bhatta charya *v.* Protab Chandra Pardhan (8 C. W. N. 320) referred to. PEARY MOHAM MONDAL *v.* RADHIKA MOHUN HAZRA, **8 C. W. N. 315**.

47 Ss. 20, 21—Right of occupancy—8 C. W. N. 601—*See Act XI of 1859 s. 37 No.* 45.

48 S. 20- See 1 C. L. J. 310 No. 6, 34 C. 516 No. 21 *supra*.

49 S. 21—Suit for ejectment by purchaser—Occupancy raiyat—Defence—Onus—10 C W. N. 497—*See Act XI of 1859 s. 37.*

50 *S. 21, 28—Raiyati holding—Subsequent zur-i-peshgi lease—Occupancy right, acquisition of.*

A *raiyat* by taking a *zur-i-peshgi* lease of land of which he was previously or then put in possession as a raiyat does not lose this *raiyati* status nor divest himself of his right to acquire a right of occupancy in his land. Bengal Indigo Co. *v.* Raghubar Das (I. L. R. 24 Cal. 272), Ram Khelawan Roy *v.* Sambhoo Roy (2 C. W. N. 758) does not lay down that proposition. RAMDHARI SINGH *v.* M. H. MACKENZIE, **10 C. W. N. 352**.

51 *S. 21 Ejectment, suit for—Cultivating raiyat—Leases, construction of—Occupancy right—accrues in what land.*

Under the provisions of S. 21 of the Bengal Tenancy Act, if a tenant is an accupancy or settled raiyat in respect of some lands in a village, he is entitled to possession as an occupancy raiyat of the whole of the lands he holds in the village, *provided* he *holds them* (that is, the lands other than those of which he is an occupancy or settled raiyat) as a raiyat. But if he holds them as a tenure-holder, his occupation of some lands as raiyat will not give him the rights of a raiyat in the other lands. BUJRANGI RAUT *v.* M. H. MACKENZIE. **7 C. L. J. 475.**

52 S. 21—See 5 C. L. J. 9, 10 C. W. N. 285, 8 C. W. N. 315, 8 C. W. N. 601 No. 44 to 57 *supra.*

53 *S. 22—'Or otherwise'*—Ejusdem generis—*Mortgage lien, if subsists.*

The words 'or otherwise' in S. 22 of the Bengal Tenancy Act, must be construed, '*Ejusdem generis*' and do not include the case of a holding reverting to the landlord on the failure of the tenant's heirs. (2 C. L. J. 570 foll).

In such a case the lien of a mortgagee to whom the tenant had mortgaged the holding, does not subsist, MUKTAKESHI DASI *v.* PULIN BEHARY SINGH. **8 C. L. J. 324 =13 C. W. N. 12.**

54 *S. 22 (2)—Landlord and tenant—Purchase of occupancy holding by co-sharer landlord—Termination of occupancy right.*

Held, (by the Full Bench, *Rampini, J.* *dissentient*) that the result of a purchase by a co-sharer landlord of the occupancy holding of a tenant will not be the termination of the tenancy right altogether, but only of his occupancy right in the holding. *24 Cal., 134 approved.* RAM MOHAN PAL *v.* SHEIKH KACHU. **1 C. L. J. 1= 9 C. W. N. 249=32 C. 386, (F. B.)**

55. S. *22 (3)—Acquisition of occupancy-right in a holding by a temporary lessee of the village—Occupancy-right, merger—Occupancy right, acquisition by purchase—Acquisition of occupancy right by statutory method.*

When the temporary lessee of a village purchases an occupancy-holding within the village during the term of his lease, the occupancy-right is not extinguished, but inures to his benefit even on the expiry of his lease.

Section 22 cl. (3) of the Bengal Tenancy Act only prevents the acquisition of occupancy-rights by an *ijaradar* or farmer of rent by the statutory method under the Act itself, but he can acquire such right by purchase. RAMRUR MAHTO *v.* H. HANNERS. **4 C. L. J. 209.**

56. S. *22, 45, 85 and 86, cls. (5) and (7): —Applicability of—Jotedar an under raiyat —Chukani raiyat—Surrender by raiyat of a part of holding—Landlord's right of re-entry without notice to quit—Notice to under-raiyat whether necessary.*

Plaintiff, a jotedar under the government let out a partition of his jote to a raiyat as a chukanidar, who again sublet a portion of his holding to the defendant, without the consent of the plaintiff, and otherwise than by a registered instrument. Subsequently the raiyat having surrendered the portion of his holding which he had sublet to the defendant, plaintiff brought this suit for recovery of khas possession.

Held, neither Section 22 nor Section 49 of the Bengal Tenancy Act applied to the case. The landlord was entitled to khas possession and no notice to quit was necessary. A jotedar under the government is not necessarily a proprietor of a permanent tenure holder within the meaning of S. 22 of the Bengal Tenancy Act. A raiyat under a jotedar cannot be regarded as an occupancy raiyat. A chukani right does not necessarily mean a right of occupancy. The terms 'transfer, succession or otherwise' in S. 22 do not mean and include a surrender. The expression 'or otherwise' as used in the section means or, in a similar way, S. 49 of the Bengal Tenancy Act refers to a suit ejectment brought by immediate landlord of the under raiyat and has no application to a suit like the present where the plaintiff is not such immediate landlord.

Held further, under S. 86, cl. 7 the whole or a part of a holding may be surrendered and there is no distinction in principle as to the landlord's right of re-entry under cl. 5 whether the surrender is of the

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entire holding or of a part of the holding. Even when surrender is of a portion or a holding there is no provision of the law, which makes it obligatory upon the landlord to serve a notice to quit upon the under raiyat before he can be ejected from such portions. BADACHANDRA DAS *v.* RAJESHWARI DEBYA. **2 C. L. J. 570.**

57 *Ss. 22, 49 (b) and 85 (2)--Under-raiyat, ejectment of--Notice to quit.*

If a landlord (permanent tenure-holder) purchases from his occupancy raiyat title and interest in the hoding by a deed of sale, he cannot, by virtue of such purchase, eject the under-raiyat, who was let into the land by the occupancy raiyat, without serving him a notice to quit under S. 49 (*b*) of the Act, even if the subletting was made without the landlord's consent and otherwise than by a registered instrument 28 C. 205 distd, 31 C. 932 app. AMIRULLA MAHOMED *v.* NAZIR MAHOMED. **3 C. L. J. 155=34 C. 104.**

58. *Ss. 22, 49 (b), 167--Ejectment--Under-raiyat--Notice--Trespass--Right of occupancy.*

An under-tenant who is not an occupancy raiyat, cannot be ejected by the landlord without the notice prescribed by Section 49 (*b*) of the Bengal Tenancy Act in order to take *khas* possession of the holding. 28 *Cal.*, 205 *distinguished.* AMIRULLAH MAHOMED *v.* NAZIR MAHOMED. **31 C. 932.**

59 *Ss. 22, 85, 167--Landlord and under-raiyat--Sublease given by a tenant without the landlord's consent--In a suit for khas possession by a landlord on purchase of a holding told for arrears of rent, whether necessary for he landlord to avoid the incumbrance so created.*

In a suit brought by the plaintiff (landlord) to recover *khas* possession of a holding, on the allegation that he had purchased it at a sale held in execution of a decree for arrears of rent obtained against the tenant, the defendant pleaded that he was an under-tenant with a right of occupancy, and that the plaintiff was not entitled to set aside the under tenancy, inasmuch as he did not proceed in accordance with the provisions of s. 167 of the Bengal Tenancy Act.

Held, that inasmuch as the subletting was otherwise than by a registered instrument, and without the landlord's consent, it was invalid as against him, and therefore it was not necessary for him to follow the procedure prescribed by s. 167 of the Bengal Tenancy Act. PEARY MOHUN MOOKERJEE *v.* BADUL CHANDRA BAGDI, **28 C. 205=5 C. W. N. 310**

60 S. 23—Agricultural purpose— Indigo-factory— Injunction restraining tenant from rendering land unfit for tenancy 31 C. 174—*See Col. 45 1. P. I.*

61 S. *23, 76 (2) (f). 77--Improvements--Masonry dwelling-house--Homestead land--Purposes of tenancy--Permanency, proof of--Injunction.*

An occupancy raiyat has a right to erect as a dwelling-house a building, consisting of masonry walls with a corrugated iron roof, on the site of his ancestral dwelling house within the homestead land of the holding; there is nothing in s. 23 and 76 of the Bengal Tenancy Act to prevent him from doing so. There is nothing in s. 76 of the Bengal Tenancy Act to indicate that a suitable dwelling-house of an occupancy raiyat as described in the section must be of a temporary description only. Nyamatoollah Ostagor *v.* Gobind Churn Dutt, 6 W. R. (Act X) 40, followed. Prosunno Coomar Chatterjee *v.* Jagun Nath Bysack, (10 C. L. R. 25) referred to; Anund Coomar Mookerjee *v.* Bissonath Bannerjee (17 W. R. 416) and Beni Madhab Banerjee *v.* Jai Krishna Mookerjee, (7 B. L. R. 152, 12 W. R. 495) distinguished). HARI KISHORE BARNA SARMA *v.* BARADA KISHORE ACHARJYA CHOWDHURI, **31 C. 1014=8 C. W. N. 754.**

62 *S. 25, 178—Landlord and Tenant—Denial of title—Forfeiture--Decree of Court.*

Where the denial by tenant of his landlord's title is followed by a decree of Court affirming such denial, such denial operates as a forfeiture and the landlord is entitled to *khas* possession of the land by ejectment of the tenant. 2 W. N. Cal., 755; 6 W. N., Cal., 575 followed. 17 Cal., 196; 2. C. L. J. 389 distinguished. RAMGATI MOHURER *v.* PRAN HARI SEAL. **3 C. L. J. 201.**

63 *Ss. 25, 155—Ejectment, suit for claim, extent of—Portion or whole—Transfer of a portion of an occupancy holding—Forfeiture.*

In a suit instituted by a landlord under S. 155 of the Bengal Tenancy Act for ejectment on the ground that the occupancy raiyat has used the land in a manner which has rendered it unfit for the purposes of the tenancy within the meaning of S. 25 of the Act, the claim must include all the lands comprised in the tenancy. If the claim is limited to a protion of the land *e.g.*, the portion covered by a building the erection of which is complained of, the suit is badly framed and must fail. The transfer by an occupancy raiyat of a portion of his holding does not effect a forfeiture of his tenancy if he continues in occupation of the remainder and although the landlord may be entitled to a declaration that the transfer is not binding upon him, he is not entitled to maintain an action in ejectment either against the transferor or the transferee. RAI KUMALESWARI PROSAD SINGH BAHADUR *v.* MAHARAJA HARBULLABH NARAIN SINGH BAHADUR. **2 C. L. J. 369.**

64 S 26—See 34 C. 516 No 21 *supra.*

65 S. 28—*See 10 C. W. N. 351 No. 50 supra.*

66 S. 29--*Suit to set aside a kabuliat--Enhancement of rent by contract--Consideration for such contract--Agreement to pay enhanced rent in settlement of bonâ fide disputes.*

An agreement embodied in a *kabuliat* to pay a certain amount of rent agreed

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upon by the parties in settlement of *bona fide* disputes regarding the rate of rent and to avoid further litigation, is not an agreement in violation of the terms of section 29 of the Bengal Tenancy Act. *Sheo Sahey Pandey* v. *Ram Rachia Roy*. (I. L. R. 18 Cal., 333), followed. NATH SINGH *v.* DAMRI SINGH, **28 C., 90.**

67 S. 29--*Second appeal--Question of law --Enhancement of rent*--Bhaoli--Nakdi--*Evidence.*

Enhancement of rent under the Bengal Tenancy Act must mean an enhancement of the same kind of rent. A conversion of *nakdi* into *bhaoli* therefore cannot be regarded as an enhancement within the meaning of section 29 of that Act. Where the Subordinate Judge left out of account an important portion of the evidence relied upon by the plaintiffs.

Held, that this was an error of law and a ground of second appeal to the High Court. HASSAN KULI KHAN *v.* NAKCHHEDI NONIA. **33 C. 200.**

68 *S. 29, Cl. b, Proviso (i)—Enhancement of rent—Average rate of rent—Registered kabuliat.*

Proviso (*i*) to section 29 of the Bengal Tenancy Act does not control clause (*b*) of that section. The landlord of an occupancy raiyat cannot, therefore, recover rent at the rate at which it has been paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed, if such rate exceeds, by more than two annas in the rupee, the rent previously paid by the raiyat. *Mothura Mohun Lahiri* v. *Mati Sarkar* (I. L. R., 25 Cal. 781), so far as it decides to the contrary, was wrongly decided. The rate contemplated by proviso (*i*) is not the average rate. BIPIN BEHARI MANDAL *v.* KRISHNADHAN GHOSE. **9 C. W. N. 265 =1 C. L. J. 10=32 C. 395 (F. B.).**

69 S. 29 (b), proviso (3)—Whether evidence as to improvements admissible. 33 C. 607—*See* Col. 197 P. I.

69 (2) S. 29--2 C. L. J. 540 No. 76 *infra.*

70 *Ss. 30, 50, 181—Enhancement of rent, suit for—Ghatwali Chakran lands—Resumption by Government—Transfer to Zemindar —Settlement, fresh from Zemindar--Presumption—Occupancy raiyat--*

Where there is no Ghatwali tenure in existence it having been resumed and where there has been none at least for some years before the institution of the suit, no question arises as to any provision of the Bengal Tenancy Act affecting the incidents of a Ghatwali tenure and Section 181 of the Act has no application. In order to make the rule in Section 50 of the Act applicable to a case two conditions must be satisfied, viz., first, that the suit is one under the Bengal Tenancy Act and secondly that the raiyat and his predecessor in interest have held at a rent which has not been changed during the twenty years, immediately preceding the institution of the suit. There is nothing in the nature of a Ghatwali tenure to shew that as long as such a tenure existed, the presumption under s. 50 of the Bengal Tenancy Act could not by reason of S. 181 of the Act arise.

Semble:—If with reference to raiyat holding under a ghatwal the presumption embodied in S. 50 (2) of the Bengal Tenancy Act be applied that does not in any way effect any incident of the ghatwali tenure, S. 50 merely embodying a rule of evidence and raising a rebuttable presumption. GOURIKANTA *v.* RAM GOPAL. **2 C. L. J. 379.**

71 *Ss. 30, 52—Joinder of causes of action.*

There is nothing in the law which prevents one suit being brought for enhancement under S. 30 and for increase of rent under S. 52 of the Bengal Tenancy Act. The two causes of action may be joined in one suit. SARADA CHARAN CHATTERJEE *v.* ISWAR SAMLI. **11 C W N 1154.**

72 *Ss. 30, 37, 50, 52, 115*--Res judicata--*Presumption as to status from uniform payment of rent, after record-of-rights published--Suit for increase of rent for increased area--Civil Procedure Code (Act XIV of 1882) S. 13*—Res judicata.

Where, after an entry in the record-of-rights that the tenant is an occupancy raiyat the landlord brought a suit for enhancement of rent

Held, that, notwithstanding the provisions of S. 115 of the Bengal Tenancy Act, the tenant was entitled, upon proof of uniform payment of rent for 20 years, before the record-of-rights was framed, to the benefit of the presumption under sub-sec. (2) of section 50.

That the word "thereafter" in S. 115 refers to a period subsequent to publication of the record-of-rights.

A suit for assessment of additional rent on the same additional area which formed the subject matter of a previous suit, is barred as the decision in the previous suit operates as *res judicata*. MAHARAJA RADHA KISHORE MANIKYA BAHADUR *v.* UMED ALI. **12 C. W. N. 904.**

72 (a) S. 30—*See* 31 C. 960, No. 41 *supra.*

72 (b) S. 37-12 C. W. N. 904, No. 72 *supra.*

73. *S. 38, 52—Abatement of rent of portion of which tenant did not obtain possession—Bengal.*

When in a suit for rent a tenant who did not obtain possession of a portion of the lands let out to him, pleaded that he was not bound to pay rent of that portion.

Held,--that he was entitled to say so and it was not necessary for him to bring a separate suit for abatement of rent.

That a suit under S. 38 and 52 of the Bengal Tenancy Act was not necessary, as those sections do no apply where the tenant has never been put into possession by the landlord. SIBA KUMARI DEBI *v.* BIP-

Bengal Act (VIII of 1885) *(Contd.)*

RODAS PAL CHOWDHURY. **12 C. W. N. 767.**

74. *S. 45, 49—Notice to quit to under raiyat.*

In this case the notice to quit to the defendant, the under-raiyat was served in Pous 1303, and though he was required to quit in Bysak 1304, yet the suit for ejectment was not instituted against him till the 1st of Bysak 1305.

Held, that the defendant was liable to ejectment notwithstanding the terms of the notice served on him. *1 C. W. N. 133 followed—6 C. W. N. 69, distinguished.*

The law does not require that the notice should be actually signed by the landlord. It is sufficient if the notice is at the instance of the landlord calling upon the under riayat to quit the land. It is quite immaterial whether the notice is actually given by the landlord himself or at his instance, provided that the notice signifies to the under-raiyat that the landlord has called upon him to quit the land. MOHENDRA NATH SARKAR *v.* BISWA NATH HALDAR. **6 C. W. N. 183=29 C. 231.**

75 *S. 48 (a) Under-raiyat—Limit of rent —Retrospective effect.*

The provisions of s. 48, cl. (*a*) of the Bengal Tenancy Act are retrospective and apply to a tenancy created before the passing of that Act. Guru Dass Shut *v.* Nand Kishore Pal (I. L. R., 26 Cal., 199) followed. BABALUDDIN MAHOMED *v.* DWARKA NATH SINGHA, **28 C. 166.**

76 *S. 48, 29, cl. (6), 85, Sub-S. (2)—Contract for rate in excess of the maximum prescribed, validity of.*

A contract for a rate of rent in excess of the maximum rate prescribed is not wholly void but nothing in excess of the prescribed rate can be recovered. Such a contract is different from the one contemplated by s. 29 (6) and S. 85 sub-section (i) of the Bengal Tenancy Act—SITANATH MIDDA *v.* BASHDEB MIDDA. **2. C. L. J. 540.**

77 *S. 49.*

When a noitce to quit was addressed to four persons, *held* that it was not sufficient that the service was effected personally on them. In such cases Rule 3 of Chapter I of the Rules made by the Bengal Government, dated the 21st December, 1885, must be complied with. TAMASHABIBI *v.* MATHURA NATH BHOWMIK. **28 C. 590=6 C. W. N. 67**

78 S. *49—Heritability.*

The heirs of an under-raiyat under an annual holding do not acquire an interest in his holding by inheritance The only right which they have, irrespective of custom or local usage, is to remain in possession of the land, until the end of the agricultural year, for the purpose of either realising the rent, which might accrue during that year, or for the purpose of tending and gathering in the crops 8 C. W. N. 479 expl. JAMINI SUNDRI DASI *v.* RAJENDRA NATH CHUKRABUTTY. **11 C. W. N. 519.**

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79 *S. 49, (b)—Permanent lease by a raiyat void—Purchaser of transferee rights, right of—Suit by transferee—Defence no title—Validity of defence.*

A raiyat granted a permanent sublease and an assignee of the interest of the under-raiyat sublet to the plaintiff. Plaintiff was dispossessed by the purchaser of the right, title and interest of the raiyat at a sale in execution of a decree and brought a suit to recover possession from the latter.

Held, that the plaintiff could not succeed except on proof of title and the permanent lease being invalid under S. 85, Bengal Tenancy Act, plaintiff had no title, That not being a defendant resisting a suit for eviction plaintiff could not, on the ground of mere prior possession, claim the protection afforded by the provision of S. 49 (*b*) of the Bengal Tenancy Act to an under-raiyat with a *bona fide* subsisting tenancy whose permanent lease is void and cannot be put in evidence. 6 C. W. N. 916 dist. RAMGHATI MANDUL *v.* SHYAMA CHARAN DUTT **6 C W N 991.**

80 *S. 49 (b) —Written lease—Meaning of.*

The expression "written lease" in Cl. (*b*) of S. 49 means such a lease as is mentioned in Cl. (*a*) *i.e.*, a little lease defining the terms of the tenancy. KOMARUDDI *v.* SREENATH CHOWDHRY. **8 C W N 139.**

81 *S. 49 (b)—Written lease, meaning of.*

The words " written lease " in cl. (*b*) of S. 49 of the Bengal Tenancy Act, mean a written lease for a fixed term of years. Komaruddi *v.* Sreenath Chowdhury, (8 C. W. N. 136) ; Mohendranath Sepai *v.* Purbutty Charan Das (8 C. W. N. 136), followed, Madan Chandra Kapali *v.* Jaki Karikar, (6 C. W. N. 377), not relied upon. IDUGAZI DOCTOR *v.* CHANDRAKALI SUNDRANI. **8 C. W. N. 139.**

82 *S. 49, Cl. (b)—Notice to quit—Mention of the time within which tenant is to quit—Necessity for—Notice to quit in the early part of a year, validity of.*

S. 49 Cl. (b) of the Bengal Tenancy Act does not require that the notice should mention any particular time within which the under-raiyat is to quit the land. A notice requiring the tenants to quit at the early part of a year is still good notice, though they are entitled to stay till the end of the year, 1 C. W. N 133 foll. DWARKANATH SANTRA *v.* RANI DASSI. **28 C. 380.**

83 *Ss 49 (b) and 85—Lease by under-raiyat —Ejectment.*

Under S. 49 of the Bengal Tenancy Act an under-raiyat can be ejected on the ground of the expiration of the time of a written lease—or by a notice to quit, if he holds otherwise than under a written lease. But if he holds under a written lease an indefinite time, he (raiyat lessor) cannot eject him arbitrarily. He can only do so for non-payment of the rent.

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Section 85 (3) has no application to under-raiyats; clause (3) is not intended to prescribe an additional ground on which under-raiyats can be ejected. MADAN CHANDRA KAPALI *v.* JAKI KARIKAR. **6 C.W.N. 377.**

84. *S. 49, 85—Lease to an under-raiyat—Settlement without any fixed terms—Effect of registration of such a lease.*

Settlement by a raiyat to an under-raiyat without any fixed term under a registered lease must be, for the purpose of S. 49 of the Bengal Tenancy Act, construed to be an ordinary lease from year to year. If a document be registered in contravention to the express provision of S. 85 (2), it is void and it must be dealt with as non-existing. Srikant Mondul *v.* Saroda Kant Mondul, (I. L. R., 26 Cal. 46), Fazil Shaikh *v.* Karimuddi Shaikh (6 C. W. N. 916), and Gopal Mondul *v.* Eshan Chunder Banerjea, (I. L. R., 29 Cal. 148), referred to. But the lease not being expressly for a period exceeding nine years is void, if the indefinite period in the lease had the effect of creating a lease from year to year. Madan Chunder Kapali *v.* Jaki Karikar, (6 C. W. N. 377), referred to and dissented from. S. 49 *(b)* must be read as covering the case of a written lease without a term of years. Kamaruddi *v.* Sreenath Chowdhury, (8 C. W. N. 136), followed.—MOHENDRA NATH SEPAI *v.* PARBUTTY CHARAN DAS, **8 C. W. N. 136.**

85. *S. 49, 85 (2)—Permanent lease by an occupancy* raiyat*—Registration Act (III of 1877), Section 17—*Kaimi.

The defendant No. 1, an occupancy tenant, executed and registered a permanent lease of his holding in favour of the defendant No. 2. About two years after the plaintiff, in execution of a money decree, purchased the right, title and interest of the defendant No. 1, but when he went to take possesion of the land, he was resisted by defendants No. 1 and 2. The plaintiff sued for a declaration of his title and for eviction of the defendants. The claim was decreed and the appeal against the decree was dismissed. It was contended, on behalf of defendant No. 2 on second appeal (1), that section 85 of the Bengal Tenancy Act was not correctly interpreted by the Lower Courts; (2) that the plaintiff was the representative in interest of the defendant No. 1, and was therefore estopped from questioning the validity of the lease to the appellant; (3) that as the holding purchased by the plaintiff was a *kaimi* one, the defendant No. 1 was empowered to make a permanent assignment to the appellant, under the provisions of sections 18 and 11 of the Bengal Tenancy; and (4) that the appellant was not a trespasser but an under-*raiyat*, and was not liable to eviction except under the provisions of section 49 (6) of the Bengal Tenancy Act.

Held, that there was no validity in any of the first three contentions; the document of title on which the appellant relied was altogether void, having regard to the provisions of section 85 of the Bengal Tenancy Act. No such sub-lease purporting to create a term exceeding nine years could be admitted to registration since the passing of the Bengal Tenancy Act. The document having been regsitered contrary to the provisions of section 85 (2) of the Bengal Tenancy Act must be regarded as unregistered.

Since the appellant had been let into land in perfect good faith long before the plaintiff's auction purchase and, as a matter of fact, was in possession as an under-*raiyat* for a period of about three years previous to suit, he was not a trespassor but must be regarded as an under-*raiyat* holding otherwise than under a written lease inasmuch as his written lease was void in law, he could not be evicted except after service of notice: as prescribed by clause 6 of section 49 of the Bengal Tenancy Act.

A tenant can prove his tenancy without proving his lease if he has one which is inadmissible for want of registration.

Held, also that the word *'kaimi'* does not import fixity of rent, and sections 18 and 11 of the Bengal Tenancy Act were not applicabe to the holding in question. FAZEL SHEIK *v.* KERAMUDDI SHEIKH **6. C. W. N. 916.**

86 S 49—See 8. C. W. N. 455 No 22. C. L. J. 570 No 56, 34 C. 104 No 57, 31 C. 932 No 58, 29 C. 231 No 74 *supra.*

87 *S. 50.—Presumption—Suit for ejectment on the ground of transfer of a non-transferable holding—Proceeding under the Act.*

A and B were tenants under X in respect of a non-transferable holding which they sold to C. X sued to eject A, B and C. C. alone defended the suit and pleaded that the holding purchased by him was transferable as his vendors were *raiyats* at fixed rates. The Court below found that rent had been paid at a uniform rate for 20 years and applying the presumption mentioned in section 50 of the Bengal Tenancy Act, concluded that the rent was fixed in perpetuity.

Held, that the suit was one for ejectment of a person alleged to be a trespasser and was not a proceeding under the Bengal Tenancy Act and consequently section 50 had no application. SARAT CHANDRA GHOSE *v.* SHYAM CHAND SINGHA. **10 C. W. N. 930.**

88 *S. 50--Transfer of tenancy--Rent paid by purchaser--Recognition of transfer by landlord--Dakhila.*

On the face of the plaint the suit was for the recovery of possession against certain persons alleged to be trespassers. The defendants claimed to be tenants.

Held, that until the fact of the tenancy was proved independently of s. 50 of the Bengal Tenancy Act, the suit could not be

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regarded as one under that Act and s. 50 would have had no application whatever. The application of s. 50 is limited to a suit or proceeding under the Bengal Tenancy Act. Nilmani Maitra *v.* Mathura Nath Joardar (4 C W N clix) followed.

Held, also that where a tenancy had been transferred and the Dakhilas granted by the landlord showed the name of the old tenant under the heading "tenant's names" and also the name of the purchaser as *sarbarahakar*, it could not be said, merely by this fact, that the transfer had been recognized by the landlord. The mere fact of rent having been received from a certain person does not amount to a recognition by the landlord of that person as tenant. Ismail Khan Mahomed *v.* Kali Krishna Mandal (6 C. W. N. 134) relied on. Ram Gobind Ray *v.* Dushaobhooji Debee, (18 W. R. 195) distinguished RASAMOY PURKAIT *v.* SRINATH MOYRA, **7 C W. N. 132**

89 S. *50—Land Acquisition Proceeding—Apportionment of compensation between landlord and tenant—Presumption of permanency of holding.*

Although S. 50 of the Act does not apply when the question of permanency or otherwise of tenure arises in a proceeding for the apportionment between landlord and tenant of money awarded for compulsory purchase of land, the principle involved in that section is a useful guide to the Courts in deciding it. NUNDA LAL GOSSAMI *v.* ATARMANI DASSI, **12 C. W. N. 432=36 C. 463**

90 *S. 50 (2)—When presumption applies*

The presumption referred to in S. 50 (2) of the Bengal Tenancy Act arises only in suit brought under the provisions of that Act alone.—NILAMANI MAITRA *v.* MATHURA NATH JOARDAR. **5 C. L. J. 413.**

91 *S. 50, Cl. (2)—Uniform rent—Presumption—Proof from particular year.*

Where a tenant has paid rent for over twenty years prior to the date of suit at a unifrom rate which has not changed, the presumption of law under S. 50 Cl. (2) of the Bengal Tenancy Act would arise if there is no allegation or proof that a tenancy commenced in a particular year after the permanent settlement. The mere fact that the tenant shows by documentary evidence that the rate of rent has not changed from a particular year would not preclude him from the benefit of the presumption given by Cl. (2) of S. 50.—SHEIKH MONGALA *versus* MAHARAJA KUMUD CHANDER SINGH BAHADUR. **5 C W N 60.**

92 *S. 50 (2)—Acquisition Act (I of 1894)—Landlord and tenant—Permanent tenancy—Apportionment of compensation.*

Sub-section 2 of section 50 of the Bengal Tenancy Act only applies to a suit or proceeding under that Act and does not apply to a case for the award of compensation for land acquired by Government.

Bengal Act (VIII of 1885) *(Contd.)*

The principal upon which the compensation money awarded for land acquired by Government ought to be apportioned, as between the landlord and tenant, is as follows:—

First, the Court must ascertain the amount of rent payable to the landlord and capitalize that rent at so many years' purchase, the number of the years' purchase depending upon that particular circumstances of such particular case. The landlord is at the outset entitled to that capitalized value and to something more. There is, or in many cases may be, the chance of an enhancement of the then existing rent, he is entitled to have the value of this chance of enhancement assessed and to have a money value put upon it, and to take that money value out of the compensation awarded. It may in some, perhaps in many cases, be somewhat difficult to arrive at the true capitalized value to the landlord of this chance of enhancement but it will be for the landlord, who sets up such a claim, to make it out, and show what the true value is. The landlord cannot be entitled to any thing more. When the rent is fixed in perpetuity no question of the chance of enhancement arises. 1 *Marshall's Reports p.* 490,—20 *W. R.* 370, 7 *Cal.*, 585, 17 *Cal.*, 144, 3 *C. W. N.*, 202, 28 *Cal.*, 146 *referred to.*—(KUMAR) DINENDRA NARAIN ROY *v.* TITURAM MUKERJEE. **7 W. N. C., 810 =30 C., 810.**

93. *S. 50, 52—Enhancement of rent. Suit for—Enhancement. Grounds of exemption from—Onus—Report of Commissioner not challenged in the first Court, should be accepted as correct.*

When a tenant claims exemption from enhancement of rent, under section 50 of the Bengal Tenancy Act, the *onus* lies on him to prove that he has held the tenure at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, or for 20 years or more preceding the suit.

When the report of a commissioner as to the prevailing rate of rent was not challenged by either side in the first Court, and was acted upon by it without further corroborative evidence, the Lower Appellate Court ought not to have gone behind that report and examined the materials on which the report was founded and come to a different finding, without allowing the parties opportunity to adduce evidence in support of or to rebut it. GOVINDA PRIYA CHOWDHURANI *v.* RATAN DHUPI. **4 C. L. J. 37.**

94. S 50—See 2 C. L. J. 379 No. 70, 12 C. W. N. 904 No. 72 *supra.*

95 *S. 51—Suit for* bhowli *rent—Previous judgment between the parties allowing* nakdi *rent, whether res judication—Record of rights, subsequent to the previous judgment, entry in, effect of*

Decision in a previous rent suit as to the amount of rent payable does not operate

Bengal Act (VIII of 1885) (*Contd*).

as *res judicata* in a suit for rent of subsequent years, although it may give rise to a presumption under S. 51 of the Bengal Tenancy Act (6 C W N 539 ref., 32 C 336 Diss.)

The same principle should be applied to the question whether a tenant held at *bhowli* or *nakdi* rent for a particular period.

When a conflict arises as to the rate of rent, between that allowed by a previous decree, and that entered in the record of rights subsequently prepared, both are to be considered together and weighed against each other.

Record of rights under Chapter X of the Bengal Tenancy Act are prepared with considerable formality, and the proceedings of the Revenue officers are conducted with publicity. Entries in such records should not be lightly discarded. KALI ROY *v.* PRATAB NARAIN, **5 C. L. J. 92**.

96 S. 51—Encroachment by tenant—Adverse possession of a limited interest. 2 C. L. J. 125 Col. 1905. P. I.

97 *S. 52—Additional rent—Consolidated rent fixed for entire tenure.*

A landlord cannot successfully claim additional rent under section 52 of the Bengal Tenancy Act, in respect of an excess of area, unless he can satisfy the Court that the rent originally fixed did not cover, and was not intended to cover, such excess of area.

Where a confirmatory patta fixed a certain rent as the rent payable for two entire villages and not for any definite area, held, that the tenure was not liable to have any additional rent assessed thereupon. The expression "the area for which rent has been previously paid" in sub-section (1), clause (*a*) of section 52 must be understood to mean the area with reference to which the rent previously paid had been assessed or adjusted. RAJENDRA LAL GOSWAMI *v.* CHUNDER BHUSAN GOSWAMI. **6 C. W. N. 318**.

98 *S. 52—Landlord and Tenant—Enhancement of rent on the ground of increase of area—Burden of proof.*

The plaintiffs, landlords, brought a suit for enhancement of the rent paid by the defendants, tenants, on the ground of an increase in the area of the holding. It appeared that the defendants were holding the same lands without any variation in the boundaries and it was not known whether the rent was a consolidated rent or not.

Held, that in the absence of proof as to the area originally leased to the defendants, or their predecessors, the plaintiffs were not entitled to enhance the rent. The plaintiffs were bound to prove facts and circumstances showing that there was some reason not within the contract of the landlord, for additional lands being included in the holding of the defendants. 20 Cal. 579, 6 W. N. Cal. 318 referred to. RATAN LAL BISWAS *v.* JADU HALSANA. **10 C. W. N. 46**.

99 *S. 52—Additional rent for excess lands, when allowable—S. 109, cl. (3)—Appeal—Decision settling rent.*

A landlord is entitled to additional rent for excess lands, only when he shows (*a*) what the quantity of land was at the inception of the tenancy, (*b*) that the rent was settled with reference to the area, (*c*) that no consolidated rent for the entire area let out was settled, and (*d*) that the quantity of land held at the time of suit is in excess of that originally let out.

Where the decision of the Judge does not settle a fair and equitale rent, but merely proceeds on the ground that there was no excess land and, therefore, no rent to be settled, an appeal lies (4 C. L J 133) Dist. RAJKUMAR PRATAP SAHAY *v.* RAM LAL SINGH, **5 C L J 538**.

100 *Ss. 52, 90, 188—Suit for increased Rent and Measurement—Joint Landlords—Estoppel.*

R held certain lands as a *mokuraridar* under the plaintiff, out of which he granted, in 1874, a *dar maurasi lease* to M in respect of about 375 bighas. Some of the terms of the *dar maurasi* lease were that M should pay rent not to R, but direct to the zemindar and that should pay rent on account of the excess land @ As. 14 per bigha out of which As. 12 was to go to the zemindar and As. 2 to R. M's name was duly registered in the zemindar's *sherista* as tenant. On a suit being brought by the zemindar for the measurement of the land and increased rent

Held, that the plaintiff, having been accepted by M. as the landlord, had a right under s. 90 of the Bengal Tenancy Act to bring the suit for measurement of land.

Held also that though under the terms of the lease both the plaintiff and the *mokuraridar* R were the landlords of M, they were not joint landlords as contemplated by s. 188, inasmuch as they collected rent separately. Hence it was not necessary for the plaintiff to have made R a party.

Held further that the *kabuliat* having been executed before the passing of the Bengal Tenancy Act, s. 52, 188 of that Act did not apply to the case. Punchanan Banerjee *v.* Raj Kumar Guha (I. L. R., 19 Cal. 610) and Tejendra Narain Singh *v.* Bakai Singh (I. L. R. 22 Cal. 658) followed. MATUNGINI *v.* RAM DAS MULLIK, **7 C. W. N. 93**.

101. *S. 52, 154—Additional rent for excess land—Back rent—Suit for rent.*

There is nothing in the Bengal Tenancy Act to prevent the landlord from claiming back rents for any additional area under S. 52 of that Act, if such additional area was in the use and occupation of the riayat, provided the period for which the claim is made is within that prescribed by the law of limitation.—JAGANNATH MANJHI *v.* JUMAN ALI PUTWARI, **29 C. 247**.

102 Ss. 52, 178, 179—Mokarri lease—Abatement of rent—Diluvion—9 C. W. N. 886 Col. 14 P. I.

Bengal Act (VIII of 1885) (*Contd.*)

103 Ss. 52, 178, 188—*Suit for rent of land found by measurement to be in excess—Co-sharer—Landlord—Kabuliat.*

The plaintiffs, as owners of an undivided share in certain property, held jointly with another, sued for arrears of rent on their share and also for assessment to be in excess of the lands on which rent was admitted in a *kabuliat*, executed by the defendants to be payable to them in respect of their share. In this *kabuliat*, on which the suit was based, the right of the plaintiffs to certain rent, and also to additional rent for lands found, on measurement, to be in excess of the area stated, was admitted. The right of the plaintiffs and the liability of the defendants were distinctly set out as the basis of the agreement between the parties without any reference to the right of any other co-sharer landlord.

Held, that section 188 of the Bengal Tenancy Act was no bar to the suit, which, therefore, was maintainable without making the other co-sharer a party to it. The right was given to the plaintiff by the *kabuliat*, and it was on that *kabuliat* that the suit had been brought. Section 188 does not affect this right unless the right to make such an agreement is otherwise forbidden by the Bengal Tenancy Act. Section 178 which is the only section which deals with the full action of landlords and tenants in the matter of contract, does not refer to such a matter. *Baidya Nath De* v. *Jhin* (I. L. R. 25 Cal. 917) distinguished. GOBIND CHANDRA PAL *v.* HAMIDULLAH BHUIAN. **7 C. W. N. 670.**

104 *S 52*—See 11 C. W. N. 1154 No. 71, 12 C. W. N. 904, No. 72, 12 C. W. N. 767, No. 73, 4 C. L. J. 37, No. 93, *supra.*

105 *Ss. 54, 61, 67—Tender of rent—Refusal,—Deposit in court not essential to stop interest.*

Held by a majority (*Rampini, C. J., & Mitra J*, dissenting) that "to stop interest on rent running in a case governed by the Bengal Tenancy Act a tender of rent which is improperly refused need not be followed up by a deposit of rent in Court under s. 61 and such a tender, if kept good, is sufficient to stop interest running from the date of the tender. KIRPA SINDHU *v.* ANAND SINDHU **11 C. W. N. 983**=6 C. L. J. 273= **35 C. 34.**

106 Ss. 55, 107, 109, 109 (a), 192—Payment of rent—Appropriation—Settlement of rent how made—Settlement affirmed by special Judge—Resjudicata—Contract Act S. 59, (the provisions of section 55 B. T. A. and S. 59 Contract Act compared and discussed. *See Col. 313 P. B.*

Where, by an arrangement between the landlord and the tenant, the latter paid a certain sum annually to Government on behalf of the former

Held that there was no appropriation of the amount so paid each year to the rent of that year within S. 55, Bengal Tenancy Act.

Quære: Whether, under S. 192, Bengal Tenancy Act, a Settlement Officer can settle the rent payable by the tenant to the landlord, except upon the application of the landlord or the tenant.

Where a tenant, in his appeal before the Special Judge against an order for the settlement of rent purporting to have been made under S. 192 of the Bengal Tenancy Act, did not take the objection that the settlement of rent was made contrary to the provisions of that section and without jurisdiction—and the decision of the Settlement Officer was affirmed by the Special Judge.

Held that the matter was *res judicata* and could not be re-opened in the Civil Court, owing to the operation of Ss. 107, 109 and 109A of the Bengal Tenancy Act, MOHIM CHANDRA ROY *v.* SRIMATI KALITARA DEBYA. **11 C. W. N. 939.**

106 (a) S. 55, 65—6 C. W. N. 794, No. 123 (*a*) *infra.*

107 *S. 58—Landlord and tenant—Rent receipts. Failure to prepare and retain—Jurisdiction of Magistrate—Trial—Procedure.*

A Magistrate has jurisdiction to try a landlord for the act specified in section 58 (3) of the Bengal Tenancy Act, namely, failure to prepare and retain counterfoils of rent receipts. But the trial of such an offence must be conducted with the ordinary procedure.

When the Magistrate convicted a landlord under section 58 (3) of the Bengal Tenancy Act, after examining him on oath but without recording evidence for the prosecution and the plea of the accused, relying upon an admission alleged to have been made by the accused, and recorded in a report written by a police officer in another case—

Held, that the procedure adopted by the Magistrate was wholly irregular and the conviction must be set aside. EMPEROR *v.* MOHUNT RAMDAS. **9 C. W. N. 816.**

108. *S. 58, 39, 67—Interest—Rent.*

The word "rent" does not necessarily include interest; so, if any sum of money be paid by a tenant to a landlord as rent, and the latter receives it as such, he cannot be permitted to apply that money towards any interest, which might then be due. 25 C. 571 and 22 C. 575 ref. BHAGABATI DEBYA CHOWDHURANI *v.* BASANTA KUMARI DEBI, **5 C. L. J. 69**= **11 C. W. N. 110.**

109. *S. 60—Suit for rent.*

When a registered proprietor sues a tenant for rent, the latter cannot raise a plea that the rent is payable to some third person who is not a registered proprietor.—SADHU CHARAN PAL *v.* RADHIKA MOHAN RAY. **8 C. W. N. 695.**

109 a. S. 59—See 11 C. W. N. 110 No. 108 *supra.*

110. S. *60—Registered proprietor, suit for rent by—Tenant's defence on ground of title—Admissibility—Title upon which registration obtained declared void by Court.*

Bengal Act (VIII of 1885) (*Contd.*)

S. 60 of the Bengal Tenancy Act does not preclude a tenant defendant from proving that the title under which the plaintiff claims to hold and in respect of which he has been registered under the Land Registration Act has been held by a Court properly constituted to be void and of no effect.

Where this was proved, *held*, that this was a good defence to the suit. GIRISH CHANDRA CHONGDAR *v* SATISH CHANDRA SARKAR, **12 C. W. N. 622.**

111. S. 60—5 C. W. N. 482. See Bengal Act VII of 1876 S. 55 No. 7,

112. *S. 61.*

The statutory provision for deposit of rent, under S. 61 of the Act, does not take away the effect of a tender validity made and kept good. (5 C. L. J. 192 ref.) JAGAT TARINI DASI *v.* NABAGOPAL CHAKI. **5 C. L. J. 270=34 C. 305.**

113 *Ss. 61, 63—Deposit of rent—Omission to sue for the rent of the period between deposit and suit, effect of.*

Deposit of rent under the Bengal Tenancy Act (VIII of 1885), Section 61, must be treated as equivalent to part payment. Notice of deposit under Section 63 of the Act does not give a fresh and independent cause of action in respect of the balance then due. In a suit for such balance, the landlord is obliged, under Section 43 of the C. P. C., to include a claim for all arrears of rent due at the time of institution. ATEEL KRISHNA GHOSE *v.* NRIPENDRA NARAIN GHOSE. **1 C. L. J. 114.**

114 Ss. 61, 67—Suit for cancellation of putni—Subsequent suit for rent—Interest on arrears of rent—7 C. W. N. 720 Col. 931 P. I.

115 *S. 61, Sch. III, Art. 2 (a)—Deposit of rent—Notice of deposit on one of several joint landlords, effect of—Limitation.*

Service of notice on one of the landlords of the deposit of rent under S. 61 of the Bengal Tenancy Act (VIII of 1885) has not the effect of reducing the period of limitation to six months as provided in art. 2 (*a*) of Sch III of the Act, if there are co-sharer landlords jointly and severally entitled to the rent.—RUP CHAND MAHTON *v.* GURDAN SINGH, **6 C. W. N. 15=29 C. 283.**

116 *Ss. 61, 182—Deposit of rent in Court —Dispute between rival landlords.*

This was a suit for rent of a plot of homestead land, in the occupation of the defendant, who was also a raiyat of the village but under a different landlord. There being a dispute between the two rival landlords as to who was entitled to the rent of the homestead land, the defendant deposited the rent in Court under S. 61 of the Bengal Tenancy Act.

Held, that the deposit was rightly made and the suit should be dismissed, S. 182 being applicable to the case.

Per Ghosh J.: The deposit having been made in fact, the question whether S. 182 applied to the case or whether the deposit was rightly made, need not be gone into. It was now only to be decided as to who was entitled to the amount deposited. Hence the suit should be dismissed. PROTAP CHANDRA DAS *v.* BISESWAR PRAMANIK, **9 C. W. N. 416.**

117 S. 61—35 C. 34 No. 105 *supra.*

118 S. 63—1 C. L. J. 114 No. 113 *supra.*

119 S. 65—Ticcadar—*Lease—Rent—Execution proceedings.*

A *ticcadar* on the expiry of his lease obtained a decree against a tenant for rent, which fell due during the pendency of his lease. In execution of this decree, the tenure was sold and purchased by A. The landlord obtained a decree, for rent for subsequent years against the same tenant. In the proceedings in execution taken on the decree obtained by the *ticcadar*, the landlord decree-holder put in an application stating that he had obtained a decree for arrears of rent for later years. Subsequently the landlord took out execution of his decree and had the tenure put up to sale. A then intervened objecting to the sale of the tenure.

Held, that under section 65 of the Bengal Tenancy Act, rent being a first charge on the tenure, that first charge did not stand in favour of the *ticcadar* for the rent which fell due during the pendency of his lease, but it stood in favour of the landlord in possession, for the rent which fell due afterwards, and that the *ticcadar* in execution of his decree could not sell the tenure itself so as to pass all rights in it to the auction-purchaser A and annul the first charge standing on it in favour of the landlord. The tenure itself was liable to sale under the decree obtained by the landlord against the tenant. *Hem Chundar Bhunja* v. *Mon Mohini Dassi* (3 C. W. N. 604) referred to. SRIMANT ROY *v.* MAHADEO MAHATA. **8 C. W. N. 531=31 C. 550.**

120 S. 65—*Suit to enforce a kist-hundi or instalment bond—Arrears of rent—Consideration for bond—Nominal owner, authority of. to pledge property in arrears of rent—Estoppel, doctrine of—*

Where one of two defendants, the father, allows his son, the other defendant, to take the lease of an under-tenure in his name from the plaintiff who is well aware that the father is the real owner of the under-tenure and that the son is only his *benamidar*, the plaintiff-landlord is entitled to look to the son, the recorded tenant, for the due payment of the rent, and if the under-tenure falls into arrears, the landlord may sue the recorded tenant, the son, and obtain a decree for rent which would be operative against the property in the hands of the father, the beneficial or real owner. But it is not competent to the recorded tenant, the son, to create a charge or mortgage on the property, in the event of the rent falling into arrears, in favour of the landlord. If the beneficial or real owner fails to pay the rent regularly,

Bnegal Act (VIII of 1885) (*Contd.*)

the nominal owner has no implied authority to pledge the property in arrears, the creation of such a charge being neither necessary for the purposes of the tenancy nor usual for the management of the tenancy.

When, therefore, a landlord accepts an instalment bond either creating a charge or security on the property for the arrears of rent from the nominal owner with full knowledge of the true ownership, he cannot be permitted to follow the property in the hands of the true owner. 15 *All.*, 304 *distinguished.*

A suit instituted on a *kistibandi* or instalment-bond, part of the consideration for which was arrears of rent, is a suit not for rent but for money due under the contract, *viz.*, the instalment-bond, by which in lieu of the original liability a new liability was substituted, and they can have no charge on the land under the Tenancy Act.

Per Mookerjee, J.—The charge referred to in section 65 of the Bengal Tenancy Act is not such a charge as that defined by section 100 of the Transfer of Property Act, and does not require to be enforced in the manner; the only consequence which follows from the provision that rent is a first charge upon an under-tenure is, that a sale held in execution of a decree for arrears of rent produces the effects described in Chapter XIV of the Bengal Tenancy Act.

A mortgage does whereas a charge does not involve a transfer of an interest in specific immovable property. 25 *Mad.*, 220 (237); 23 *Q. B. D.*, 239 (242); 12 *Q. B. D.*, 347 (350) *referred to and followed.*

A mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, whereas a charge can be enforced against a transferee only if it is shown that he has taken with notice of the charge. 13 *All.*, 28 (44) *referred to.*

Where an instalment-bond provided that the executant would be personally responsible for the payment of the money and that, in case of default, it would be competent to the person in whose favour it was executed to institute a suit to obtain a decree and to recover the dues by attachment and sale of an under-tenure.

Held, that upon the terms of the bond, it did not create a mortgage, but merely effected a charge.

The words "and the transaction does not amount to a mortgage" in section 100 of the Transfer of Property Act signify that if the relation created by the instrument is not that of a mortgagor and mortgagee and immovable property has been made security for the payment of money, there is a charge on the property; they do not mean that if the transaction on the face of it purports to be a mortgage but the instrument is not operative as such by reason of defective execution or non-compliance with the formalities described by the law, the transaction is converted into a charge. 1 *C. W. N.*, 81; 26 *Cal.*, 78; 26 *Cal.*, 246; 32 *Cal.*, 129; 7 *Bom. L. R.*, 934

Bengal Act (VIII of 1885) (*Contd*)

referred to and followed: 10 *Mad.*, 509; 24 *Mad.*, 397 *disapproved.*

Equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying, under the guise of amending defective instruments, those defficient elements or form without which the agreement is absolutely void, even as between the parties to it.

In the face of the statutory provision contained in section 100 of the Transfer of Property Act, the Courts in India will not and cannot apply indiscriminately the general equitable principle of English rule, namely, that a mortgage which is defective and is inoperative as such operates as a good equitable lien, if it shows an intention to create a charge.

The validity of equitable mortgages is recognised by the legislature in this country only to a limited extent 28 M. 54 referred to.

Difficulty of applying the English rule of equitable mortgages in this country pointed out and explained. ROYZUDDI SHEIKH *v.* KRITARTHANATH MUKERJEE. **4. C L. J. 219 = 33 C. 985.**

121 *S. 65—Sale—Sale subject to payment of arrears of rent—Liability of purchaser.*

A purchaser at an auction-sale is liable to pay arrears of rent for a period anterior to the date of the sale, when the sale was made subject to the payment of such arrears. —24 *Cal.*, 37 ; 21 *Cal.*, 169, *referred to.* HARADHAN CHATTORAJ *v.* KARTIK CHANDRA CHATTOPADHYA. **6 C. W. N. 877.**

122 *S. 65—Landlord and Tenant—Execution of decree—Rent decree—Sale of holding.*

A 16-anna proprietor obtaining a decree for the whole rent due in respect of a *mokarari* tenure in a suit brought against all the tenants is entitled under section 65 of the Bengal Tenancy Act to sell the tenure in execution of the decree, althought he recognised the fact that the tenants had sub-divided the tenure and chose to accept a decree making each of them separately liable for his own share of the rent 17 *Cal.*, 301 *referred to.* SURBO LAL *v.* J. M. WILSON. **32 C. 680.**

123 S. 65—Suit against mortgagor in possession, when rent fell due, maintainability of—Equity 9 C. W. N. 670—32 C. 643 Col. 322 P. I.

123 (a) *Ss. 65, 55—Putni Regulation (VIII of 1819), section 17—Decree for rent for a period anterior to sale—Suit for contribution by purchaser.*

The plaintiff purchased a *putni taluk* in execution of a rent-decree. The defendants 1, 2 and 3 obtained a decree against the defendants 4, 5 and 6 for rent due for a period anterior to that of the rent-decree in execution of which the tenure was sold. and put the *taluk* up to sale. The plaintiff paid the decretal amount, and then instituted a suit for contribution from the defendants 4, 5 and 6.

Held, that the plaintiff was not entitled to claim the contribution sought for by him. 1 C. W. N. 458 followed.

Bengal Act (VIII of 1885) (*Contd*).

The provisions of the Bengal Tenancy Act, so far as they do not interfere with the *putni* law in respect of *putni taluks*, are applicable to them. 19 C. 501 followed.

There is no conflict between s. 65 of the Bengal Tenancy Act and section 17 (3) of the putni Regulation. Antecedent balances may be mere personal debts, which can not be summarily recovered under the procedure prescribed by the Putni Regulation, but they may be also a charge on the *taluk*, and the *taluk* may be sold subject to them. 26 C. 103 referred to. PEARY MOHAN MUKHOPADHYA *v.* SREERAM CHUNDRA BHOSE, **6 C. W. N. 794.**

124 *S. 65, 88—Landlord not bound by his Tahsildar's separate collections of proportionate rents in respect of entire holding.*

Where a holding is in the occupation of several tenants at one entire rental, the fact that the landlord's *Tahsildar* has accepted from the various tenants proportionate parts of the rent does not bind the landlord to recognize a separation of the tenancy in the absence of evidence connecting the landlord with the receipt of any proportionate rate of rent by the *Tahsildar*. MOHARANI BENI PARSHAD KOERI *v.* GOBERDHAN KOERI. **6 C. W N. 823.**

125 *Ss. 65, 152, 188—Co-sharers—Right of one co-sharer to sue for the whole rent making defendants his co-sharers, who refuse to join in the suit as plaintiffs—Right to bring whole tenure to sale—Agreement to pay rent to co-sharers separately, effect of.*

By the express terms of the Bengal Tenancy Act (VIII) of 1885 in the event of rent being unpaid, the owners of the zemindari interest are entitled by suit under that Act to bring a patni to sale with the consequences prescribed by the Act. And it is a general rule - a rule not derived from the Bengal Tenancy Act but from the general principles of legal procedure—that a sharer, whose co-sharers refuse to join him as plaintiffs, can bring them into the suit as defendants and sue for the whole rent of the tenure. Section 188 of the Act does not preclude such a suit; the filing of a suit not being a thing, which the landlord is, under the Act, "required or authorized to do," but an application to the Court against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision in the Tenancy Act, but under the general law. Although an agreement, expressly proved or implied by the conduct of the parties, for the payment of rent to co-sharer landlords separately may establish the right to sue separately for the shares of rent receivable by the separate shareholders, yet such an agreement merely affects the right to sue separately for rent and in no other respect modifies the terms of the holding. The right, therefore. to bring the tenure to sale for arrears of rent remains intact, and also the right of one co-sharer

Bengal Act (VIII of 1885) (*Contd.*)

to sue making his co sharers defendants, when they refuse to join as plaintiffs. PRAMADA NATH ROY *v.* RAMANI KANTA ROY. **35 C. 331.**

126 *Ss. 65, 159, 188—Joint Landlords—Agreement to pay rent separately—Suit for whole rent by one co-sharer—Maintenance of suit—Contract, recission of.*

By an arrangement entered into by all the co-sharer landords on the one hand and the tenants on the other, it was agreed upon, that the former was to recover their respective shares of the rent separately from the latter.

Held, that so long as the arrangement subsists, one of the co-sharer landlords is not entitled to bring a suit for the whole rent making the other co-sharers defendants.

Held, also that the mere failure of the tenants to pay the plaintiff his share of the rent would not of itself entitle him alone, or even jointly, with his co-sharers, to rescind the agreement. The general rule is that the refusal or omission of one of the contracting parties to do something which the contract binds him to do will not entitle the other party to rescind the contract unless the act and conduct of the party who make default show an intention to abandon and wholly to refuse performance of his part of the contract. In this case, it was proved that the tenants had an intention to abandon the agreement. RAJA PRONODA NATH ROY *v.* RAJA RAMONI KANT ROY. **9 C. W. N. 34.**

127 *S. 65, 159.—Sale in execution of a decree for arrears of rent at the instance of a co sharer landlord—Interest of transferee of some of the recorded tenants, how far affected.*

One of several joint landlords brought a suit for arrears of his share of the rent of a certain occupancy holding against three persons who were the recorded tenants. But two of the recorded tenants had already transferred their interest to the plaintiff.

Held, that the purchaser at the sale in execution of the decree for arrears of rent at the instance of the co-sharer landlord purchased only the right, title and interest of the judgment-debtor, and as two of these had no interest at the date of the sale, the right of their transferee was not affected by the sale. AFRAZ MOLLA *v.* KULSUMUNNESSA BIBI. **4. C L J 68=10 W. N. C, 176.**

128 Ss. 65, *170—Rent-decree—Execution—Landlord's inetrest in tenure sold after decree—Decree for rent, if continues to be first charge on tenure—Civil Procedure Code (Act XIV of* 1882*), Section* 278*—Claim, if allowable.*

If at the time, when a suit for rent is instituted, and a decree is made, the plaintiff is still the landlord, the fact that subsequently he sells his landlord's interest does not prevent him from obtaining the benefit of section 65 of the Bengal Tenancy

Bengal Act (VIII of 1885) (*Contd.*)

Act of bringing to sale the tenure or holding in execution of such decree, the rent continuing as a first charge thereon.

If at the date of the suit and the date of the decree, the plaintiff is the landlord, both the suit and the decree for rent would clearly be a suit and a decree under Bengal Tenancy Act, and under section 107 of the Act, no claim can be preferred under section 278, Civil Procedure Code, when such a decree is executed by the decree-holder, even if he has parted with his landlord's interest before applying for such execution. *3 W. N. Cal., 604 overruled.* KHETRA PAL SINGH RAY *v.* KRITARTHAMOYI DASI **3 C. L. J. 470=10 W. N. C. 547=33 C. 566 (F. B.)**

129. *S. 65, 178, 179—Permanent tenure-holder—Ejectment for non-payment of rent, contract illegal.*

A contract in contravention of section 65 of the Bengal Tenancy Act, under which the tenant of a permanent tenure makes himself liable to be ejected upon failure of payment of rent is bad in law, even though section 178 and 179 are inapplicable. SAMANT RADHA CHARAN DAS *v.* ANANTA PRASAD DAS. **4 C. L. J. 521.**

130. *S. 65, 183—Sale of a tenure—Landlords' Decree—Execution.*

Held that the sale of a tenure in execution of a decree for rent obtained by certain persons, who did not constitute the entire body of landlords at the date of the suit and of the decree, and who were not the entire body of landlords, at the date at which part of the claim for which the rent suit was brought, accrued due, would not pass the entire tenure but would pass merely the right, title and interest of the judgment-debtors in the tenure at the date of the sale. NARAIN UDDIN *v.* SRIMANTA GHOSE. **6 C. W. N. 124=29 C. 219.**

131 *Ss. 65, 148 (b), 161—Regulation VIII of 1819 section 134—Landlord and tenant—Decree for rent—Execution—First charge—Lien—*

A Zemindar sued his putnidar for arrears of rent and obtained a decree, but previous to the institution of the suit had sold all his interest in the zemindari. The purchaser of the zemindari subsequently instituted proceedings under Reg. VIII of 1819 for further arrears of rent and the darpatnidar deposited the rent under s. 13 of the Regulation.

In a suit by the darpatnidar for a declaration that he had a first charge on the putni in respect of the sum deposited by him

Held, that the decree obtained by the former zemindar was a decree for rent within the meaning of s. 65 of the Bengal Tenancy Act and constituted a first charge on the patni under that section with priority to the lien of the respondent. 6 C. W. N. 91 distinguished. 3 C. W. N. 604, 31 C. 550 not followed. 33 C. 566 referred to. MAHARAJA BAHADUR SINGH *v.* FORBES. **35 C. 737.**

132 S. 65—See 1 C. L. J. 114 No. 113 *supra.*

133 *S. 66—Suit for ejectment for non-payment of rent—Waiver—Act VIII (B. C.) of 1889, S 22.*

Where a landlord sues for arrears of rent for four successive years; the landlord's claim for ejectment for non-payment of arrears for the first three years must be held to have been waived and a decree for ejectment can be made. GOURI KANTA MUKHOPADHAYA *v.* RAMGOPAL MUKHOPADHAYA. **2 C. L. J. 379.**

134 *S. 67—Kabuliat, rate of interest mentioned in—Purchaser at auction sale; liability of, to pay interest.*

A purchased at an auction-sale in execution of a rent decree a tenure covered by a *kabuliat*, which stipulated for interest at a specified rate.

Held that the tenure being subsisting, A brought the teuue subject to the terms and conditions of the lease, and was liable for interest at the rate mentioned in the *kabuliat*, and not at the rate mentioned in S. 67 of the Bengal Tenancy Act. LAL GOPAL DUTT *v.* MANMATHA LAL. **32 C. 253=9 C. W. N. 175.**

135 *S. 67—Implied contract.*

When a stipulation for interest will be opposed to S. 67 if mentioned equally in an express contract it will be deemed invalid in an implied contract. ADMINISTRATOR-GENERAL OF BENGAL *v.* ARAF ALI. **28 C. 227 at 234.**

136 *S. 67—Interest.*

Interest was claimed in the suit at a rate of more than 12 p. c. per annum on the basis of a *kabuliyat* executed before the passing of the Bengal Tenancy Act, the tenant being proved to have acquired the holding by private purchase.

Held, that the stipulation as to interest must be given effect to. TILUK CHANDRA ROY *v.* JASODA KUMAR ROY. **11 C. W. N. 215.**

137 *Ss. 68, 98, 153—Rent payable in kind—Second appeal—Damages.*

Where, in a suit for rent, the contention between the parties is whether the rent is payable in money or in kind

Held that a second appeal lies under S. 163 of the Bengal Tenancy Act.

Held also that it is settled law that mere non-payment of rent does not determine the relation of landlord and tenant.

Held, further that in a suit for rent in kind, the landlord is not entitled to damages at a higher rate than 25 per cent. under s. 68 of the Bengal Tenancy Act. APURBA KRISHNA ROY *v.* ASHUTOSH DUTT. **9 C. W. N. 122.**

138 Ss. 67, 74, 178 (*c*) (*h*), 179—*Rate of interest—Permanent tenure—Interpretation of statute.*

Held, by the majority of the Full Bench (Ameer Ali J., dissenting) that s. 67 of the

Bengal Act (VIII of 1885) (*Contd*).

Bengal Tenancy Act does not control the provisions of s. 179 of that Act, and that therefore a contract for the payment of interest on arrears of rent, entered into by a landlord and a permanent tenure-holder under him, is enforceable by law, although it may contravene the provisions of s. 67 of the Bengal Tenancy Act. *Basanta Kumar Roy Chowdhry* v. *Promotha Nath Bhuttacharjee* (I. L. R., 26 Cal. 130) overruled. MATNAGINI DEBI *v.* MOKRURA BIBI. **29 C. 674=5 C. W. N. 438.**

139 Ss. 67, 121, 122, 140—*Application for distraint permissible for arrears of rent and interest, but not for damages—Separate application for each holding—Wrongful distraint—Compensation—Principle of computation.*

Under ss. 121, 122 of the Bengal Tenancy Act (VIII. of 1885) a landlord can apply for distraint for the purpose of recovering the arrears of rent of the holding due for the preceding agricultural year, together with interest thereon at the rate of 12 per cent. per annum, but not for the recovery of damages, nor can he by one application apply for distraint of rent of more than one holding Principles on which compensation for wrongful distraint in a suit instituted under s. 140 of the Bengal Tenancy Act should be computed, discussed. SHEOBARAT SINGH *v.* NAWRANGDEO NARAIN SINGH. **23 C. 364.**

140 *S* 67 *and* 178 (3)*(h)—Interest on arrears—Holding over after the expiry of the lease.*

In this case the lease which allowed interest at 75 per cent on arrears of rent expired in 1886. In a claim for rent for the year 1894, and a period subsequent to it, *held*, that on the expiry of the term the tenancy was impliedly renewed from year to year and after the Bengal Tenancy Act came into force the contract relating to interest was not valid with regard to any interest claimed to have accrued after 1885. ADMINISTRATOR GENERAL OF BENGAL *v.* ASRAF. **28 C. 227.**

141 Ss. 67, 178 (3) (*h*) abwab—Puja *expenses—Road cess, if* abwab—*Bengal—Interest at rates higher than* 12 *p. c.*, *contract to pay if enforceable—Unconscionable contract.*

Puja kharach, or expenses for a *Puja*, agreed to be paid in excess of the rent, is an *abwab* and cannot be enforced.

Road cess is not an imposition on the tenant by the landlord in addition to the rent but a tax imposed by Government and it does not come within the definition of an *abwab* contained in section 74 of the Bengal Tenancy Act.

A contract to pay more than the proportion payable by the tenant under the Road Cess Act is not illegal. 4 *Cal.*, 576 ; 3 *C. L. J* 337, *referred to.*

The provisions of section 178 (3) (*h*) are applicable to the case of a *kabuliat* executed after the passing of the Bengal Tenancy Act

Parties ought not to be allowed to nullify the effect of section 178, sub-section 3, Cl. (*h*) by contracting themselves out of the provisions of section 67 of the Bengal Tenancy Act, which limits the interest to simple interest at 12 per cent. per annum, by the device of making the rent payable otherwise than quarterly.

A contract made after the passing of the Bengal Tenancy Act is not enforceable in so far as it provides for payment of interest at rates higher than 12 per cent., 22 *Cal.*, 214 *explained and distinguished.*

Even if it were open to the parties to contract themselves out of the provisions of section 67 of the Bengal Tenancy Act, a contract to pay interest at the rate of 75 per cent. for arrears of rent payable for land for which arrears the landlord has good security in the holding, on which these arrears are a first charge and which he can recover in other ways, is an unconscionable one and is one which ought not to be enforced.—NARENDRA KUMAR GHOSE *v.* GORA CHAND PODDAR. **3 C. L. J. 391=33 C 683.**

142 Ss. 67, 179—Landlord and tenant—Interest on rent. 9 C. W. N. 466—*See Col. 957 P. I.*

143 Ss. 67, 179—Resjudicata—Kabuliat—Illegal cesses—Agreement to pay. 9 C. W. N. 469.—*See Col. 963 P. I.*

144 S. 67—See 35 C. 34. No. 105, 11. C. W. N. 110 No. 108, 7. C. W. N. 720 No. 114 *supra.*

145 S. 68—See 9 C. W. N. 122 No. 137 *supra.*

146 S. 69, Sch. III. Art. 2 (*a*)—Res-judicata *Matter directly and substantially in issue, applicability of—Rent, deposit of—Onus—Notice, service of by post, presumption—Fact, question of Order-sheet,* ex parte *entry in, evidentiary value of—Joint Hindu family, members of, rent due to—Co-owners, suit by some of, maintainability of—Addition of parties after limitation period—Claim joint and indivisible—Limitation Act* (*XV of 1877*), *S.* 22—*Abwabs—Bata usual, Dustur, Hazzatnama, Sonari, Selami, Percentage, and Batta Company. C. P. C. S. 11.*

The Court is not precluded under S. 13 of the Civil Procedure Code from trying an issue whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind, as it was not directly and substantially in issue in a previous litigation between the same parties, where the substantial relief sought was a declaration that the appraisement made by the Collector under S. 69 of the Bengal Tenancy Act was invalid.

S. 69 of the Bengal Tenancy Act is applicable upon the assumption that the rent is taken by appraisement or division ; the only matter in controversy between the parties is as to the quantity, value or division of the produce ; the section ceases to be applicable when there is a *bona fide* dispute as to the character of the holding itself (4 C. W. N. 239 foll).

If a tenant relies upon clause (*a*) of Art. 2 of Sch. III of the Bengal Tenancy

Bengal Act (VIII of 1885) *(Contd.)*

Act, he must prove that there was an application which fulfilled the requirements of S. 61, sub-S. (2) of the Bengal Tenancy Act, and that a deposit was made under S. 61 after the arrear had fallen due; he must also show that notice under S. 63 was served on the landlord and prove the date when the service was effected.

There is no presumption that a letter, which was posted, was properly addressed and the presumption, that the letter reached the addressee, has no application till it is established that the letter was properly addressed. 6 Wheaton 104, 9 A 366, 17 Q. B. 828, 85 R. R. 688 refd.

Before the presumption of due service can be applied, it is necessary to prove that the notice was sent in a cover which was properly addressed. (Ir. R. 10 Eq. 117 (127) refd).

The presumption that a notice sent by post was duly served is not a conclusive presumption of law; it is merely a presumption of facts; and whether it arises in a particular case or not depends upon all the circumstances (111) U. S. 185 (193), 3 B. L. R. 420 ref. 15 C. 681 dist.

An *ex parte* entry in the order-sheet is by no means conclusive evidence, if it is admissible in evidence at all, as against the landlord, who was not a party to the proceedings for deposit under S. 61 of the Bengal Tenancy Act (1 Cal. and Ells 10. ref.) MIR TAPURA HOSSAIN *v.* GOPI NARAYAN, **7. C. L. J. 251.** *See for other facts Col. 1801 P. I.*

147 *Ss. 69, 70—Right of suit—Order of Collector. Finality of—*

A suit by a tenant against a third party for the recovery of the crops awarded to the latter by the order of the Collector is not barred by section 70, (5) of the Bengal Tenancy Act. 22 Cal., 480 referred to. CHHEDI *v.* CHHEDAN, **32 C. 472.**

147 (*a*) Ss. 69, 70—Separate suits for rent for successive years barred—Accidental and involuntary missions. 4 C. L. J. 490 Col. 1412 P. I.

148 S. 70—32 C. 422 No. 147, 4 C. L. J. 490 No. 147 *supra.*

149 *S. 72—Notice of transfer of landlord's interest—Payment of Rent.*

There was a transfer of the landlords interest and although the transferee gave no notice of the transfer to the tenant, the latter was aware of it through the transferror. Even with such knowledge of the transfer, the tenant paid rent to the transferror.

Held, that such payment of rent was invalid and the transferee had a right to claim the same from the tenant.

Held, also that the object of the provision of s. 72 (2) is to relieve the transferee landlord from the necessity of giving notice to each tenant individually. It says that a general notice published in the manner prescribed by law shall be sufficient. It does not say that such a notice shall be a necessary notice. NOBIN CHANDRA *v.* SURENDRA NATH, **7 C W N 454.**

Bengal Act (VIII of 1885) *(Contd.)*

149 (**a**) S. 74—Agent collecting illegal cesses—Suit by principal for recovery of the same. 7 C. W. N. 535 Col. 368 P. I.

150 *S. 74—Bengal Tenancy Act (VIII of 1885), section 74—Cess—Right to recover—Right to additional rent—Recurring right.*

Section 74 of the Bengal Tenancy Act declares void all stipulations, and reservations, past and future, for the payment of *adwab mahtab* and other like impositions. The only way in which the landlord can recover any such cess is by showing that it is not an *adwab* but part of the rent.

When the lease stipulates that the tenant would pay additional rent for increased area, if any be found on measurement, the right is a recurring one, and the landlord is entitled to exercise it whenever he finds it necessary to do so. JOTINDRA MOHAN TAGORE *v.* CHANDRA NATH SAFUI, **6 C. W. N. 360.**

151 S. 74—Value of property—Abwab—Substantial injury—7 C. W. N. 439 Col. 1549 P. I.

152 *S. 74—Landlord and Tenant—*Ab-wab—*Rent—Collection charges.*

Each case must be decided upon its own particular circumstances as to whether the payment which the tenant agrees to make is in reality a part of the rent as opposed to *abwab.*

Held, that a certain sum of money mentioned in the lease as 'the fixed collection charges blended with rent' was not an *abwab* but rent. RADHA CHURN ROY. *v.* GOLAP CHANDRA GHOSE. **10 C. W. N. 529.**

153 S. 94—3 C. W. N. 337—See Bengal Act IX of 1880, S. 41 No. 11.

154 S. 74—See 10 C. W. N., 527 No. 8; 12 C. W. N. 175 No. 29, 29 C. 674 No. 138, 3 C. L. J. 391 No. 141 *supra.*

155 S. 76—8 C. W N. 754 No. 61 *supra.*

156 S. 77—8 C. W. N. 754 No. 61 *supra.*

157 S. 79—34 C. 519 No. 21 *supra.*

158 S. 82—34 C. 519 No. 21 *supra.*

159 S. 84—*Landlord and Tenant—Land acquisition—Immediate landlord—"Reasonable and sufficient purpose"—Collector's certificate—Jurisdiction of Civil Court.*

A landlord, who is not the immediate landlord in respect of the holding, cannot apply for acquisition of the land under section 84 of the Bengal Tenancy Act.

Where the land was acquired under section 84 of the Bengal Tenancy Act, and it was alleged that it was for the improvement of the estate inasmuch as it increased its revenue

Held, that the purpose for which the land was acquired, was not "reasonable and sufficient purpose" within the meaning of section 84 of the Bengal Tenancy Act.

Bengal Act (VIII of 1885) (Contd.)

The Collector's certificate as to the reasonableness and sufficiency of the purpose is not conclusive and the Civil Court should hold a judicial enquiry to determine the reasonableness and sufficiency of the purpose. 18 *Cal.*, *271 followed*. NARAIN MAHTO *v.* TEKAIT BROJO BEHARI SINGH. **9. C. W. N. 472.**

160 *S. 85—Sub letting restrictions on—Validity of sub-lease granted by raiyat for more than nine years—Sub-lease registered before the commencement of the Bengal Tenancy Act.*

Where a raiyat has, without the consent of his landlord granted a sub-lease by an instrument registered before the commencement of the Bengal Tenancy Act, the sub-lease shall not be valid for more than nine years from the commencement of the Act, as against the landlord, but not as against the raiyat. GOPAL MONDAL *v* ESHAN CHUNDER BANERJEE, **29 C 148.**

161. *S. 85, Cl. 2—Under-raiyati lease—Term exceeding nine years—Validity—Ejectment suit by raiyat—Notice.*

Cl. 2 of S. 85 of the Bengal Tenancy Act has not been enacted merely for the protection of the superior landlord. A sub-lease by a raiyat for a term exceeding nine years is invalid even against the raiyat. 29 C. 148; 6 C. W. N. 377 dist. BASARATULLA MUNDLE *v.* KASIRUNNISSA BIBI. **11 C. W. N. 190.**

162. S. 85--34 C. 516 No. 21, 2 C. L. J. 570 No. 56, 34 C. 101 No. 57, 28 C. 205 No. 59, 2 C. L. J. 540 No. 76, 6 C. W. N. 377 No. 83, 8 C. W. N. 136 No. 84, 6 C. W. N. 916 No. 85 *supra.*

163. *S. 86—Surrender of occupancy-right.*

Nothing in S. 86 of the Bengal Tenancy Act requires the surrender of a ryot's occupancy-right to be in writing. KHANKAR ABDUR RAHMAN *v.* ALI HAFEZ, **23 C., 256**

164. S. 86--8 C. W. N. 315 No. 46, 34 C. 101 No 56 *supra.*

165. *S. 87—Transfer of Right of occupancy—Original tenant remaining in possession as sub-tenant of the transferee—Abandonment—Ejectment.*

Where a tenant having a non-transferable right of occupancy sold such right to a third person, obtained a sub-lease from the purchaser and remained in possession of the land and was cultivating the same

Held, that the landlord was not entitled to *khas* possession as against him. *Dina Nath Roy* v. *Krishna Bijoy Saha* (9 C. W. N. 379); *Bristeedhur Biswas* v. *Mudan Sirdar* (I. L. R., 9 Cal. 648), followed. *Kallinath Chakravarti* v. *Upendra Chundra Chowdhry* (I. L. R., 24 Cal. 212), distinguished. In order to entitle a landlord to re-enter on abandonment by the tenant, it must be an abandonment in the words of S. 87 of the Bengal Tenancy Act, namely, that the raiyat voluntarily abandons his residence and ceases to cultivate, without notice to the landlord and without arranging for the payment of his rent as it falls due. *Narendra Narain Roy* v. *Ishan Chunder Sen* (23 W. R. 22) and *Dwarka Nath Misser* v. *Hurrish Chunder* (I. L. R., 4 Cal. 925), referred to. MADAR MONDAL *v.* MAHIMA CHANDRA MAZUMDAR. **3 C. L. J. 343=33 C. 531.**

166. *S. 87—Non-transferable holding—Transfer—Under-lease—Forfeiture—Landlord and tenant.*

A raiyat holding a non-transferable holding, having sold it to a third person, took an under-raiyat lease under him and refused to pay rent to the landlord of the raiyati holding who dispossessed him. In a suit by him to recover possession and for declaration of his title as an under-raiyat under the purchaser, *held* on a review of the authorities, that plaintiff's suit ought to fail; and it was accordingly dismissed. RAJANI KANTA BISWAS *v.* EKKARI DAS, 11 C. W. **N. 811=7 C. L.J. 78=34 C. 689.**

167 *S. 87, not exhaustive—Abandonment, a question of intention—Mortgage of non-transferable holding—Mortgagee auction-purchaser—Mortgagor, interest of—Ejectment of purchaser, by landlord—Re-entry—Execution sale—Voluntary abandonment.*

The first sub-section of S. 87 of the Act shows that abandonment is the effect of the act of the tenant in vacating the holding, without making arrangement for payment of his rent as it falls due, and for cultivating the land.

Where there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case.

In order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of noitce under sub-S. 2 of S. 87 of the Act is not necessary. The only effect of the service of noitce is to make it obligatory upon the tenant to have a speedy determination of the question whether there has been an abandonment or not. S. 87 of the Act is not exhaustive, and a landlord is not a wrong-doer merely because he re-enters upon the holding, before he has followed the procedure laid down in that section.

When the holding is a non-transferable one, and the ryot executes a mortgage, the mortgage is inoperative as against the landlord, but as between mortgagor and mortgagee, the mortgage is operative 4 C. L. J. 679 referred to.

Where the mortgagee of a non-transferable occupancy holding purchases the holding in execution of his mortgage-decree and takes possession, the possession of the tenant mortgagor completely ceases, and the holding passes into the occupation of the mortgagee. As against the landlord, the mortgagee auction purchaser is a trespasser. The landlord is entitled to sue him and to obtain a decree for ejectment; in such

Bengal Act (VIII of 1885) (*Contd.*)

a suit the tenant who is not in occupation is not a necessary party.

Under the circumstances of the case, the abandonment of his holding by the tenant, although due to the execution sale, is a voluntary one. RAM PERSHAD KOERI *v.* JAWAHIR ROY, 7 C L J 72 =12 C W N 899.

168 *Sec. 88—Separate collection of rent by co-sharer landlords from under-tenants—Joint suit for rent against intermediate tenant—Fraud—Effect of a decree for rent.*

Where several co-sharer landlords who had been collecting the rent due to them, separately, from the *dar-mourashidars*, united in bringing an action against the intermediate *mourashidars* for arrears of rent so as to obtain a decree which would be binding upon and would pass the tenure—

Held, that the landlords were not bound to continue to collect rent in this manner unless they had given their consent in writing under Sec. 88 of the Bengal Tenancy Act, and that the action of the landlords in bringing a joint action did not amount to fraud. GIRISH CHANDRA MUKHOPADHYAYA *v.* CHHATRADHAR GHOSE. 3 C L J 379.

169 *S. 88—Sub-division of holding—Grant of separate receipt by the landlord—Joinder of Parties.*

Where two tenants' names were jointly recorded in the landlord's *sherista* in respect of a holding but the *tehsildar* of the landlord collected rents separately from them and granted separate receipts therefor, and where there was no consent of the landlord in writing to the sub-division.

Held that such an arrangement was not binding, on the landlord, and he could sue both the tenants jointly for arrears of rent. Peary Mohun Mukerjee *v.* Gopal Paik (2 C. W. R. 375), distinguished, and Moharani Beni Pershad Koeri *v.* Goburdhun Koeri (6 C. W. N. 823) and Jnanendra Mohan Chowdhury *v.* Gopal Das Chowdhury (8 C W. N 923), referred to. The tehsildar of the landlord should not be made a party defendant in such a suit. SRI MOHARANI BENI PERSHAD KOERI *v.* RAMADHIN PANDE, 10 C. W. N. 216.

170 *S. 88—Sub-division of holding—Rights of purchaser - Landlord's title not questioned.*

Where the landlord's rights are not questioned and he does not appear in the suit, a transferee of a share of a holding may maintain a suit against persons who claim under an inferior title, even though they may set up a recognition by the landlord. (12 C 615 dist, 8 C. W. N. 55, 9 C. W. N. 134 foll). GOUR KAIBARTA *v.* SRIMATI TARAJAN BIBI, 8 C. L. J 161.

171 *S. 88—Division of Tenure—Distribution of Rent—Rent-receipt and furd, construction of—Consent to a division or distribution of tenure.*

A receipt for rent granted by a landlord or his agent, containing no specification of the total *jama* of the taluq, no statement of the area of the taluq, or of the portion of the taluq which was separated and separately settled with the tenant, nor of the share separated, nor containing a recital that the tenant was registered in the landlord's *sherista* as a tenant of a portion of the original holding at a rent which was a portion of the original rent, does not amount to a consent in writing by the landlord to a subdivision of the holding, within the meaning of s. 88 of the Bengal Tenancy Act. Pyari Mohun Mukhopadhya *v.* Gopal Paik (I L R, 25 Cal 531), distinguished. An entry in a *furd* or account which appeared on the face of it to have been written by a servant of a tenant and exhibited payments of rent made in respect of six different *taluqs* by the tenant to the landlord, and which was signed and receipted by a *sumarnavis* of the said landlord, does not amount to a consent in writing on behalf of the landlord to a division of the tenure or distribution of the rent. JANENDRA MOHAN CHOWDHRY *v.* GOPAL DAS CHOWDHRY, 8 C. W. N. 923=31 C. 1026.

172 S. 88—10 C. W. N. 270 No. 28, 11 C. W. N. 217 No. 39, 6 C. W. N. 823 No. 124 *supra*.

173 *S. 89- Specific Relief Act (I of 1877) Section 9—Limitation—Suit for possession by non-occupancy tenant illegally ejected by landlord.*

Held, that a suit for recovery of possession by a non-occupancy tenant illegally dispossessed by landlord must be brought within six months from the date of dispossession under section 9 of Specific Relief Act, though the tenant urges he has occupancy right. 17 Cal 926 dissented from. BHAGBATI CHARAN ROY *v.* LUTON MONDAL, 7 C W N 218.

174 S. 90- *See 7 C. W. N. 93 No. 100 supra.*

175 *Ss. 91, 188—Application for measurment by a landlord who is realizing his rent separately, whether maintainable—Joint owner—Joint landlord.*

Held, that if one set of land lords obtains separate kabuliats entering in to separate contract for rent with the tenants, such landlords cease to be joint landlords with the other co-proprietors of the land. They become joint owners and not joint landlords. *Matungini Dassi* v. *Ramdas Mullick*, 7 C. W. N. 93, and *Gobind Chandra Pal* v. *Hamidulla Bhuian*, 7 C. W. N. 670, referred to.

Held, further, that such a landlord is entitled to make an application for measurement of the land comprised in his estate under section 91 of the Bengal Tenancy Act. JOGNESH PROKASH GANGULI *v.* MANIADDI. 35 C 417.

176 S 93—Common manager—Consent order by 4 C. L. J. 564 Col 1598 P. 1.

177 *Sec. 63—Common manager—Irregular appointment of—Suit to set aside appointment, maintainability of.*

Bengal Act (VIII of 1885) *(Contd.)*

A common manager was appointed under the Bengal Tenancy Act in respect of property which was neither an estate nor a tenure. Some of the co-sharers upon whom notice had not been served, sued to recover possession upon a declaration that the appointment was invalid.

Held, that the suit as framed was maintainable, and that it was not obligatory upon the plaintiffs to apply in the first instance to the District Judge who had appointed the common manager. INDU BHUSAN BOSE *v.* ANNAPURANA MITRA. **6 C. L. J. 216.**

178 Ss. *93, 94—Common manager separate appointment for separate estates or groups of estate belonging to same co-owners—District Judge may reconsider question of necessity of appointment at any stage—Discretion, judicial —Position of co-owner who has separated his share but not by metes and bounds.*

Where a District Judge made an order for the appointment of a common manager in respect of several revenue paying and revenue-free estates of which the co-owners were not the same.

Held, that the District Judge should have separately considered each property or group of properties belonging to the same co-owners and made separate appointments in regard to each property or group, though the same common manager might be appointed in all the cases. Fazal Ali Chowdhury *v.* Abdul Majid Chowdhury I. L. R. 14 Cal. 659 (1887) followed. Where on being directed to deal with the case in the above manner, the District Judge instead of starting proceedings *de novo* and issuing notices on the co-owners under S. 93, Bengal Tenancy Act, to show the cause why a common manager should not be appointed, issued notices under S. 94 of the Act asking them to appoint a common manager.

Held, that in the circumstances of the case, the proceedings should have been commenced *de novo* and the co-owners given in opprtunity of showing that owing to the altered state of things there was no longer any necessity for appointing a common manager. A District Judge can, in the exercise of his discretion, consider the property of the appointment of a common manager whatever be the stage at which the proceedings may have arrived. This discretion is not, however, to be exercised arbitrarily but according to well established rules.

A co-owner who has opened a separate account in Collector's register or makes separate collection for his share is nevertheless liable to have his share taken over by a common manager, althouh the dispute may not have extended to his share.

His remedy, if any, is to have his share demarcated by metes and bounds. KUMAR *v.* THE COLLECTOR OF RANGPUR. **11 C W N 1143.**

179 *S 93, 95—Common Manager—Appointment of a successor by the District Judge.*

The District Judge appointed a common Manager under the Bengal Tenacy Act. The Manager so appoined resigned his post. Thereupon the District Judge appoined another as his successor.

Held that he had no power to do so—DWARKA NATH MITRA *v.* BAKUTESH LAL MITRA, **10 C W N 437=7 C L J 109**

180 *S. 93, 98 and 100—Landlord and Tenant—Manager appointed by District Judge. Prowers of—Co-sharer's right to deal with his share—Rules of High Court.*

The rule framed by the High Court under section 100 of the Bengal Tenancy Act to the effect that no manager shall have power to sell or mortgage any property, is *ultra vires.*

The appointment of a manager does not take away from a co-sharer his power of dealing with his own share in the estate.

Where the manager mortgaged the estate in favor of the respondent and one of the co-sharers during the management mortgaged his share with the appellant who purchased it in execution of decree obtained by him on his mortgage.—

Held, that whatever the appellant took, whether under the mortgage or by reason of the purchase, was subject to the charge on the property created by the manager, AMAR CHUNDER KUNDU *v.* SHOSHI BHUSAN ROY. **8 C. W. N. 225=31 I. A. 24=31 C. 305 (P. C.).**

181 S. 94—11 C. W. N. 1143 No. 178 *supra.*

182 *Ss. 95, 98 (3)—Common Manager—His right to sue for recovery of possession of land.*

By S. 98 (3) of the Bengal Tenancy Act, a Common Manager is declared to have the same powers as the co-owners jointly might have, but for his appointment, exercised. So he is empowered to sue to recover possession of lands, on behalf of the co-proprietor. SEBO SUNDARI GHOSH *v.* RAJ MOHAN GUHO. **8 C. W. N. 214.**

183 S. 95—10 C. W. N. 437 No. 179 *supra.*

184 S. 98—31 C. 305 No. 180, 8 C. W. N. 214 No. 182 *supra.*

185 S. 100—31 C. 305 No. 180 *supra.*

186 *Ss. 101, 102, 103, 105—Landlord and Tenant—"Record of rights"—Jurisdiction of Revenue Officers.*

An application under section 103 of the Bengal Tenancy Act was made, for pr paration of a "Record of rights" of an estate. The application was allowed. Subsequently the rent was enhanced on application under section 105 On appeal the District Judge dismissed the application on the ground that "all the proceedings taken by the Revenue Officer after making the record of particulars under section 103, including those under section 105, were void for want of jurisdiction." On appeal to the High Court—

Held, that the Revenue Officer had jurisdiction, and further proceedings could be taken in accordance with section 103*A* and the following sections of the Act.

Per Ghose, J.—The particulars specified

Bengal Act (VIII of 1885) *(Contd.)*

in section 102 of the Bengal Tenancy Act when recorded and compiled under section 103 of the Act amount to a "Record of rights" within the meaning of Chapter X of the Act.

Per Pargiter, J.—Whether a record of particulars made in a proceeding under section 103 of the Bengal Tenancy Act constitutes a "Record of rights" or not must depend upon whether the particulars recorded include "rights" or not. SUDHENDU NARAIN ACHARJYA CHOWDHRY *v.* GOBINDA NATH SIRCAR. **9 W. N., C., 504=1 C. L. J. 239=32 C 518.**

187 Ss. 101, 117, 118, 119, 143, 153, 189—Application for preparation of—Records-of rights—Procedure—Revenue officer. 30 C. 339 col. 1004 P. I.

188. *S. 102, 104—Section 9—"Every settlement of rent or decision of a dispute by a Revenue Officer."*

The words "every settlement of rent or decision of a dispute by a Revenue Officer" are applicable only to those cases which a Revenue Officer has jurisdiction to try. RADHA KISHORE MANIKYA *v.* DURGA NATH BHUTTACHARJEE. **32 C. 162.**—

189. S. 102—32 C. 518 No. 186 *supra.*

190. *Chap. X, S. 103—Record-of-rights Khewat*—Prima facie *evidence.*

If there is no settlement of rent under Chap. X of the Bengal Tenancy Act, the entry in the record-of-rights, if its was duly published, would be only *prima facie* evidence in favour of the landlord—evidence which may be rebutted by the tenant. ABDUL RASHID *v.* JOGESH CHUNDRA ROY, **11 C. W. N. 153.**

191 *S. 103—Presumption—Record of rights, entry in and publication of—*

The presumption referred to in section 103 (*b*) of the Bengal Tenancy Act is applicable to a suit which has been instituted before the publication of the record of rights in which the entry is contained. C. R. MAGDONALD *v.* BABU LAB PURBI, **4 C. L. J. 519.**

192 *S. 103 A, 104 E, 104 H, 111 A—Rent. Suit for—Dismissal of objection under section 104 E for default, not a judicial order—Record of rights. Final publication of, under section 193 A, sub-section (2)—Sections 104H., 111 A, whether bar a suit for rent*—Res-judicata

An order striking off a petition of objection under section 103 *A.* of the Bengal Tenancy Act for default is not judicial order: nor does it operate as *res judicata* in a subsequent suit for rent brought by the objector against the recorded tenant. 28 *C.*, 471 *followed.*

The first part of section 111 *A* of the Act p ohibits suits which seek to take undue advantage of mere technical defects in the procedure leading up to or involved in the settlement proceedings.

The section further prohibits the alteration of rent once settled, except to the extent allowed by section 104 *H*, and the proviso, in virtue of which suits of a declaratory nature may be brought, cannot be read as prohibiting suits for the recovery of arrears of rent alleged to be due from tenants.

Section 104 *H* of the Act is designed mainly to safeguard the Government revenue and to attach reasonable finality to the fixation of the rental assets upon which the assessment of revenue is based. It does not bar a suit like the present brought against the recorded tenant for rent due. NASARULLAH MIA *v.* AMIRUDDI. **3 C. L. J. 133.**

193 *S 103 A, 105, 106—Second Appeal—Res judicata—Distinction between order under S 105, 103A and S 106.*

When a Revenue Officer disposes of an objection summarily under S 105 (103 A of the amended Act) of the Bengal Tenancy Act (VIII of 1885) without adopting the procedule laid down in the Code of Civil Procedure, for the trial of suits, his order will not be open to appeal or second appeal, nor will it have the effect of *res judicata. Dengu Kazi v. Nobin Kissori Chowdhrani* I. L. R. 24 C. 462 discussed and explained. KURBAN ALI *v.* JAFAR ALI. **28 C 471.**

194 *S. 103 A, 105, 106 A, 109 A.—Second appeal—Entry in the khatian by Revenue Officer that no rent fixed—Application for assessment of fair and equitable rent.*

Where in an application by the landlord under section 105 of the Bengal Tenancy Act for settlement of a fair and equitable rent, the Settlement Officer settled a fair and equitable rent, and the Special Judge on appeal by the tenant confirmed the decision of the Settlement officer—

Held, that under section 109 A of the Bengal Tenancy Act, no second appeal lay to the High Court against that decision. RAM BISHEN RAUT *v.* RAJARAM. **10 C W N 832.**

195 *S 103 B, 104 A—Entry in khewat—Presumption—Proof of 60 years separate possession.*

The entry in a *khewat* simply raises a presumption under s. 103B and was not intended to be conclusive. Where in the *khewat* the entry was that the tenants were joint and were jointly liable for rent and the tenants defendants proved that for 60 years they held possession of their separate shares on payment of rent separately and obtaining separate receipts

Held, that the presumption of the correctness of the entry had been rebutted —RAJ NARAIN MITRA *v.* ANANT TARAI **10 C W N 908.**

196 *S 103 B, 105, 106, 108—Record-of-rights—Suit to correct or alter entries—Maintainability.*

No suit lies for the alteration or correction of entries made in the record of rights, published under Ch X of the Bengal Tenancy Act. Persons aggrieved by the entries should have recourse to the special remedy provided in that chapter

Bengal Act (VIII of 1885) (*Contd.*)

JOGENDRA NATH ROY v. KRISHNA PROMADA DISSI. **12 C W N 1032.**

197 *S. 103 (a), 111 (a)—Draft Record of Rights, objection to—Entry made on objection—Final publication of Record of rights—Presumption as to correctness of entry.*

The final publication of the Record of Rights merely raises a presumption of the correctness of the entry and it is not necessary to bring a suit to avoid a presumption.

Nature of remedy under s. 111 A of the Bengal Tenancy Act, discussed. RAMIGULAM SINGH v. BISHNU PARGASH NARAIN SINGH. **11 C W N 48.**

198 S 103—32 C 518 No 186 *supra.*

199 *S. 104 (2), 107—Settlement Officer settling rent not* res judicata, *but evidence—Second appeal- Exclusion of evidence, an error of law—Civil Procedure Code (XIV of 1882), section 584.*

Where a settlement of rent was made under Section 104 (2) of the Bengal Tenancy Act, before its amendment by the Amendment Act of 1898, the decision of the Settlement Officer had the effect of a decree under Section 107 of the Act (before amendment), and is evidence in a suit for rent subsequently brought by the landlord even though it may not operate as *res judicata.*

Where, in a rent suit, the Court of first appeal found as a fact that a certain amount was payable by the tenant as rent, *held,* that the High Court on second appeal can set aside the finding, when the Court of first appeal wrongly excluded the settlement proceedings from its consideration, and disregarded the evidence of road cess returns filed by the tenants, and thereby committed errors of law. MOHIM CHANDRA ROY v. SRIMATI KALI TARA DEBYA. **11 C. W. N. 1028.**

200 S. 104—See C. L. J. 310 No. 6, 32 C. 518 No. 186, 32 C. 162 No. 188 *supra.*

201 S. 104 (a)—See 10 C. W. N. 908 No. 195 *supra.*

202 S. 104 (e) (h)—See 3 C. L. J. 133 No. 192 *supra.*

203 *Chapter X, S. 105, 109 (3)—Second appeal—'Decision settling a rent' meaning of —Section* 30, 37, 62, 104, 109, 113—Act III (B. C.) of 1898.

The words "not being a decision settling a rent" in section 109 (3) of the Bengal Tenancy Act refer not only to a decision by which existing rents are varied, but also to a decision by which existing rents are maintained as fair and equitable. The words "settle a fair and equitable rent" in section 105 (1), do not exclude a case in which the existing rent is not varied.

When, therefore, a Special Judge, on appeal from the decision of a Settlement Officer on an application by the landlord under section 105 (1), holds that no case has been made out for an enhancement of rent on any of the grounds stated in the application,

Bengal Act (VIII of 1885) (*Contd.*)

Held, that this is a decision settling a rent within the meaning of section 109 (3) of the Act, and consequently no second appeal lies to the High Court from this decision. 16 Cal. 596 ; 17 Cal. 326 ; 25 Cal. 146, referred to.

Sections 37, 105 and 113 of the Act discussed with reference to the question as to what is meant by a settlement of rent. RAMESWAR SINGH v. BHUBANESWAR JHA. **4 C. L J 3**}.=**33 C. 8 7.**

203 a. *Ss. 105, 106 and 108—Record of rights—Entries as to character of holding and status of tenant—Correction of entries—Proper procedure.*

Before the passing of Act I. B. C. of 1907, an entry in a finally published record-of-rights that lands held by tenants were *mal* lands or that the status of the tenants was that of settled raiyats could not be corrected by the Settlement Officer, except in a suit instituted under S. 106, Bengal Tenancy Act. He had no authority to revise such an entry under S. 108 of the Act. SAMBHU CHANDRA HAZARA v. PURNA CHANDRA PAL, **7 C. L. J. 103=12. C. W. N. 122.**

203 b *Ss. 105 and 106—Maintainability of suit to avoid intermediate tenures by lessee from Government—Conditions of the settlement—Record of rights, finality of.*

The defendants were recorded in the *khatian* of the cadastral survey as intermediate tenure-holders. The plaintiff did not take the remedy mentioned in S. 106 of the Tenancy Act. He subsequently took a settlement from the Government and is now the Zemindar. In a suit by him to avoid the tenures of the defendants, *held,* that the suit is not maintainable. The settlement-holder is bound by the terms of his settlement to recognise intermediate tenure-holders mentioned in the settlement papers (*a*). TAPANIDHI RAGHUNATH PURI v. PITAMBAR GAJENDRA MAHAPATY. **5. C L J 67.**

204 S. 105—28. C. 471 No. 193, 12 C. W. N. 132 No 196 *supra.*

205 *S. 106—Rival proprietors—Scope of suit—Question of possession or title—Limitation—Limitation Act (XV of 1877), S. 22—Substitution of executor in place of supposed legal representative—New defendant.*

In suit under S. 106 of the Bengal Tenancy Act, certain lands were alleged to have been erroneously recorded as part of *mouzah* P., and it was prayed that the record-of-rights be amended and the disputed lands entered as part of plaintiff's own *mouzah* R., from the record of which the same had been omitted. The suit was instituted more than two months after the final publication of the record-of-rights for *mouzah* R., but within two months of the final publication of the record of-rights for *mouzah* P.

Held, that the suit was not time barred.

In such a suit the Revenue Officer, and in case the suit is transferred to the

Bengal Act (VIII of 1885) (*Contd*).

Civil Court, the Civil Court, is confined to the question of possession, and cannot be asked to adjudicate upon the title of rival proprietors.

The suit was originally instituted against the person whose name was entered in the record-of-rights. But it appeared that this person was the widow of the deceased proprietor, and her name was entered as representing the estate of her deceased husband,

Held, that the executors to the estate of the deceased proprietor who were substituted as defendants were not new defendants within S. 22, Limitation Act, MOHUNT PADMALAY RAMANUJA DAS *v.* LUKMI RANI, **12 C. W. N. 8.**

206 S. 106—Resjiudicata—Same parties. 5. C. W. N. 421—Col. 995. P. I.

207 *S. 106—Record-of-rights—Application to correct entry, made before Amending Act of 1898—Reference to Civil Court under Amending Act—Jurisdiction—Interpretation of Statute—Change of procedure during pendency of proceeding.*

A record of-rights having been prepared in 1896, the landlord applied in 1897 for the correction of an entry, under S. 106 of the Bengal Tenancy Act as it then was. After the Amending Act of 1898 was passed the case was referred to the Civil Court under the proviso to S. 106 of the Act as amended:

Held, that the Court has jurisdiction to try, notwithstanding that the proceedings were commenced prior to the passing of the Amending Act, which first empowered a reference to the Civil Court.

In matters of procedure, an Amending Act would affect legal proceedings instituted under the repealed provision. RAHIMUDDIN SARKAR *v.* JAGAT KISHORE ACHARYA, **12 C. W. N. 987.**

208 *S. 106—Ben. Act III of 1898, s. 9—Revenue officer, decision of, on question of title.*

S. 106 of the Bengal Tenancy Act, before it was amended by Ben. Act III of 1898, did not provide for the entertainment and decision of a question of title between two rival purchasers of a tenure. So where a Revenue officer had decided such a question before Ben. Act III of 1898 came into force, it did not oust the jurisdiction of the Civil Courts to try the same question again. *Pandit Sardar* v. *Meajan* (I. L. R. 21 Cal. 378); *Haro Mohan Roy* v. *Pran Nath Mitter* (I. L. R. 27 Cal. 374) followed. The decision by a Revenue officer under s. 106 of the Bengal Tenancy Act, contemplated by s. 9 of the Amending Act (Ben. III of 1898) is meant to be a decision in regard to a dispute which could be decided by the Revenue officer under s. 106.—DONAY DAS *v.* KESHAB PUROHIT, **8 C. W. N. 741.**

209 *Ss. 106, 108—Suit in Civil Court, if maintainable, for alteration of entry published.*

A suit in the Civil Court for the alteration and correction of certain entries made in the record-of-rights published under

Bengal Act (VIII of 1885) (*Contd.*)

Chapter X of the Bengal Tenancy Act is not maintainable. JOGENDRA NATH RAY *v.* KRISHNA PRAMADA DASEE. **35. C. 1013.**

210 *S. 106, 109 (a) Second appeal—"Decision settling a rent"—Evidence Act (I of 1872), Section 21 and 167—Admission—Sale certificate—Statements in.*

A suit was brought under section 106 of the Bengal Tenancy Act for the decision of the question whether the rent payable by the plaintiff was Rs. 30-0-6 as recorded in the Record-of-Rights, or was Rs. 13-8-0 as contended for by the plaintiff. The first Court gave effect to the defence but on appeal the Special Judge reversed the first Court's decision taking into consideration the statement about rent in the plaintiff's sale certificate as evidence against the defendants. On second appeal objection was taken that second appeal did not lie, as the Special Judge's decision was a decision settling a rent.

Held, that the contention was invalid. The words "a decision settling a rent" in section 109 of the Bengal Tenancy Act do not mean and include any decision upon the question what is or what ought to be the rent. The words are used in a technical sense and not in what might be their ordinary signification. They mean only a decision settling a rent in the sense of settling a fair and equitable rent in place of the existing rent. They do not include a decision determining what the existing rent is 25 C. 34 referred to. RAMANI PERSHAD NARAIN SING *v.* MAHANT ADAIYA GOSSAIN. **31 C. 380.**

(For admission by a person made in his sale certificate by himself see the same case on col. 162 P. I.)

211 *S. 106—32 C. 518, No. 186, 5 C. W. N. 798 No. 193, 12 C. W. N. 1032, No. 196, 12 C. W. N. 122, No. 202; 5 C. L. J. 67, No. 203, supra.*

212 Ss. 106, 120 (2), 188—10 *Bengal Tenancy Act* (VIII of 1885), ss, 106, 120 (2). 188—*Zerait—Admission by tenant—Joint landlords.*

Held, that the mere fact of a land having been taken lease of as *zerait* by the defendant would not give to that fact any evidentiary value when the letting was not (as is required by s. 120 (2) of the Bengal Tenancy Act to make it evidence) before the 2nd day of March 1883.

Held, also that disputing an entry made in the course of a record-of-rights proceeding under s. 106 of the Bengal Tenancy Act does not come within the meaning of the words "anything which the landlord is under this act required or authorised to do" as used in s. 188. So one of several joint landlords can institute proceedings under ch. X disputing certain entries made by a settlement officer. SHER BAHADUR SAHU *v.* M. H. MACKENZIE. **7 C. W. N. 400.**

213 Ss. 107, 109—*Record of right—Decision of Revenue officer, uncontested proceeding—*

Bengal Act (VIII of 1885) (*Contd.*)

Effect of—Decree—Presumption of accuracy.

The proceedings referred to in S. 107 of the Bengal Tenancy Act mean contested proceedings in which there is an adjudication on disputed points. The decision of a Revenue officer in an uncontested proceeding has not the effect of a decree under that section and the entry in the Record-of-rights pursuant to such decision cannot override the effect of a contested civil court decree between the same parties. The effect of such a decision and entry would be that, under S. 109 of the Act, there would be a presumption in favour of their accuracy until the contrary was proved. The effect of S. 109 of the Bengal Tenancy Act which lays down a rule of evidence is not to override the rule of Resjudicata RAJAH PUDMANUNDA SINGH *v.* GHANASHYAM MISSER. **1 C. L. J. 134.**

214 *Ss. 107, 109—Settlement Officer's decision, effect of—Presumption under S. 109, force of.*

The effect of the decision of the Settlement Officer, or rather the entry in the record of rights, there having been no contest before the Settlement Officer, is not that of a decree under S. 107. S. 109 merely lays down a rule of evidence and the presumption arising therefrom can be rebutted by the production of a decree passed *inter partes.* The presumption arising from S. 109 cannot override the rule of *res judicata.* GHANSHYAM MISSER *v.* PADMANAND. **1 C. L. J. 134; 9 C. W. N. 610; 32 C. 336.**

215 *S. 107, 111—Resjudicata—Rent fixed by Settlement Officer—Certificate of rent due by tenant—Suit to set aside certificate—28 C. 676 col. 1830, P. I.*

216 *S. 107—1 C. L. J. 310, No. 6, 11 C. W. N. 139, No. 106, supra.*

217 *S. 108 and 109 (3)—Record of rights —Settlement officer, power of—Revision of entries—Objection by tenants—Second appeal—Settlement of rent.*

Section 108 of the Bengal Tenancy Act does not warrant the Settlement Officer in revising his entries as to mal lands in the records-of-rights.

The Act gives to tenants ample opportunity for the correction of mistakes in the record of rights; but the tenants to avail themselves of the opportunity must make an objection to the draft record or institute a suit under section of the Act after the final publication of the record.

No second appeal lies from the decision of a settlement officer settling rent under section 109 of the Bengal Tenancy Act. SHAMBHU CHANDRA HAZRA *v.* PURNA CHANDRA PAL, **35 C. 176.**

218 S. 108, 12 C. W. N. 122 No. 202, 35 C. 1013 No. 209.

219 S. 109, 11 C. W. N. 939 No. 106, 1 C. L. J. 134 No. 213, 32 C. 336 No. 214 *supra.*

220 *Sec. 109 (1) (c)—Surplus sale proceeds—Mortgage—Transfer of Property Act (IV of 1882), sec. 73—Landlords claim preferential.*

The landlord has a right under section 169 clause (1) sub-clause (c) Bengal Tenancy Act, to have the rent due to him in respect of the tenure between the institution of the suit for rent and the date of the sale, out of the balance, before any sum can go to the judgment-debtor or to his mortgagee. He has a preferential claim to that of the mortgagee of the holding, who stands in the shoes of the judgment-debtor. PRABAL CHANDRA MUKERJI *v.* JADUPATI CHUCKERPUTTY **6 C. L. J. 26.**

221 *S. 109 (a)—Civil Procedure Code (Act XIV of 1882), section 588—Remand—Appeal.*

No appeal lies from a remand order of a Special Judge passed under the Bengal Tenancy Act. MOTHUR CHANDRA MAJUMDAR *v.* TARA SUNKAR GHOSE. **7 C W N 440.**

222 S. 109 (*a*)—10 C. W. N. 832, No. 194, 31 C. 380, No. 210 *supra.*

223 S. 109 (3)—33 C. 837, No. 201, 35 C. 1013 No. 217 *supra.*

224 *S. 111 Cl. (a)—' Suit for the determination of the status of any tenant, meaning of—Suit for ejectment and mesne profits—Defence of tenancy—Applicability of section:—*

Section 111, cl. (*a*) of the Bengal Tenancy Act does not apply to a suit for ejectment and mesne profits on the ground that the defendant is a trespasser and where the allegation of the defendant that he is a tenant is altogether denied. It is not a suit for the determination of the status of any tenant within the meaning of the section. TROYLOKHIANATH BOSE *v.* MACLEOD. **28 C 28 at 31, 32.**

225 S. 111—28 C. 766, No. 215 *supra.*

226 S. 111 (*a*)—11 C. W. N. 48, No. 197 *supra.*

227 S. 115—12 C. W. N. 904. No. 72 *supra.*

228 *Ss. 116, 120, Cl. 2, 178—Occupancy right, acquisition of—Zerait or kamat land Act X of 1859, S. 6; VIII of 1869 (B. C.) S. 6—Lease for a term or from year to year—Inception of the tenancy—Admission by tenant.*

Acquisition of occupancy or non-occupancy rights by a tenant in an alleged *Kamat* or *Zerait* land cannot be prevented unless the landlord proves that when the holding was first created, it was held under a lease for a term or from year to year. If the land is not so initially let out the execution of a kabuliat for a term by the tenant during the continuance of the tenancy, does not affect his status or bar the application of the provisions of Chs. V and VI of Act VIII of 1885.

Quære—Whether an admission by a tenant as to the *Zerait* or *Kamat* character of the land of his holding, made after the 2nd March 1883 is conclusive as against the tenant on the question of the nature of the land. MASUDAN SINGH *v.* GOODAR NATH PANDEY. **1 C L J 456.**

229 S. 116—1 C. L. J. 310, No. 6 *supra.*

230 S. 116—12 C. W. N. 436. *See Bengal Act VIII of 1869, S. 6, No. 4.*

Bengal Act (VIII of 1885) *(Contd.)*

231 S. 117—30 C. 339, No. 187 *supra.*
232 S. 120—7 C. W. N. 400, No. 212 *supra.*
233 S. 120 (2)—1 C. L. J. 456, No. 228 *supra,*
234 S. 121—28 C. 364, No. 139 *supra.*
235 S. 122.—28 C. 364, No. 139 *supra.*
236 S. 140—28 C. 364, No. 139 *supra.*
237 S. 143, 170—Application to set aside—Rent sale—Right accrued before but application after repeal—35 C. 543 Col. 1543 P. I.
238 S. 143—30 C. 339 No. 187 *supra.*
239 *S. 144—Civil Procedure Code (Act XIV of 1882), sections 15, 16 and 17—Suit for rent of* putni *tenure—Order on appeal returning plaint for presentation to proper Court—Appeal to High Court.*

When on an appeal against a decree passed by a Munsiff in a suit for rent due on a *putni* tenure for a sum under Rs 1,000, the lower Appellate Court returned the plaint to be presented to proper Court, on the ground that the capital value of the tenure was over Rs 1,000 and the Munsiff had no jurisdiction to try the suit. On appeal to the High Court

Held, that the High Court had jurisdiction to hear the appeal, and the Munsiff was competent to try the suit. The question turned on the true construction of section 144 of the Bengal Tenancy Act and sections 15 and 17 of the Code of Civil Procedure. 26 Cal, 275, followed. CHOWDHRY FAZLUR-RAHIM *v.* DWARKA NATH *Chowdhry*, **7 C. W. N. 402=30 C. 453.**

240 *Ss. 144, 184 and 193, Sch III, Art. 2—Forest lease—Suit for price of trees—Demands for breach of contract—Suit for arrears of rent—Limitation, no admission, raised in appeal—Grant to cut timber of a certain size of limited rights, construction of.*

A grant of the right to fell timber of a particular class and specified size during a defined period of time, though extremely restricted in its scope, which prohibited the lessee from doing any damage to the *bankar mahal, i. e.*, to the forest, and imposed upon the lessee a condition to notify to the Court any occurrence which might happen and though it obviously gran'ed no interest in the soil itself, was obviously grant of the most valuable of the forest rights; it cannot be regarded as a sale of timber. (23 W. R. 458 dist).

A grant of a fishery right or right of pasturage or the like may be made independently of an interest in land. (33 C. 601 refd.)

A grant of the trees as distinct from the land in which the grantor reserves every forest right except the one which is granted is nevertheless the grant of a forest right within the meaning of S. 193 of the Bengal Tenancy Act; and a suit for the recovery of money payable in respect of such forest rights is governed by the three years' rule of limitation laid down in Sch. III, Art. 2, Cl. (*b*) of the Act.

Bengal Act (VIII of 1885) *(Contd.)*

The provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent are, having regard to the phraseology of S. 193 of the Act designedly made applicable to suits for the recovery of sums that are not rent; and money payable in respect of forest rights is not rent within the meaning of S. 3 (5) of the Act.

The question of limitation, raised in the written statement but abandoned in the Court of first instance, is a clear question of law, and it could be raised in the Court of appeal.

Under S. 184, sub-S. 1 of the Bengal Tenancy Act, it is obligatory upon the Court to dismiss the suit on the ground of limitation, although limitation has not been pleaded. (28 C. 86 ref).

Refusal by a counsel or pleader to urge a question of law is a mere admission of law which is not binding upon the party, and the party may raise the question in appeal although not raised in the lower Court, specially where the question of limitation obviously arises upon the admitted facts of the case. (33 C. 257, 27 C. 856, 25 M. 367 P. C. ref).

Although standing timber is moveable property within the meaning of S. 3 of the Indian Registration Act, yet under S. 3, cl. 25 and S. 4 of the General Clauses Act of 1897; standing timber is immoveable property within the meaning of the Civ. Pro. Code. (7 A. W. N. 59, 19 B 207, 11 M. 193 ref).

Growing trees may be regarded as part of the soil and consequently immoveable property (86 R. R. 576 ref).

But where under a contract the grantee has no right to the soil, takes no interest in the land and obtains a right to the trees with a view to fell them immediately or within a reasonable time without any stipulation for the beneficial use of the soil but with a license to enter and take the trees away, the transfer may be regarded as one of moveables, (33 R. R. 259 ref) ABDULLAH SARKAR *v.* ASRAF ALI MANDAL, **7 C. L. J. 152.**

241 *S 148—Suit for rent—Aggregate rent—Aggregate area—Single suit—Maintainability of suit—Execution of decree.*

A landlord is entitled to bring one suit for the total rents of three separate holdings giving the total area as the sum of three holdings. He is not bound to bring three separate suits.

The suit is maintainable though the landlord may have difficulty in executing the decree obtained in it under the special procedure prescirbed in the Bengal Tenancy Act (34 C 298 foll.) NANDA LAL MOOKERJI *v.* SADHU CHARAN KHAN. **7 C L J 96.**

242 *S. 148 (b)—Rent Suit—Plaint—Description of land.*

Where rent due in respect of a holding sufficiently identified by the plaint is claimed and the amount is known, but there was dispute as to the extent of land in the holding between the parties

Bengal Act (VIII of 1885) *(Contd).*

Held, that the Court could pass a decree for rent without determining the exent and such decree did not contravene S 148 of the Bengal Tenancy Act. PIJRADDI NASKAR *v.* AMBIKA CHURN. **5 C. W N 121.**

243 *S. 148 (b).*

The original Court rejected the plaint in a suit for recovery of arrears of rent on the ground that the land in respect of which the claim was made was not defined as the plaint did not give its extent and boundaries, nor any description in lieu thereof. The appeal against the order rejecting the plaint was also dismissed.

The High Court considered the description given sufficient and set aside the order rejecting the plaint. DURGA CHARN LAW *v.* KALA CHAND BISWAS. **7 C. W. N. 615.**

244 *S. 148, cl. (b)—Applicability of—Application subsequent to the Act for execution by assignee of merely the rent decree passed before the Act—Sale by such assignee in execution of rent decree obtained against recorded tenants, effect of, if binding upon unrecorded co-sharers.*

Section 48, cl. (*h*) of the Bengal Tenancy Act governs an application for the execution of a rent decree by an assignee of the decree unless the landlord's interest in the land has become and is vested in him where such application is made after Act VIII of 1885 came into force, even though the decree was made before the Act. When an assignee of a rent decree obtained against the recorded tenants, has brought to sale the tenure in arrears and the execution court has erroneously overruled the objection of the judgment debtor that Section 148 cl. (*h*) was an effective bar to the proceedings, such erroneous order, though binding upon the judgment debtors, is not binding against their unrecorded co-sharers who are consequently competent to question the legality of the sale.

Quære—Whether Section 148, cl. (*h*), absolutely bars an execution at the instance of an assignee of a rent decree who is not also an assignee of the landlord's interest in the land or whether it merely prevents the execution proceedings from having the effect of proceedings in execution of a rent decree. The history of this provision and conflicting decisions as to its scope and interpretation reviewed.

Quære further—Whether the provisions of Section 148 of the Bengal Tenancy Act are applicable to suits by co-sharer landlord. MANURATTAN NATH *v.* HARI NATH DAS. **1 C. L J. 500.**

245 *S. 148 (h)—Landlord and Tenant—Execution of rent decree by assignee—Sale when landlord's interest is not vested in assignee confers no title on purchaser.*

Since under section 148 (*h*) of the Bengal Tenancy Act an application for the execution of a decree for arrears of rent cannot be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in him, a sale of the tenancy on the application of the assignee confers no title on the purchaser when the landlord's interest in it in respect of which the rent decree was obtained was not transferred to the assignee. A purchaser at a subsequent sale held in execution of a decree by a Civil Court obtains a good title as against the first purchaser. GURU CHARAN NATH BEPARI *v.* KARTIK NATH. **10 C. W. N. 44.**

Bengal Act (VIII of 1885) *(Contd.)*

246 *S. 148 (h).*

Clause (*h*) of Section 148 of the Bengal Tenancy Act imposes a limitation upon the execution of a decree for rent, and therefore it should be interpreted strictly and should not be extended to any person who does not come properly within its provisions.

Execution of a decree is not barred under Section 148 (*h*) of the Bengal Tenancy Act, when the landlords parted with their interest as landlords before they obtained the decree and the decree was assigned by them to a third party who again assigned the decree back to the landlords, because the decree sought to be executed was an ordinary decree, and the petitioners were not landlords at the time they obtained the decree. NAGENDRA NATH BOSE *v.* BHUBAN MOHAN CHAKRAVARTI. **6 W. N. C. 91**

247 *S. 148 (b)*—See 35 C. 737 No. 131 *supra.*

248 S. *149—Suits.*

In a case under s. 149 of the Bengal Tenancy Act, where dispute arises as between rival claimants to land in respect of the rent due, the parties are at liberty to have the dispute tried between them as to title and also as to possession. When the plaintiff claims by reason of his possession, the issue regarding possession should be tried first. If the plaintiff fail to prove possession, the suit should also fail. If, on the other hand, he succeeds in doing so, and the defendant claims by virtue of title, he will have to prove it and if he succeeds, the plaintiff will be entitled to adduce evidence to the contrary, *Rabiunnissa* v. *Guljan Bibi* (I. L. R. 17 Cal. 329) followed. JADUB LAL ROY *v.* SRIMUTTY KHEMANKARI DEBYA. **8 C. W. N. 248.**

249 *S. 149, Cl. 3—Onus—Title—Competency to try, question of,*

Where a suit was brought under the provisions of S. 149, Cl. (3), of the Bengal Tenancy Act, and the plaintiff made out a very strong case in support of his title to the rent in deposit

Held, that the onus was then shifted on the defendant and that plaintiff was entitled to succeed, although he was not in a position to prove realization of rents from the tenant, the plaintiffs case being that the defendant had been preventing her from realizing them. It could hardly have been the intention of the legislature that a suit under S. 149, Cl. 3, should develop into a suit involving intricate questions of title. TRAILOKYA MOHINI

Bengal Act (VIII of 1885) (*Contd.*)

DASI *v.* KALI PROSUNNA GHOSE. **11 C. W. N. 380 at 382.**

250. S. 149, 153—Landlord and tenant—Suit with reference to money deposited in Court—Relationship of landlord and tenant —9 C. W. N. 492 Col: 1331 P. 1.

251. *S. 150—Burden of proof.*

S. 150 of the Bengal Tenancy Act is limited in its operation to those cases in which the plea of the tenant is one in respect of which the burden of proof lies upon him; in other words, where it is a plea of confession and avoidance. The section does not, therefore, apply to a case where the rate of rent is in dispute. BANARSI PERSHAD *v.* MAKHAN ROY, **I. L. R. 30 C. 947.**

252. S. 152—35 C. 331 No. 125 *supra.*

253. *S. 153—Right of second appeal.*

No Second appeal lay in a suit for rent for less than Rs. 100 when the tenant pleaded merely that he was not the plaintiff's tenant, but that he had held the land under some third person at a certain rent. In such a case no question arises as to the amount of rent annually payable by the tenant to the landlord. BAIDYA NATH BAHARA *v.* DHON KRISHNA SIRKAR. **V. W N., C, 1901. p. 515.**

254. *S. 153—Suit for rent by Co-sharer landlord.*

The word "rent" in the Bengal Tenancy Act is wide enough to cover a suit for rent by a co-sharer landlord and s. 153 applies to such suits. JOGENDRA NATH GHOSH *v.* PABAN CHANDRA GHOSH. **7 C. W. N. 908.**

255 *S. 153—Second appeal—Lease—Registration and writing not always necessary.*

In a rent-suit brought by a tenant against a sub-tenant, the latter contended that, he was in occupation of the land under zemindar and that he was not the plaintiff's sub-tenant.

Held, that a second appeal lay under S. 153 of the Bengal Tenancy Act because the question involved is one of some interest in land between the parties having conflicting claims thereto. A tenant can prove his tenancy without proving his lease, even if he has any. In all cases it is not necessary that the lease should be in writing and registered. Lala Surabh Narain Lal *v.* Catherine Sophia. (1 C. W. N. 248 referred to.—SITA NATH PAL *v.* KARTICK GHARMI. **8 C. W. N. 434.**

256 *S. 153—Appeal.*

Where in a rent-suit valued at less than Rs 100, the question was one between a raiyat and a tenure holder, the raiyat setting up the title of the superior tenure-holder who was not a party to the suit,

Held, that no second appeal lay under S. 153 of the Bengal Tenancy Act. RAM MOHAN MOHISH *v.* BADAN BARAI, **8 C. W. N 436**

257 *S. 153—Appeal.*

Bengal Act (VIII of 1885) (*Contd*)

In a rent-suit, where the defendants claimed to hold land under the plaintiff and his mother who, the defendant alleged, had a right different from that claimed in the suit, *held* that no appeal lay as the parties had no conflicting claims to the land. Sita Nath Pal *v.* Kartick Gharmi. (8 C. W. N. 484) and Baij Nath Sahoo *v.* Ramdour Roy. (7 C L. R. 369) distinguished.—DENABANDHU NANDI *v.* NABIN CHUNDRA KER, **8 C. W. N. 437.**

258 *S. 153—Value of suit—Withdrawal of portion of claim—Transfer of officer specially empowered—Power, if ceases.*

Where, in a suit for rent, the claim originally made exceeded Rs. 50, but, when the suit came on for trial, the claim was reduced to Rs 7 8-9, a certain of the claim having been withdrawn

Held that, for the purpose of an appeal under S. 153 of the Bengal Tenancy Act, the amount claimed in the suit should be considered to be less than Rs 50.

When a Munsiff is empowered to exercise final jurisdiction under S. 153, he does not cease to have the power by reason of his transfer from the station. S. M. SHILABATI DEBI *v.* MR. M. Y. RODERIGUES. **12 C. W. N. 448=35 C. 547.**

259 S. 153—Execution of decree—Sale—Order setting aside or declining to aside—Appeal against order if allowable—9 C. W. N. 721—32 C. 957 (F. B.) Col. 1131 P. I.

260 S. 153—Prior purchaser applying to set aside a subsequent sale of same property —Munsiffs order setting aside sale—Appeal —1 C. L. J. 255—32 C. 572 Col. 1133 P. I.

261 S. 153—Setting aside sale—Second appeal—28 C. 116 Col. 1274 P. I.

262 *S. 153—Appeal—Conflicting claims to land—Second appeal—Finding of facts.*

The defendant was a *darkhi* or *burgadar*, paying an ascertained quantity of crops to the landlord. The landlord created an intermediate *jotedari* right in favour of the plaintiff, who sued the defendant for *dakhi burga* paddy rent, that he was bound to pay to the landlord. The munsiff decreed the suit but the subordinate Judge reversed the decree on the finding, that the right which the plaintiff obtained on settlement from the landlord was of the same description as that of the defendant and therefore there could be no relationship of landlord and tenant between them, and as there was no proof of an assignment of the lessor's right to collect rent from the defendant, the plaintiff was not entitled to a decree.

Held, per Mitter J., that an appeal would lie under the provisions of section 153 of the Bengal Tenancy Act as the contention was with regard to conflicting interests between the parties. Dewa Bandhu Nandi *v.* Nobin Chundra Kur (8 C. W. N. 437) and Sita Nath Pal *v.* Kartick Garmi (8 C W N 434) followed.

Held, by Fargiter, J. and Maclean C. J.

Bengal Act (VIII of 1885) *(Contd.)*

In a second appeal the court is bound by the finding of the lower appellate court on facts. The plaintiff was not entitled to a decree. RAM KANAI DAS *v.* FAKIR CHUND DAS, **8 C. W. N. 438.**

263 *S. 153—Appeal.*

Where in execution of a decree for rent made in a suit valued at less than one hundred rupees, immoveable property has been sold a second appeal against an order refusing to set aside the sale is not barred by S. 153 of the Bengal Tenancy Act because the order determines a question relating to the land or to some interest in land as between the applicant (mortgagee from the judgment debtor) and the purchaser (decree-holder). SAFAR ALI *v.* RAJ MOHUN GUHA. **1 C L J 454.**

264 *S. 153—Suit for rent including Road and Public Works Cess—Verbal assignment (barat) by putnidars of their liability to pay rent to the superior landlord, effect of.*

Where, in a suit for rent certain cesses are claimed as part of that rent, and the Courts decide whether such cesses are payable or not, a second appeal lies as the decree has decided 'a question of the amount of rent annually payable by a tenant'. (16 C. 638, 20 C. 254 foll.)

Where, under a verbal arrangement existing for a long time, a *darputnidar* has been paying the rent due to the superior landlord from the *putnidar*, it is not open to the *putnidar*, so long as the arangement subsists, to sue the *darputnidar* for the full amount of the rent and treat the assignment as non-existing. DEBENDRA PROSHAD GHOSE *v.* PARESH NATH MITTER. **4 C. L. J. 119.**

265 *S. 153—Co-sharer landlord—Separate landlord—Appeal.*

When a tenant has contracted to pay rent to one of several persons interested in a Zemindari, in respect of his share separately from that of his co-sharers, and such rent has been assessed without any reference to the rent payable to the other sharers and has been separately collected, the landlord is a separate landlord, and to a suit for rent brought by him to recover his rent, S. 153 of the Bengal Tenancy Act applies —BHABATARINI DASI *v.* EKABBAR MALITA. **5 C. L. J. 235; F. B.**

266. S. 153 (a)—8 C. W. N. 193—30 C. 773—See Bengal Act VII of 1876 S. 42 No. 4.

267. *S. 153, Cl. (h)—Co-sharer landlord—Suit for share of rent without making other co-sharers parties—Appeal—Second appeal—Civ. Pro. Code (Act XIV of 1882) S. 622.*

A suit by a co sharer landlord for his share of the rent only without making the other co-sharers parties is a suit instituted by a landlord for the recovery of rent within the meaning of S. 153, Bengal Tenancy Act.

Where the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsif who was specially empowered under cl. (*b*) of S. 153;

Held, that no appeal lay to the Subordinate Judge and hence no second appeal from his decision revising that of the Munsif.

But the decision of the Subordinate Judge being without jurisdiction was set aside under S. 622, Civ. Pro. Code (12 C. W. N. 249 applied 8 C. W. N. 472 not foll.) BHAGABATI BEWA *v.* NANDA KUMAR CHUCKERBUTTY, **12 C. W. N. 835.**

268. *Ss. 153, 193—Falkar rent.*

Falkar rent is rent within the meaning of the Bengal Tenancy Act and S. 153 is applicable to a suit for recovery of such rent. KANAI MAHALDAR *v.* MADHU SUDHAN GHOSE. **6 C. L. J. 669.**

269. *Ss. 153, 188.—Suit for rent by co-sharer landlord.*

S. 153 of the Bengal Tenancy Act must be read with s. 188 and its provisions do not apply to the case of a suit for rent by a co-sharer landlord. The principle in Beni Madhub Roy *v.* Joad Ali Sirkar (I. L. R., 17 Cal. 390), Kedar Nath Chatterjee *v.* Ardha Chandra Roy Chowdhury (5 C. W. N, 763) and Durga Charan Mondal *v.* Kali Prosonno Sarkar (3 C. W. N. 586; I. L. R., 26 Cal. 727) followed. JOGENDRA NATH GHOSH *v.* BABAN CHANDRA GHOSH, **8 C. W. N. 472.**

270. S. 153—9 C. W. N. 122 No. 137, 9 C. W. N. 492 No. 250 *supra.*

271. S. 154—29 C. 247 No. 101 *supra.*

272 *S. 155—Ejectment, Suit for—Alternative relief—Limitation.*

A suit for the ejectment of a tenant for misuse of the land was dismissed by the Court below on the ground that the noitce served on the tenant under S. 155 of the Bengal Tenancy Act was bad, as the compensation claimed in the notice for the misuse was demanded in the alternative.

Held, that the notice was not bad in law merely because the compensation was demanded in the alternative. Pershad Singh *v.* Ram Pertab Roy, (I. L. R. 22 C. 77) distinguished. BOIDY ANATH PANDAY *v.* GHISU MANDAL, **30 C. 1063.**

273 S. 155—See 2 C. L. J. 369 No 63 *supra.*

274 *S. 158 Cl (d)—Determination of rent for excess area—Jurisdiction of the court to determine.*

Under S. 158 cl. (*d*) of the Bengal Tenancy Act a Court has to determine what the existing rent is and it has no jurisdiction to determine what the rent should be and consequently, additional rent for additional area cannot be assessed in such a proceeding. 19 C. 182 and 21 C. 807 foll.—SRI NARAIN THAKUR *v.* MAHARAJA SIR LUCHMESHWAR SINGH BAHADOOR. **6 C. W. N. 529.**

275 S. 158—See 30 C. 339 No. 187 *supra.*

276 S. 159, 161, 166—Surplus sale proceeds for arrears of revenue are subject to mort-

Bengal Act (VIII of 1885) (*Contd*).

gagees charge 33 C. 873. See Col. 632 P. I.

277 S. 159—See 9 C. W. N. 34 No. 126, 10 C. W. N. 176 No. 127 *supra.*

278 S. 160 (g)—Suit to set aside sale held for arrears of cess under Public Demands Recovery Act. 28 C. 813, See col. 1084 p. I.

279 *Ss. 160, 165, 167—Sale for arrears of rent—Rights and liabilities of purchaser—Protected interest—Inumbrance, annulment of—Notice to annul incumbrance.*

A clause in a putni lease, to the effect that, if the putnidar should grant a darputni, the darputnidar shall act according to the terms of the putni kabuliyat, does amount to a permission to the putnidar to create a darputni within the meaning of s. 160 cl. *(g)* of the Bengal Tenancy Act. Knowledge on the part of the proprietor of the creation of the darputni and acceptance by him of the putni rent from the darputnidar are not sufficient to constitute the darputni a protected interest within the meaning of that section. Where an application under s. 167 of the Bengal Tenancy Act was made to the Collector and both the application and the notice issued bore the seal of the Collector and the notice was duly served:

Held, that the provisions of the section was complied with, although the application was received by a Deputy Collector in charge and the notice was signed by a Deputy Collector "for the Collector." It is not necessary that the Collector should personally receive the petition or personally cause the notice to be served. Akhoy Kumar Soor *v.* Bejoy Chand Mohatap, (I. L. R., 29 Cal. 813) approved on this point. MAHOMED KAZEM *v.* NAFFAR CHUNDRA PAL. **32 C. 911= 9 C. W. N. 803.**

280 *S. 161*—See 11 C. W. N. 217 No. 39, 35, C. 737 No. 131, 33 C. 873 No. 276 *supra.*

281 *S. 164, 165, 167—Landlord and Tenant—Annulment of incumbrances—Notice—Mortgage—Apportionment—Transfer of Property Act (IV of 1882), Sections 73, 82 and 101.*

The plaintiff brought the present suit on a mortgage-deed. Pending the suit, one of the properties mortgaged, that is, the property No. 4, which was a *putni* taluq, was sold without any reservation whatsoever for arrears of rent accruing on the taluk itself and was purchased by the plaintiff. Some of the heirs of the mortgagor, defendants Nos. 3, 4 and 8 denied execution of the mortgage-deed and passing of consideration and pleaded that the property No. 4 having been purchased by the plaintiff they could be held liable, if at all, only for the amount justly attributable to the share of the properties in their possession. Subsequently those defendants and defendants Nos. 1 and 7 entered into a compromise with the plaintiffs under which they admitted liability for a portion of the mortgage-debt of the mortgaged property in their possession, and agreed that the suit should proceed against the other defendants in respect of the balance of the claim due by them in respect of their share

Bengal Act (VIII of 1885) (*Contd.*)

of the mortgaged property. Afterwards another defendant, who had not joined in the compromise, raised the objections which had been preferred by defendans Nos. 3, 4 and 8 and assigned her interests in the property. Defendant No. 5 also sold her interest. The assignee was made a defendant.

The Subordinate Judge held that the plaintiff after his purchase was bound to have given notice, as prescribed by section 167 of the Bengal Tenancy Act, for the purpose of cancelling the incumbrance upon the property No. 4. He determined the true value of property No. 4 and deducted the same from the amount claimed and passed a decre for a proportional share of the balance against defendants Nos. 5, 6 and 9 and the assignee according to their share in the mortgaged property. On appeal to the High Court—

Held, that it was not necessary for the plaintiff to issue a notice under section 167 of the Bengal Tenancy Act.

That section 167 applies in a case where the incumbrancer is a third party, and not where the purchaser and the incumbrancer are identically the same person.

Held, also, that property No. 4 having been sold, without any reservation for arrears of rent the Subordinate Judge was wrong in holding that it should be regarded as still subject to the mortgage.

He should have determined the proportional amount of the mortgage-debt justly chargeable on property No. 4, and deducted such amount from the claim of the plaintiff and then found what might be proportionately due from the defendants other than those who entered into the compromise with the plaintiff and he should have determined the amount due to the plaintiff upon the date of the decree.

When a mortgaged property is sold for rent the mortgage charge is transferred to the surplus sale proceeds. HEM CHANDRA CHOWDHURY *v.* TAFAZZEL HOSSEIN. **8 C W N 332.**

282 *S. 165—See* 9 C. W. N. 803, No. 279, 8 C. W. N. 332, No. 281 *supra.*

283 *Ss. 166, 167—Occupancy holding—Mortgage—Incumbrance, annulment of—Fraud.*

Where an occupancy holding which had been mortgaged by the raiyat of the holding was purchased by a person in execution of a decree for money obtained by him, and the purchaser re purchased it in execution of a a rent-decree against the old tenant for arrears which had accrued previous to his first purchase and annulled by a notice under S. 167, the mortgage of which he was aware of at the time of his re-purchase:

Held—That the purchaser did not commit any fraud in re-purchasing the property and was entitled to annul the mortgage and the mortgagor was not entitled to get a decree upon the mortgage making the holding liable for the mortgage debt:

That the purchaser was not bound as representative of the old tenant to pay off the decree for rent obtained by the landlord,

Bengal Act (VIII of 1885) (*Contd*).

SURANDRA MOHAN SINGH *v.* BANSIDHAR MARWARI. **12 C. W. N. 114.**

284. S. 166—See 33 C. 873 No. 276 *supra.*

285. S. 167—Tenure sold in execution of rent decree with power to avoid incombrances—Right of mortgagor to have his lien transferred to sale proceeds. 9 C. W. N. 117. *See Col 631 P. I.*

286. S. 167—Sale for arrears of rent—Incumbrances, annulment of—Notice—Disclaimer. 32 C. 710 Col: 89 P. I.

287. *S. 167—Incumbrance, annulment of—Application—Notice issued by Deputy Collector, if valid.*

Under S. 167 of the Act, the application by a purchaser for the issue of a notice to annul incumbrances is to be made to the Collector and by Sub-Sec. 3, it is the Collector, who must issue the notice on the incumbrancer.

Where, therefore, the application was made to the Deputy Collector, who was not shown to be then acting for the Collector, and notice was issued by him, though his action was subsequently approved by the Collector, after the lapse of the time limited by S. 167, namely, one year from the date of sale, the notice was not a legal notice under the provisions of S. 157 and was invalid and the incumbrance was not annulled. (28 C. 66 foll.) RAMDHON DEY *v.* SURJA NARAIN MUKHOPADHYA. **2 C. L. J. 99.**

288 *S. 167—Application to avoid an incumbrance mentioning a wrong person as the incumbrancer—Another application after the period of limitation for amending the previuos application, effect of—Collector's power to amend such application.*

An application to avoid an incumbrance under s. 167 of the Bengal Tenancy Act, was made by an auction-purchaser, within one year from the date on which he had notice of the incumbrance, mentioning therein a wrong person as the incumbrancer. After the period of limitation, another application was made by him, to amend the previous application by substituting the name of the real incumbrancer, which was allowed by the Collector.

Held, that the Collector, who was merely a ministerial officer in the matter, had no power to make any such amendment; and that the application to serve a notice on the real incumbrancer not having been made within one year from the date on which the purchaser had notice of the incumbrance, was barred by limitation. NRITYA GOPAL HAZRA *v.* GOLAM RASOOL. **28 C. 180.**

289 S. *167—Mesne Profits—Assessment of —Landlord and tenant, combined position of.*

Where the position of the plaintiff is that of landlord and tenant combined and the defendant, a sub-tenant, notwithstanding a notice served upon him under s. 167 of the Bengal Tenancy Act, withheld possession from the plaintiff, the mesne profits must be assessed on the value of the crops raised by the defendant, and not upon the basis of the rent which the rightful owner

Bnegal Act (VIII of 1885) (*Contd.*)

had been realising from the tenants before dispossession. GOPAL CHANDER MANDAL *v.* BHOOBUN MOHUN CHATTERJEE. **30 C. 536.**

290 *S. 167—Joint notice to several tenants —Particulars in a notice.*

A notice under section 167 of the Bengal Tenancy Act 1885, is not invalid because it does not specify the area of the land held by the tenants or the amount of rent paid by them. A joint notice to several tenants is not illegal. JOGABUNDHU MAJUMDAR *v.* RASHO MONJAN DASSYA. **5 W. N. C. 272.**

291 *S. 167—Landlord and Tenant—Annulment of encumbrances—Right of mortgagee to apply to set aside sale held in execution of rent decree.*

Held, that a mortgagee is competent to apply to set aside a sale held in execution of a rent decree and his right is not barred by a notice under section 167 of the Bengal Tenancy Act annulling his mortgage. BRIJ KUMAR ROY *v.* DHANUKDHARI RAUT. **10 C. W. N. 976.**

292 *S. 167—Sale of portion of tenure or holding—Annulment of encumbrances.*

Per *Geidt* J. (before the reference)—S. 167, Bengal Tenancy Act, does not apply to a sale in execution of a rent-decree of a portion only of a tenure or holding and the auction-purchaser cannot proceed under that section to annul encumbrances. RAMKINKAR BISWAS *v.* AKKIL CHANDRA CHOWDHURI. **5 C. L. J. 242=2 M. L. T. 137=11 C. W. N. 251** (**F. B**).

293. *S. 167—Single decree for rent of several tenures held by same tenant—Sale—Avoidance of incumbrance—Money decree.*

When there are several tenures held by the same tenant, the landlord may institute one suit for the rent of all the tenures. But he cannot put the tenures to sale under the procedure laid down in Ch. XIV of the Bengal Tenancy Act in execution of the decree obtained in such a suit, so as to enable the purchaser to avoid incumbrances under S. 167, Bengal Tenancy Act. A sale under the provisions of that chapter can take place only when a separate decree has been obtained for the arrears of each tenure or holding and the same is sold separately in execution of such a decree.—HRIDOY NATH DAS CHOWDHURY *v.* KRISHNA PRASAD SIRCAR, **11 C. W. N. 497; 34 C. 298.**

294 *S. 167—Suit for—Title at the date of suit—Notice, proof of service of—Notice, validity of—Order-sheet of the proceedings, entries in, evidential value of.*

In a suit for recovery of possession, the plaintiff can succeed only on the title as it stood on the date of the institution of the suit.

Until the notice has been properly served under section 167 of the Bengal Tenancy Act upon the incumbrancer, the incumbrance subsists.

Bengal Act (VIII of 1885) *(Contd.)*

It is obligatory on the purchaser to show that the notice under Section 167 had been served in the manner prescribed. The entries in the order-sheet are not *prima facie* evidence against the incumbrancer that the notice was served. C. L. J. 1907 P. 251 followed.

The purchaser, who relies upon the service of notice, must prove it either by the production of the person who served the notice or by any other means recognized by law; and if a question arises to the validity of the notice it must be shown that it was a valid notice and was signed by a competent officer as required by cl. (1) of Section 167 of the Bengal Tenancy Act. 25 C., 813 referred to. RADHAY KOER *v.* AJODHYA DAS **7 C L J 262**.

295 S. 167—Annulment of incumbrances—Omission—Effect of—Landlord having a charge for rent. 6 C. W. N. 834 Col. 719 P. 1.

296 S. 167—Order of remand holding service of notice proved is a "final decree" suit under Section 167 of B. T. A.—12 C. W. N. 645—35 C. 618. Col: 1287 P. I.

297. S. 167—Right, title and interest of the debtors—Protected interest. 29 C. 813 Col: 1741 P. I.

298. *S. 167—Mortgage—Mortgagee purchasing mortgaged property—Extinguishment of charge.*

A mortgagee obtained a decree on his mortgage, afterwards he purchased the property mortgaged at a sale held to recover arrears of rent. The mortgagee drew out from the Court the balance of the surplus sale proceeds and applied it *pro tanto* to the satisfaction of the martgage decree.

Held, that the mortgagee could proceed against the other properties of the judgment-debtor to recover the balance still due, 4 *C. W. N.*, 268, *dissented from.* MASHITTA MANDUL *v.* JAN MAHMUD SHAH. **28 C. 12**.

299 *S. 167*—See 28 C. 66 at 68 No. 16. 31 C. 932 No. 58, 28 C. 205 No. 59, 9, C. W. N. 803 No. 279, 8 C. W. N. 332 No. 281, 12 C. W. N. 114 No. 283 *supra.*

300. *S. 169—Rent—Interest—Pleading.*

Where a landlord applied under S. 169, Cl. *(c)* of the Bengal Tenancy Act for getting the rent and interest due to him between the date of the institution of the suit and the date of the sale from the surplus sale proceeds and the judgment-debtor raised no objection to it but admitted the justice of the decree-holder's demand:

Held—That the decree-holder was entitled to get interest on rent. *Ghose* J.—'Rent, as used in Cl. (c), S. 169, does not exclude interest.' MOHARAJADHIRAJ BEJOY CHAND MOHATAB BAHADUR *v.* S. C. MOOKERJEE. **11 C. W N. 1106**.

301 *S. 169—Landlord and tenant—Right to surplus of sale-proceeds on sale of jote—Question of transferability.*

Held, by Maclean, C. J., and Gupta, J., (Rampini, J., *dissenting*), that when a *jote* is sold in execution of a decree for arrears of rent, and after satisfying the claim of the landlord there is a surplus which is claimed by the plaintiff, a transferee from the original tenant of a portion of the *jote* and the defendant, an auction-purchaser of the holdings of the original tenant, and the landlord is not interested in any of the claims, *held*, that the question of transferability of the *jote* does not arise in such a case. AMBICA NATH ACHARJEE *v.* ADITYA NATH MOITRA **6 C W N 624**.

302 *S. 169—Surplus sale proceeds, claim to, by unregistered tenant—Date of sale.*

A tenure was sold in execution of a decree for arrears of rent and out of the sale-proceeds there was a substantial surplus after satisfying the landlord's claim. The plaintiff, an unregistered tenant, who had purchased a share of the tenure after the date of the decree, brought this suit claiming a share of the surplus sale-proceeds.

Held, that the plaintiff is entitled to maintain the suit.

Held, also that words "date of sale" in S. 169, (1) *(c)* of the Bengal Tenancy Act mean the date when the sale becomes absolute by confirmation by the Court and not the actual date of sale.—MATANGINI CHAUDHURANI *v.* SREENATH DAS, **7 C W N 562**.

303 *S. 169—Transfer of Property Act IV of 1882 S. 73. Sale for Arrears of rent—Surplus sale-proceed—Landlord's right to surplus sale proceeds—Priority between landlord and mortgagee.*

Where a tenure, which had been mortgaged by the tenure-holder, was sold in execution of a decree for rent obtained by the landlord and the balance of the sale-proceeds, after deducting the costs of the decree-holder and what was due to him under the decree, was paid into Court.

Held, that under section 169 of the Bengal Tenancy Act the landlord was entitled to be paid out of the sale proceeds in Court the amount of rent due in respect of the tenure between the institution of the suit and the date of the sale, in priority to the mortgagee. PRABAL CHANDRA MUKERJEE *v.* JADUPATI CHAKRAVARTI **6 C. L. J. 26=34 C. 724**.

304. S. 170—Arrears of rent—Decree—Attachment of tenure claim 28 C. 382 (F. B.) Col. 1516 P. I.

305. S. 170—32 C. 566 No. 128, 55 C. 543 No. 237 *supra.*

306. S. 131—*Mortgage—Mortgagee paying arrears of rent—Lien.*

Held, that a mortgagee making payments to save mortgaged property from being sold in execution of a rent decree, has a lien on the property for sums so paid by him. RAKHOHARY CHATTARAJ *v.* BIPRA DAS DEY, **31 C. 975**.

Bengal Act (VIII of 1885) *(Contd.)*

307 *S. 171--Right of depositor to obtain possession—Procedure—Application or suit.*

Where a deposit is made under S. 171 of the Bengal Tenancy Act the depositor can, as against the judgement-debtor, obtain delivery of possession of the holding advertised for sale by application to the execution Court; but by such application the depositor is not entitled to invite the execution Court; to oust a stranger to the proceeding. If he met by a stranger his remedy is by a regular suit for recovery of possession. RAM NARAIN ROUTH *v.* LAL DAS ROUTH. **12 C. W N 55·6 C L J 595.**

308 *S. 171--Withdrawal of money deposited by landlord, effect of--Transferree, receipt of money from, by landlord--Estoppel--Silence.*

It is the duty of the landlord to challenge the title of the applicant under S. 171 of the Bengal Tenancy Act and to deny that he has any interest in the tenancy advertised for sale. As his silence is prejudicial to the interest of the applicant, he is estopped from denying the latter's title later on. 23 C. 393 and 3 C. L. J. 67; 33 C. 927 ref. to. If a party makes an application on the allegation that all the elements necessary to make a provision of law operative are present and if this is denied, it is not only competent to the Court, but it is its study, to investigate whether all the elements, which give jurisdiction, do as a matter of fact exist. 7 W R. 460; 12 W. R. 195 ref. to, 2 C. W. N. 6 dist. A receipt of money by a landlord from a transferee of his tenant may, under certain cirtumstances, amount to recognition of the transfer. 6 C. L. J. 122, 11 C. W. N. 865; 4 A. L. J. R. 570, 9 Bom. L. R. 846 ref. to. THOMAS BARCLAY *v.* SYED HOSSEIN ALI KHAN. **6 C L J 601.**

309 S. *171 Cl. (1) (c)--Depositor--Possession, delivery of.*

A person who has made a payment, under S. 171 of the Bengal Tenancy Act, is entitled to be placed in possession of the tenure, upon application to the execution Court, and he is not bound to bring a regular suit to obtain possession. An encumbrancer whose interest is not voidable, because the decree under execution is in favour of a co-sharer landlord and operates as a mere money decree, is not entitled to make a deposit and to obtain possession under S. 171 of the Bengal Tenancy Act. UMATUL FATIMA *v.* NEMAICHARAN BANERJI. **6 C L J 592.**

310 S. 171--Interest--Account--Payments made by subsequent mortgagee to save property from rent sale. 11 C. W. N. 403=5 C. L. J. 315 Col. 325 P. I.

311 S. 171--32 C. 972, No. 17, 5 C. L. J. 22 No. 18 *supra.*

312 S. 172--7 C. W. N. 670 No. 103 *supra.*

313 S. 173 (3)--Purchase by judgment debtor in another person's name—Transferee's right to have sale set aside. 9 C. W. N. 134 Col. 1131 P. I.

314 S. 174—Execution of decree—Mokarari tenure—Sale of—Durmokararidar. Person whose immoveable property has been sold.

Bengal Act (VIII of 1885) *(Contd.)*

NARAIN MANDAL *v.* SOURINDRA MOHAN TAGORE. **32 C. 107 Col. 1541 P. I. (For 110 read 107.)**

315. *S. 174-- Sale, setting aside—Deposit —Miscalculation by an officer of the Court.*

Where, upon setting aside a sale under S. 174 of the Act, it was found that the amount of deposit fell short of the amout required to be deposited under the law, but that this was owing to a mistake in calculation by the officer of the Court, who ordinarily supplied such information, and it appeared that the Chief Ministerial Officer of the Court had also signified his approval of the information by signing the challan.

Held—That this was a case in which the High Court ought not to interfere. 26 C. 449 Dist. 18 C. 255 refd. 25 C. 21 foll. SHAIKH FAKIR *v.* BERAJ MOHINI DASI, **11 C. W. N. 116.**

316. *S. 177 (3)—Landlord and Tenant—Rent decree—Execution of decree—Deposit of decretal amount in Court by purchaser of holding--Stay of execution--Revision--Civil cases --No injury to petitioner.*

In execution of a rent decree an order was made for attachment of the tenant's holding and sale proclamation to issue. Before the sale had taken place, the purchaser of the holding in question deposited the full amount of the decree in Court. And the execution proceedings were set aside.

Held, that the purchaser was not a person having an interest in the tenure or holding voidable upon the sale within the meaning of the section 170 (3) of the Bengal Tenancy Act, and was not entitled to prevent the sale.

But the High Court declined to interfere with the order of the Lower Court setting aside execution proceedings, since it appeared that the decree-holder had on a former occasion withdrawn the full amount of the previous decree obtained under exactly the same circumstances, deposited by the purchaser. JOTINDRA MOHAN TAGORE *v.* DURGA DABE, **10 C. W. N. 438.**

317 S. 178--33 C. 136--*See Bengal Act VIII of 1869 s. 7 No. 6.*

318 S. 178--34 C. 516 No. 21, 3 C. L. J. 201 No. 62, 9 C. W. N. 886 No. 102, 7 C. W. N. 670 No. 103, 4 C. L. J. 521 No. 129, 29 C. 674 No. 138, 1 C. L. J. 456 No. 228 *supra.*

319 S. 178 (3) (h)—28 C. 227 No. 140, 33 C. 683 No. 141 *supra.*

320 S. 179, 10 C. W. N. 527 No. 3, 12 C. W. N. 175 No. 29, 9 C. W. N. 886 No 102, 4 C. L. J. 521 No. 129, 29 C. 674 No. 138, 9 C. W, N. 466 No. 142, 9 C. W. N. 469 No. 143 *supra,*

321 S. 180, 33 C. 444 No. 43 *supra.*

322 *S. 181—Occupancy right—-Ghatwali Tenure—Local usage or custom.*

The occupation of land which is included in a Ghatwali tenure and which has been held under a Ghatwal for more than

Bengal Act (VIII of 1885) *(Contd.)*

12 years by a raiyat, does not necessarily confer on him a right of occupancy. The Bengal Tenancy Act does not expressly lay down any rule of law with respect to acquisition of either occupancy or non-occupancy right in land held by Ghatwals as service tenures, and the incidents of a Ghatwali tenure which are declared by section 181 of that Act not to be affected by the provisions of the Act are nowhere specified. The growths of such rights would seem to be inconsistent with the nature of service tenures, but a custom or a local usage might grow up in any local area as to recognition of occupancy rights and such a custom might be binding on successive ghatwals. MOHESH MOJHI *v.* PRAN KRISHNA MANDAL, **1 C. L. J. 138.**

323 *S. 181—Acquisition of right of occupancy—Ghatwali tenures.*

Occupancy rights cannot be acquired in Ghatwali lands. Mohesh Majhi *v.* Pran Krishna Mandal, (1 C. L. J. 1348), referred to. UPENDRA NATH HAZRA *v.* RANI NATH CHOWDHURY, **1 L. R., 33 C. 630.**

324. *S. 181—Village Chaukidars Act (VI of 1870, Bengal)*—Chaukidari Chakran *lands —Resumption. Effect of—Trespasser.* Bona fide *lessee from—Status.*

When *Chaukidari Chakran* lands have been resumed under Act VI of 1870 (B.C.) and transferred to the Zemindar, they are at the Zemindar's disposal to be dealt with by him as *mal* or *serait* at his option; consequently a tenant taking a settlement *bona fide* from a trespasser of such resumed lands does not become an occupancy or a non-occcupancy *raiyat* he is liable to be ejected by the *Zemindar.* The principle of the decision of the Full Bench in 20 *Cal.*, 708 cannot be extended to such a case. 8 C. W. N. 320, 10 M. I. A. 16 refd. to. SHAIKH JONAB ALI *v.* RAKIBUDDIN MALLIK, **1 C. L. J. 303 =9 C. W. N. 571.**

325. *S. 181—See 8 C. W. N. 860 No 43, 2 C. L. J. 379 No. 70 supra.*

326. *S. 182—Homestead land—Occupancy right.*

S. 182 of the Bengal Tenancy Act does not require that a tenant in occupation of homestead land should be a raiyat in the village in which the homestead land is situated. Neither it is necessary that he should be a tenant under the same landlord as the landlord of the homestead land. --KRIPA NATH CHAKRABUTTY *v.* SHAIKH ANEE, **4 C. L. J. 332=10 C. W. N. 944.**

327. *S. 182—9 C. W. N. 416 No. 116, 7 C. L. J. 152 No. 240 supra.*

328. *S. 183—Fraud, Claiming higher rent does not amount to—Transferability of holding—Custom or usage.*

Claiming of higher rent owing to mistake of Patwary does not constitute fraud. The essence of a usage of transferability is that transfers made to the knowledge of, but without the consent of, landlord are valid and must be recognized by him. A

Bengal Act (VIII of 1885) *(Contd.)*

landlord can, by his own action, retard the growth of usage or custom in the village. JAGUN PROSAD *v.* POSUN SAHOO, **8 C. W. N. 172.**

329 *S. 183—Transfer of occupancy holding—Custom—Payment of nazarana—Landlord's recognition—Receipt of rent marfatwari —Ejectment.*

A raiyat transferred his holding without reference to the landlord, but the landlord although cognizant of the transfer, did not recognize the transferee as a tenant on account of the non-payment of the *nazar.* All the same, he received rents from the transferee granting receipts, in which the original holder's name was entered as tenant and in which the transferee's name was entered as the person through whom the rents were received. Sometimes when the transferee sent the rent through an agent, the name of the latter was also entered as the person by whose hand the payment was made.

Held, that inasmuch as the name of the original holder remained recorded until the *nazar* was paid, it was not a recognition of the transfer by the landlord as affecting his own righs. A usage under which a tenant is entitled to sell his holdings and transfer his occupancy right without reference to the landlord provided only that the purchaser pays to the landlord his customary fee, is not inconsistent with Section 183 of the Bengal Tenancy Act. The fact that the payment of *nazar* is requisite to validate such transaction, would imply that the landlord's consent is still necessary and when this has not been done, the landlord is entitled to a decree for ejectment. MAHARAJA RADHA KISHORI MANIKYA *v.* SREEMUTTY ANANDA PRIA. **8 C. W. N. 235.**

330 S. 184—Sch. III, Act 3—Limitation not pleaded nor issue raised. 5 C. W. N. 160 Col. 17 20 P. I.

331 *S. 188—Landlord and Tenant—Co-sharer landlords—Suit for rent. Maintainability of.*

When there is no division of the tenure, a suit for rent instituted by all the co-sharer landlords of the tenure is not unmaintainable by the fact that the rent was received by the landlords in certain shares previously to the institution of the suit for about 25 years, for the arrangement of receiving rent in share separately could be put an end to by all the co-sharer landlords or all the tenants. 4 *Cal., 96, 17 Cal., 695; 9 W. N., Cal.,* 84 *referred to.* SHYMA CHARAN BHATTACHARYA *v.* AKHOY KUMAR MITTER, **3 C. L. J., 627=10. C. W. N. 787.**

332 *S. 188—Co-sharer landlords—Separate collection—Right of sharer to sue for whole rent making co-sharers defendants—"Required or authorised to do" under the Act—Filing of suit—General principles of legal procedure.*

Agreement, either expressly proved or implied by the conduct of the parties

Bengal Act (VIII of 1885) (*Contd.*)

may establish the right of co-sharer landlords to sue separately for the shares of rent receivable by them. But such an arrangement merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding. The right to bring the tenure to sale for arrears of rent remains intact, as also the right of one sharer to sue, making his co-sharers defendants when they will not join as plaintiff.

The filing of a suit is not a thing which the landlord is, under the Bengal Tenancy Act, required or authorised to do; and S. 188 of the Bengal Tenancy Act is no bar to a sharer suing (under the general rules of legal procedure) for the whole rent of the tenure, making his co-sharers, who refuse to join as plaintiffs, defendants in the suit. RAJA PRAMADA NATH ROY *v.* RAJA RAMANI KANTA ROY, **12 C. W. N. 249 (P. C).**

333 S. 188—9 C. W. N. 34, No. 26, 7 C. W. N. 293, No. 100, 7 C. W. N. 670, No. 103. 35 C. 331, No. 125, 29 C. 219, No. 130, 35 C. 417, No. 175, 7 C. W. N. 400, No. 212, 8 C. W. N. 472, No. 269 *supra.*

334 S. 189—30 C. 339, No. 187 *supra.*

335 S. 193—7 C. L. J. 152, No. 240, 6 C. L. J. 669 No. 268, *supra.*

336 S. 95 (*e*) Suit for contribution by purchaser—Decree for rent for a period anterior to sale—7 C. W. N. 794. *See Ss. 65, 55, supra.*

337 Sch. III Art 2—Co-sharer landlord—Separate collection of rent—Suit for entire rent by transferee of whole interest of one co-sharer making other co-sharers defendants —Maintainability—Limitation Act IX of 1908 Art. 110.

Where a tenant is jointly and severally liable for rent to the several co-sharer landlords a suit for rent by the transferee of the whole interest of one of the co-sharers, making the other co-sharers parties defendants, is maintainable and a decree for the entire rent is valid. 35 C., 331—35 I. A. 73 followed.

Held, also that such a suit is governed by the Bengal Tenancy Act VIII of 1885 Sch. III, Art. 2. 4 C. W. N. 605 distinguished. SHASHI KUMAR MIRBAHAR *v.* SEETA NATH BANERJEE. **35 C. 744.**

338 Sch. III, Art. 2. 11 C. W. N. 57. *See Bengal Act VI of 1880, S. 42 No. 5.*

339 Sch. III Art. 2.—*See* 30 C. 1033 No. 25, 7 C. L. J. 152 No. 240 *supra.*

340 Sch. III Art. 2 (a)—*See* 29 C. 283, No. 115 *supra.*

341 *Sch. III, Art. 2 (b)—Suit for rent by a co-sharer landlord against some of several joint tenants—Limitation- Maintainability.*

Art. 2 (*b*) of Sch. III of the Bengal Tenancy Act applies to a suit for rent by a co-sharer landlord.

A suit for rent against some of several joint tenants is maintainable, as joint tenants are jointly and severally liable. JOGENDRA NATH ROY *v.* NAGENDRA NARAIN NANDI. **11 C W N 1026.**

Bengal Act (VIII of 1885) (*Contd.*)

342 *Sch. III, Art. 2 (b)—Limitation of rent suits—Fuslee year—Rent due on the last day of Bhadra—Period of limitation.*

The period of limitation where the Fuslee year prevails is three years from the last day of Jeith. If any instalment is due on the last day of Bhadra, the period of limitation will expire on the last day of Jeith in the third subsequent year, so that, in such a case, the suit must be brought not within three years but within two years and nine months. ISWARDHARI SINGH *v.* RAM BRICH ROY. **7 C L J 106.**

343 Sch. III, Art. 2 (*b*)—9 C. W. N. 96. *See* S. 3 cl. (5) *supra.*

344. *Sch. III Art. 3—Sch. III, Art. 3—Ejectment by co-sharer landlord—Limitation.*

The special limitation of two years as laid down in sch. III, art. 3 of the Bengal Tenancy Act is restricted to suits between persons occupying the position of landlord and tenant, for, it is in regard to such relations that the Act has been designed. It is of no consequence whether ejectment was by some co-sharers or by the entire body of landlords.—ANNADA SUNDARI CHANDALINI *v.* KEBULRAM CHANGA, **7 C. W. N. 542.**

345. *Sch. III. Art. 3.*

Where the raiyat was dispossessed by some of the co-sharers more than two years antecedent to the suit.

Held that it was not open to the plaintiff, another co-sharer to bring to sale the land of the raiyat in execution of a decree obtained by him against the raiyat if the latter had lost his right by efflux of time. SHAIKH SARAF-UD-DIN MONDUL *v.* CHANDRA MANI GUPTA. **5 W. N. C., p. 405.**

346. *Sch. III. Art. 3—Limitation—Suit by an occupancy raiyat where the landlord has no hand in the ouster.*

When an occupancy raiyat is dispossessed and the landlord has had no hand in the ouster, the period of limitation applicable is twelve years, and not two years under Art. 3, Sch III of the Bengal Tenancy Act. The case of Hara Kumar Nath *v.* Sheikh Nasaruddin, (4 C. W. N. 665), so far as the question of limitation was concerned, was not rightly decided.— RANIJULLA *v.* ISHAB DHADI **6 C. W. N. 702=29 C. 610.**

347 *Sch. III, Art 3—Suit by occupancy raiyat for recovery of possession after dispossession by landlord—Dispossession at the instigation of a co-sharer landlord.*

When a landlord dispossesses his tenant the two years' rule of limitation, as laid down in Sch. III, Art. 3 of the Bengal Tenancy Act is applicable, whether the dispossession is by the sole landlord, or by the entire body of landlords, or by a co-sharer landlord. JOOLMUTTY BEWA *v.* KALI PRASANNA RAY. **28 C., 127 note.**

348 *Sch. III, Art. 3—Limitation—Suit for recovery of possession by an occupancy raiyat—*

Bengal Act (VIII of 1885) *(Contd.)*

Dispossession by landlords, fractional, sole, or the entire body.

The period within which an occupancy raiyat can sue to recover possession of land from which he has been dispossessed by his landlord, is two years as laid down in Art. 3, Sch. III of the Bengal Tenancy Act, whether such dispossession be by a fractional landlord, the sole landlord, or the entire body of landlords, Joolmutty Bewa *v.* Kali Prosanna Roy (I. L. R., 28 Cal., 127 note) referred to. PARAMESWAR NOMOSUDRA *v.* KALI MOHUN NOMOSUDRA. **28 C. 127.**

349 *Sch. III, Art. 3—Limitation—Dispossession by defendant not as landlord but as auction-purchaser of the tenant's rights.*

Art. 3, Sch. III of the Bengal Tenancy Act, applies only to suits as between landlord and tenant, and it is not applicable to a suit where the dispossession is by the defendant acting, not as landlord, but, expressly in a different capacity, namely, that of auction purchaser of the right, title and interest of a tenant at a sale held in execution of a rent decree obtained by him as a co-sharer landlord. BROJO KISHORE MAHAPATRA *v.* SARASWATI DASSI. **6 C W N 333.**

350 *Sch. III, Art. 3—Limitation—Occupancy raiyat—Co-sharer landlord—Auction-purchaser.*

At a sale held in execution of a decree for arrears of rent obtained by a co-sharer landlord against a registered tenant another co-sharer landlord purchased the holding and in obtaining delivery of possession, evicted a person other than the judgment-debtor. The person dispossessed sued to eject the auction-purchaser.

Held, that Sch. III, Art. 3 of the Bengal Tenancy Act had no application to the case, as the dispossession by the defendant was in his character of auction-purchaser and not of landlord. 2 C. W. N. 175 and 6 C. W. N. 333 foll. MAHOMED KHALIL *v.* HIRENDRA NATH BHATTACHARYA. **5 C L J 659.**

351 Sch. III, Art. 3—Limitation not pleaded nor issue raised. 5 C. W. N. 160 = 28 C. 86, Col 1720 P. I.

352 Sch. III, Art. 3 and S. 3—Non-occupancy raiyat—Suit by, for recovery of possession. 31 C. 617. F. B. Col. 395, P. I.

353 Sch. III, Art. 3—Landlord and tenant—Occupancy raiyat—Suit for possession by. 9 C. W. N. 54, Col. 1679, P. I.

354 Sch. III, Art. 6—Application for execution of decree for rent by a co sharer landlord for a sum above Rs. 500 in value. 5. C. W. N. 763, Col. 1998, P. I.

355. *Sch. III. Art. 6—S. 185 (2)—Execution of decree—Rent-decree—Limitation Act (XV of 1877), Section 19—Acknowledgment of liability under rent-decree.*

Held, that Section 185 (2) of the Bengal Tenancy Act makes the provisions of section 19 of the Limitation Act applicable to the execution of rent decrees. The acknowledgment under section 19 of the Limitation Act does not affect or alter the period of limitation prescribed by Art 6, Schedule III of the Bengal Tenancy Act, but only gives the decree-holder a fresh starting point for counting the period prescribed by the said article. HARIHAR LAL *v.* GUNENDAR PERSHAD **9 C W N 1025.**

356 Sch. III, Art. 6 and S 185 (2)—Acknowledgment of liability saves limitation of application for execution of rent decrees not exceeding Rs. 500. 3 C. L. J. 347, Col. 1776, P. I.

(Bengal Tenancy Amendment Act. *See Act 1 of 1903*).

(26) Act I of 1887 (Bengal General Clauses Act).

1. *S. 8—Calcutta Municipal Act (II of 1888, Bengal), Sections 236 and 241—(III of 1899 Bengal), Sections 390 and 449—Detached building erected without sanction of Municipality—Applicability of Acts.*

The words "material alteration of the structure of any house," in section 236 of Act II of 1888 (Bengal), contemplate the erection of anything on a site attached to, or detached from, any building standing on it, so as to alter the structure of the house; that is to say, of the house with all buildings standing on that site, and they do not necessarily refer only to an alteration in the building used as a house or residence.

When a person constructed a building standing on a site altogether unconnected with the old building belonging to him, without the permission of the Municipality, under section 236 of Act III of 1888.

Held, that he was liable to action under section 241 of the Act.

The Calcutta Municipal Act (III of 1899), Bengal, relates only to acts done after the commencement of that Act, that is to say, after the 1st April 1900; including acts done to complete a building commenced before the Act came into force.

The provisions of section 449 (3) of Act III of 1899 (Bengal) relate to things done in breach of section 391, and section 391 does not relate to the alteration of, or addition to, a building commenced before the Act came into operation. KESHUB CHANDRA SEN *v.* CALCUTTA MUNICIPAL CORPORATION. **7 C W N 374.**

27 Act XII of 1887 (Bengal Civ. Courts Act).

See Supreme Government Acts XII of 1887 Cols. 786—792 P. I.

28 Act II of 1888 (Calcutta Municipal Act).

Section 236, 241—7 C. W. N. 374. See Bengal Act I of 1887.

29 Act I of 1895 as amended by Act I of 1897 (Public Demands Recovery Act).

1 S. 1—Certificate—Sale—Suit to partial-

Bengal Act (I of 1895) (Contd.)

ly set aside sale 9 C. W. N. 805--See Act VII of 1880 No. 1.

2 S. 1--Interest in the payment 2 C. L. J. 311 See Col. 327 P. I.

2 (a) S. 6--Objection to attachment by judgment-debtor as trustee 6 C. W. N. 63 --See Col. 1117 P. I.

3 S. 7--*Res-judicata*--Rent fixed by Settlement Officer--Certificate of rent due--Suit to set aside certificate. 23 C. 676 See Col. 1830 P. I.

4 S. 7, 8, 19, 22, 28 C. 217 See Bengal Act VII of 1880 No. 5

5 S. 8, 10--Certificate--Notice not served on judgment-debtor--Sale of immovable property in execution of certificate. 71 C. W. N. 756--34 C. 811--See Col. 1825 P. I.

6 S. 8, 10, 31--*Notice under section 10, Service of--Sale, invalidity of, without notice --Notice, how to be served--Substituted service --Notice, condition precedent.*

It is only after a notice under section 10 of the Public Demands Recovery Act has been issued and duly served that the certificate acquires the force and effect of a decree which may be enforced and satisfied by the sale of the debtor's property. If a sale has been held without service of such a notice which is a condition precedent to the validity of the sale, it is without authority and must be set aside on that ground alone. The service of notice under S. 10 must be effected in strict conformity with the provisions of section 31 of the Act. Recourse cannot be had to substituted service unless attempt had beed made to effect personal service upon the judgment-debtor, and when the judgment-debtor cannot be found, upon an adult male member of his family. Substituted service cannot be accepted as sufficient, unless it is proved that the conditions under which a recourse might be had to it, existed. 3 C. L. J. 880: 1 C. L. J. 538; 33 C. 84 and 1 C. L. J. 550 foll. JOGESWAR SAHU *v.* DEBI PROSAD. **5 C. L. J. 555.**

7. *S. 8—See 28 C. 217 No. 4 supra.*

8. *S. 10—Notice, non-service of, effect of —Decree—C. P. Code, S. 244, applicability of.*

A certificate under the Public Demands Recovery Act cannot have the force of a decree unless notice under S. 10 of the Act has been duly served.

S. 244, C. P. C., assuming it to be applicable to the case of a sale in execution of a certificate, has no application to such a case and a civil suit is not barred but *quære*, whether S. 244, C. P. Code, is at all applicable to sales under the Public Demands Recovery Act (1 C. L. J. 366 dist, 1 C. L. J. 542 ref.) SRINATH HORE *v.* BISHAN CHANDRA DAS. **2 C. L. J. 504.**

9. *S. 10—Notice, non-service of, effect of—Sale, nullity—Suit to set aside—Limitation Act. Art. 12—C. P. C., S. 244, if bars a suit to set aside a certificate sale.*

If a notice under S. 10 of the Public Demands Recovery Act has not been duly served the certificate is illegal and void and the sale based thereon is a nullity. 27 C. 698 foll. The person whose property has been sold without service of notice under S. 10 is entitled to sue for recovery of possession within twelve years from the date of dispossession. Where by reason of omission to serve a notice under S. 10 there is no legal decree and no legal sale, a suit to set aside the sale and to recover possession of the property sold is not barred by S. 244, C. P. C.—ELOKESHI DASI *v.* ABINASH CHANDRA BOSE. **5 C. L. J. 638.**

10 *Notice, non-service of—Limitation—Signature, lithograph inoperative—Purchaser, a third party—Valid sale.*

A sale under the Public Demands Recovery Act was held on the 25th September 1882; from that time until the 21st August 1886, the owners and the purchaser were engaged, the first in impeaching, the other in vindicating, the validity of the sale before the Collector, the Commissioner and the Board of Revenue. On the date last mentioned, the Board made the final order by which the sale became final. The suit to set aside the sale was brought on the 25th July 1887.

Held, that the plaintiffs were entitled to a deduction of the time between the 25th September 1882 and the 21st August 1886, and the suit was in time. The form of procedure laid down in the Public Demands Recovery Act must be strictly followed. The Court must require them to be strictly followed in the exercise of the powers conferred by it without speculating as to their object at all. When a property of very large value had been sold for nominal price, the Court would not apply in aid of the sale the principal *ut res magis valeat quam pereat.* When a certificate has not been signed by an officer authorized to sign it, there is no certificate duly made and there is no valid sale. When a certificate was not signed but a lithographed signature was attached, the certificate was not duly signed as required by law. When there was no certificate duly made and no notice under S. 10 served the sale must be set aside. even though the purchaser is a third party. No question of hardship arises when a man has made a speculative purchase of a valuable estate for next to nothing. BAIJ NATH SAHAI *v.* RAMGAT SINGH. **5 C. L. J. 687.**

11 *S. 10—Civil Procedure Code (Act XIV of 1882), Section 244—Service of certificate—Execution of certificate.*

Section 244 of the Civil Procedure Code does not apply to the case of execution proceeding held under the Public Demands Recovery Act—*VI C. W. N., 245; S. C., XXIX C., 94; VI C. W. N. 331, followed.*

When a certificate under the Public Demands Recovery Act is not duly served under section 10, there can be no execution, and proceedings held under such certificate are bad. RAMRUP SAHAY *v.* KHUSHAL

Bengal Act (I of 1895) (*Contd.*)

MISSER. **6 C. W. N. 630.**

12 S. 10. Notice not served. 5 C. L. J. 666. See col. 1825 p. I.

13 S. 10. Suit to set aside sale held for arrears of cess under Public Demands Recovery Act, 28 C. 813. See col. 1084 p. I.

14 S. 10. Certificate of sale, setting aside Fraud - Joint owner—Recovery of property. 5 C. L. J. 385. See col. 1825 p. I.

15 S. 10—Certificate—Notice under S. 10 Non-service—Jurisdiction. 34 C. 787. See Col. 1134 p. I.

16 *Ss. 10, 12, 15, 16, 21, 31—Suit to set aside—Sale certificate—Certificate to recover public demands—Notice—Defect in service, not cured by knowledge—Objections—Limitation—Civil Procedure Code, Ss. 278, 317, 568—Admission of additional evidence in appeal.*

Ss. 15 and 16 taken together indicate that the period of limitation is to run from the determination of objections, if any, under S. 12 of the Act, and that such determination need not necessarily be upon evidence given 1 C. W. N. 24 dist.

Where, therefore, objections had been filed and disallowed more than six months before the institution of a suit to set aside a sale in execution of a certificate under the Act, the suit, so far as the parties who filed those objections are concerned, is barred by S. 16 of the Act.

Such a suit must be instituted either within six months after the date of service of notice on the plaintiff under S. 10 of the the Act or within six months from the date of the determination of objections, if any, under S. 12 of the Act.

S. 31 of the Act requires personal service, whenever it may be practicable, and allows substituted service only when the judgment-debtor cannot be found; the affixing of a copy of the notice to the outer door of his dwelling house, when he is known not to be living there but at a different place, is not a sufficient compliance with the law.

Mere knowledge of the issue of the certificate under the Act is not sufficient, by itself, to cure, or make up for, the absence of due service of notice.

It is the service of notice that, by S. 10 and other provisions of the Act, gives to the certificate the force and effect of a decree of a Civil Court; and, in the absence of such notice, a sale held in execution of a certificate to enforce a public demand is invalid even if it is not shown that no arrear was due. (4 C. W N. 586, 23 C. 775 foll.)

S. 21 of the Act, Sub-Sec. (2) limits the application of Ch. XIX of the Code of Civil Procedure to the proceedings to enforce a certificate and does not make S. 317, C. P. C., applicable to a case like the present.

Where a case comes under the second paragraph of S. 317, C. P. C., as it does here, the claim cannot be barred by the first paragraph of that section.

An appellate Court has power under S. 568, C. P. C., to admit additional evidence, but that power must be sparingly exercised.

Bengal Act (1 of 1895) (*Contd.*)

(7 W. R. 10 P. C. ref.) AMBICA PROSAD *v.* GOPAL BUKSH DAS. **1 C. L. J. 550.**

17 *Ss. 10, 12, 31—Notice, service of—"Adult" meaning of—The Collector of 24-Parganas—Certificate Officer.*

A person above the age of sixteen years at the date of the service of notice is an "adult" within the meaning of S 31 of the Public Demands Recovery Act. When a notice under S. 10 of the Public Demands Recovery Act actually reaches the Judgment-debtor and he contests the claim, it cannot be said that the notice was not validly served because the person on whom the service was made is not proved to be residing with the judgment-debtor the object of serving the notice being to enable the judgment-debtor to contest his liability. The Collector of 24-Parganas is the proper Certificate Officer to enforce a certificate under the Act against immoveable property in Calcutta. HARI CHARAN SINGH *v.* CHANDRA KUMAR DEY. **35 C. 286.**

18 S. 10, 19—32 C. 691. *See* Bengal Act VII of 1880 S. 7 No. 8.

19 *Ss. 10, 31—Notice. Service of—Suit to set aside sale—Sale. Confirmation of—Certificate. Issue of, if cures defect in service of notice—Notice, how to be served.*

Service of Notice under section 10 of the Public Demands Recovery Act is essential for the validity of a sale held under the Act, and such service of notice under section 10, must be effected in conformity with the provisions of section 31 of the Act. 1 *W. N. Cal.*, 516; 4 *W. N. Cal.*, 586; 5 *W. N. Cal.*, 86; 6 *W. N. Cal.*, 630 *referred to and followed.*

A defect in the service of such a notice cannot be cured under section 8 of act VII of 1868, B. C., by the grant of the certificate of sale to the auction purchaser. 26 *Cal.* 414 *referred to.* 6 *W. N. Cal.* 688 *distinguished.* RAMRUP SAHAI *v.* KUSHAL MISSER. **3 C. L. J. 280.**

20. S. 10—See 34 C. 811 No. 5, 5 C. L. J 555 No. 6 *supra.*

21. S 12—See 1 C. L. J 550 No. 16, 35 C 286 No. 17 *Supra.*

22. S. 15—Notice—Non-service of—Certificate, effect of—Sale. 5 C. W. N. 86 *See Col 75.*

23. S 15, 17, 19, 20, 31—Sale for arrears o rent—Suit to set aside sale. Grounds of 10 C. W. N. 130. *See Col: 1077 P. I.*

24. S. 15—See 1 C. L J. 550 No. 16 *supra.*

25. 6. 16—See 1 C. L. J. 550 No. 16 *supra.*

26 S. *17*—See 10 C. W. N. 130 No. 23 *supra*

27 S. 19—Suit to set aside sale held under Act I of 1895 (Bengal) on the ground that there were irregularities in the cerificate proceedings. 5 C. L. J. 240 (F. B) Col: 1519 P. II.

28 *Ss. 19, (2), 20, 3—Civil Procedure Code (Act XIV of 1882), Sections 244, 312 and 424—Sale—Suit to set aside sale on the ground of fraud, if maintainable—Secretary of State, if necessary party—Notice to Government.*

A suit to set aside a sale under the public Demands Recovery Act on the ground of

Bengal Act (I of 1895) (*Contd*)

fraud is maintainable and is not barred by the provisions of section 244 and 312 of the Civil Procedure Code. 1 *C. L. J.*, 538 and 32 *Cal.*, 691 *distinguished.*

In such a case where no relief is claimed by the plaintiff on the ground of fraud against the Secretary of State for India, there can be no cause of action against him and under these circumstances it is impossible to serve a notice fulfilling the requirements of section 424 C. P. C. 7 *Cal.*, 499, 26 *All.*, 220 *referred to.* RAGHUBANS SAHAI *v.* PHOOL KUMARI. **1 C. L. J. 542=32 C. 1130.**

29 S. 19, 20, 21—Sale in execution of certificate—Maintainability of suit in Civil Court to set aside sale. 3 C. L. J. 235—10 C. W. N. 347--33 C. 451 Col. 1554 P. I.

30 *S. 19—See* 28 C. 217 No. 4, 32 C. 391 No. 18, 10 C. W. N. 130 No. 23 *supra.*

31 *S. 20*—See 10 C. W. N. 130 No. 23, 32 C. 1130 No. 289, 33 C. 451 No. 29 *supra.*

32 S. *21*—See 1 C. L. J. 550 No. 16, 33 C. 451 No. 29 *supra.*

33 S. 31, 1 C. L. J. 550 No. 16, 3 C. L. J. 80 No. 19, 10 C. W. N. 130 No. 33 *supra.*

(30) Act V of 1897 (Bengal Estate Partition Act)

1 Ss. 29 and 85—35 C. 575—*See Bengal Act X of 1879 S. 14 No. 7.*

2 S. 81—10 C. W. N. 818—*See Bengal Act VIII of 1876 S. 1 No. 1.*

3 S. 85, 35 C. 575 No. 1 *supra.*

(31) Act III of 1898 (Bengal Tenancy Amendment Act)

S. 9 32 C. 162--See *Bengal Act VIII of 1885 Ss. 102, 104.*

(32) Act I of 1889 (Bengal General Clauses Act.)

S. 8 (c)--Application to set aside sale---Right accrued before but application after repeal--35 C. 343 Col. 1543 P. I.

(33) Act III of 1899 (Calcutta Municipal Act.

1 *Ss 3 (25), 351, 353—Detached hut—Masonry building*

A detached wall built of masonry is not a masonry building within the meaning of clause 25 of section 3 of the Calcutta Municipal Act. IN THE MATTER OF CORPORATION OF CALCUTTA *v.* JOGESHWAR LAHA, **8 C. W. N. 487.**

2 Ss. *3 (32), 320, 574—Receiver. Prosecution of, without sanction of Court.*

A Receiver was convicted of offences under sections 320 and 574 of the Calcutta Municipal Act for not taking steps to close certain privies and to make certain structural alterations in certain premises under his control as Receiver. It was contended that the conviction was bad: (1) because the Receiver was not the "owner" of the premises, (2) because the sanction of the Court had not been obtained to his prosecution, (3) because the Receiver had not under his order of appointment the power to incur the expenditure required to carry out the orders of the corporation, and (4) because he was doing all he could to obtain funds from the Court to enable him to comply with the notices.

Held, that the conviction must be set aside on these grounds—*7 W. N Cal. 390 followed.* W. R. FINK *v.* THE CALCUTTA (MUNICIPAL) CORPORATION. **7 W. N. C. 706=30 C. 721.**

3. S. 73 (c)—Attachment of Provident Fund invalid—Trustees of the Fund's claim 35 C. 641 *See Col. 869 P. I.*

4. *S. 152—Civil Procedure Code (Act XIV of 1882), S. 622—Letters Patent, Section 15—Revision—Calcutta Municipal Acts (II of 1888), Section 135, Valuation—Assessment—Powers of Small Cause Court.*

In the year 1894 the Municipal Commissioners, acting under the provisions of Act II of 1888, made valuations of certain properties. On these valuations assessments of rates were made for the period of six years expiring on various dates on or before the 31st March 1900. On the 1st of April 1900, the new Municipal Act III of 1899 came into force. Shortly before the expiry of Act II of 1888 the Commissioners made new valuations of the properties in question for the purpose of the assessments intended to be in force for the next period of six years commencing from the end of the period then about to expire. These valuations were made at various dates between the year 1899 and the month of March 1900, the procedure adopted being that provided by Act II of 1888, which was then in force. Objections were filed by the owners under Section 135 of Act II of 1888. On the objections being disposed of appeals were filed in the Small Cause Court after the 1st of April 1900. The Judge found that the valuations and assessments made by the Commissioners in 1899 and 1900, in respect of which objections were filed by the owners under Section 135 of Act II of 1888, which objections had been finally disposed of by the Small Cause Court as the constituted Court of appeal when Act III of 1899 came into force, were not in force at the commencement of that Act within the meaning of Section 152 of the Act, and he accordingly set aside these valuations and assessments. He further declared that the valuations in force at the commencement of Act III of 1899 were the previous valuations of 1893 and 1894, and directed these old valuations to remain in force for the further periods mentioned in column 2 of Schedule VII of the new Act.

Held:—

(1) That the Small Cause Court has jurisdiction on appeal to deal with the validity or otherwise of the entire valu-

Bengal Act (III of 1899) (*Contd.*)

ation, the only condition being that the procedure as to the filing of objections to the valuation laid down by Section 135 of Act II of 1888 has been correctly followed. The provision in that section as to the form of the notice is directory only, and the Small Cause Court was not competent to declare that the assessments, under the previous valuations were still in operation, and must remain in force for further periods.

(2) That the order of the Small Cause Court, so far as it set aside the valuations, was not open to review by the High Court.—3 *C. W. N*, 70; *S. C, I. L. R. 26 Cal.*, 74, *followed.* THE CORPORATION OF CALCUTTA *v.* J. J. COHEN. **6 C. W. N. 480.**

5 *153 (b), 159, 175, 225—Assessment of bustee land—Suit for wrongful distress—Bill and notice of demand not served—Effect on plaintiff's claim.*

On the 4th March 1901 the plaintiff purchased a plot of *bustee* land consisting of 10 *cottahs* situate within the limits of the Calcutta Municipality. This plot was a portion of a holding No. 4 of which the consolidated rate at the time of purchase was Rs. 17-12-6 *per* quarter The plaintiff's vendor had broken up the holding No. 4 into 7 or 8 plots, of which he kept two and the others were sold to the plaintiff and certain other persons respectively.

The plaintiff on the 22nd March 1901 applied to the Corporation for a separate valuation and assessment and a separate number for his newly purchased premises. Nothing having been done on his application the Corporation on the 20th September 1901 seized some property of the plaintiff in his absence for the payment of the consolidated rate due in respect of the entire holding No. 4 for the third quarter of 1901. Prior to this no bill for the rate claimed was presented to the plaintiff nor any notice of demand was served upon him. The Corporation had, on the 5th October 1901, in consequence of plaintiff's application of the 22nd March 1901, served upon him a special notice purporting to be under section 159 of the Calcutta Municipal Act, and dated the 30th September 1901, intimating him that his *bustee* land was assessed at an annual value of Rs. 158 and that the valuation would remain in force for next six months from the commencement of the 3rd quarter of 1901-1902 and afterwards from year to year, until a re-valuation should be made. The plaintiff made no objection to the valuation mentioned in the notice according to which the rate for the plaintiff's plot was Rs. 6-11-9. The Corporation on the 30th December 1901 again seized plaintiff's property for Rs. 17-12-6 the entire rate of No. 4 for the then current quarter at the old valuation.

In consequence of objections made by other co-sharers effect was not given to

Bengal Act (III of 1899) (*Contd*).

the special notice served upon the plaintiff but the plaintiff was not made aware of it. On plaintiff's suit for compensation for wrongful distress

Held, that the claim must be dismissed for the Corporation was justified in not giving effect to the assessment until the disposal of objections and the omission to present bills and to serve notices was a mere irregularity under section 225 of the Municipal Act and the only damages recoverable by the plaintiff were the damages actually sustained by him. BEPIN CHANDRA BISWAS *v* THE CORPORATION OF CALCUTTA **31. C 452.**

6 *Ss. 247, 250, 427—Sanction to build by Corporation—Power to withdraw sanction—Acts of servants binding on Corporation—No orders on application for sanction to build—Right of applicant to build.*

There is nothing in Act II of 1888, B. C., which enables the Corporation of Calcutta to revoke or withdraw a sanction to build, when once granted. If sanction is given subject to an undertaking by the applicant and the undertaking is not complied with, the Corporation has its remedy at law to compel compliance with the undertaking.

To a suit for damages for withdrawal of sanction; the special limitation under section 427 of Act II of 1888, B. C., does not apply as the withdrawal of sanction cannot be considered as done or purporting to be done under the Act.

The Corporation is bound by the acts of its officers; but in such cases it may show fraud or collusion on the part of the applicant whom sanction to build and the right has been granted in connection with the obtaining of sanction under section 250 of Act II of 1888, B. C.

If the Commissioners fail under section 247 to pass orders within a fortnight, then the person applying for permission to build may proceed to build and the right of the person so applying becomes absolute. The Commissioners could not be heard to say that the failure of the Commissioners to pass orders had been due to oversight, mistake or some other like cause, nor be allowed to take steps to prevent the building from proceeding. TULLARAM RAJENDRA NATH SANYAL *v.* THE CORPORATION OF CALCUTTA. **7 C. W. N. 329=30 C. 317.**

7 *S. 310, 574—Criminal Procedure Code (Act V of 1898) Sections 197 and 432—Calcutta Municipal Act (III of 1899, Bengal).*

The Administrator-General of Bengal was appointed administrator to the estate to which the houses in dispute appertained, by an order of Court on the death of the executors appointed by the Will of the late proprietors.

A question arose whether he could be prosecuted under the Calcutta Municipal Act, without the sanction of Government for non compliance with the requirements of the Calcutta Municipal Act in respect of

Bengal Act (III of 1899) *(Contd.)*

the house vested in him as such Administrator.

Held, that no sanction was necessary. (THE MUNICIPAL) CORPORATION OF CALCUTTA *v.* (THE) ADMINISTRATOR GENERAL OF BENGAL. **7 W. N. C. 750 =30 C. 927.**

7 a S. 320, See 30 C. 721 No. 2 *supra.*

8 Ss. 333, 391, 449—Detached building erected without sanction of Municipality —Applicability of Acts. 7 C. W. N. 374. *See Bengal Act I of 1887.*

9 *Ss. 333, 383, 449, 452, 579—(II of 1888, Bengal)—Deviation from the sanctioned plan of a building commenced under the old Act—Liability of the owner under the new Act—Notice.*

If a building is constructed in deviation from the plan sanctioned under the old Calcutta Municipal Act, so as to render the owner liable to a penalty under the old Act, then he cannot show that he had acquired under the old Act, before the new Act came into force, a right entitling him to build in contravention of the provisions and rules laid down by the new Act so as to bring himself within clause *(c)* of section 8 of Act I (B. C.) of 1899, the Bengal General Clauses Act. He will then be liable to prosecution under the new Act.

The question what penalty should be enforced under sections 449, 452 and 579 of Act III of 1899, is in the discretion of the Magistrate and not a question of law to be answered by the High Court on reference made to it.

There is nothing in the Act making a notice under section 383 of the Calcutta Municipal Act a condition precedent to a proceeding under the first sub section 449 of the Act. CORPORATION OF CALCUTTA *v.* AMRITA LAL MUKERJEE. **7 C. W. N. 554.**

10. S. 351, 352—8 C. W. N. 487 No. 1 *supra.*

11. S. 383—7 C. W. N. 554 No. 9 *supra.*

12. S. 391—7 C. W. N. 374 No. 8 *supra.*

13. S. 427—30 C. 317 No. 6 *supra.*

14. *S. 449, 580 and 631.*

The accused erected a building after obtaining sanction of the Calcutta Municipality. There was a gully about 2 feet wide on the north side of it. The sanction of the corporation was accorded under a misapprehension, the misapprehension having been due to the accused's application and the plan submitted with the application not drawing the attention of the municipality to the existence of the gully. A notice was issued on the 8th September 1902 to the accused under section 449 of the Calcutta Municipal Act directing him to leave six feet wide space between his building and the next one to it or to attach his building to that one. The accused failed to carry out this order within the period allowed to him, namely, three months. On the 10th February 1903 he was fined under section 580 of the Act. Subsequently upon a complaint filed on the 10th March 1903 he was again convicted under the latter part of that section and a daily fine was imposed on him.

On appeal it was contended for him, first, that the prosecution was barred by limitation under section 631, Act III of 1899, second, that no offence has been committed by the Appellant when the house was built in accordance with the sanction of the Corporation; third, that no offence had been committed by the appellant as he did not contravene Rule No. 24 of Schedule XVII of Bengal Act III of 1899, inasmuch as he was not bound to leave any open space by reason of the building abutting on an open square or the like dedicated to public use, namely a gully or municipal land, and, fourth, that the imposition of a daily fine was bad as there was no fresh order under section 449 made in this case.

Held, (1) that after the time allowed to the accused to obey the order and his conviction every day's default in carrying out the order became a distinct offence under section 580. The summons was issued on the 6th May upon a complaint made on the 10th March 1903, so that it could not be said that the prosecution was in any way barred under section 631.

Section 580 creates the offence and also prescribes the penalty, and it is a section which creates both the primary offence and the subsidiary or the continuing offence, and the latter consists of a series of offences committed on each day by reason of the default in carrying out the order under section 449.

(2) that as the sanction was granted by the Corporation under a misapprehension due to the accused's fault it could not be said that no offence was committed by him.

(3) that the gully was not "an open square or the like dedicated to public use" within the meaning of Rule 24 of Schedule XVII. An "open square or the like" must at least be 4 feet wide.

(4) that no fresh order was necessary under section 449 to authorise the imposition of a daily fine--27 Cal. 565, 25 W. R. *Cr.* 6 18 *W. R.* 44, 18 *W. R., Cr.* 44 *foot note* 22 *Com.,* 766 *distinguished.* NONI LAL SETT *v.* THE CORPORATION OF CALCUTTA. **7 C. W. N. 853.**

15 *S. 449, 580, 628, 629, 631—Municipal Magistrate—Adjournment of case—Costs—Criminal Procedure Code (Act V of* 1898), *s. 344—Reasonable order for demolishing building—No limitation according to value.*

The words a "Magistrate" in section 449 of the Calcutta Municipal Act, mean any Magistrate having jurisdiction in Calcutta and include a Municipal Magistrate.

It is in the discretion of a Magistrate to make an order for the adjournment of a case on payment of costs of the other side

Bengal Act (III of 1899) *(Contd.)*

under section 344, Criminal Procedure Code.

The powers to demolish buildings given to a Magistrate by section 449 of the Calcutta Municipal Act have no limitation according to value. SEW PROSAD PODDAR v. THE CORPORATION OF CALCUTTA. **9 C. W. N. 18.**

16 S. 449—7 C. W. N. 394, No. 8, 7 C. W. N. 554, No. 9, *supra* and 8 C. W. N. 142, No. 24 *infra*.

17 S. 452, 7 C. W. N. 554, No. 9, *supra*.

18 S. 495—*Mustard oil adulterated with* til *oil—Article commercially known as mustard oil—Prejudice of purchaser by adulteration.*

A food Inspector purchased two samples of mustard oil from the accused's manufactory. On analysis they were found to be adulterated with *til* oil. The accused was then tried and convicted under section 495 of the Bengal Act III of 1899.

Held, that the conviction was right.

It is not necessary for the purpose of expressing all the oil from the mustard seed to mix *til* or any hard seed to assist in the process of expressing the oil.

Mustard oil as an article commercially known as such, is the pure mustard oil and not oil adulterated with *til* or any other oil.

A purchaser is prejudiced by the adulteration of mustard oil with *til* or any other oil, because it becomes less suitable for cooking and other purposes for which it is used, and also because the adulteration results clearly in increasing the bulk of the oil and the profit of the manufacturer. MOTI LAL PAL v. THE CALCUTTA CORPORATION **7 W. N. C., 637=30 C. 643.**

19 Ss. *502 and 505—Destruction of grains not fit for human consumption.*

In order to justify an order under section 500 of the Calcutta Municipal Act, the Magistrate has to be satisfied that the article to be destroyed comes within the provisions of section 502 of the Act. He is to be satisfied that the article is either exposed or hawked about for sale, or deposited in, or brought to, any place for the purpose of sale, or of preparation for sale, and is intended for human food. CHUNDER KUMAR BISWAS v. THE MUNICIPAL CORPORATION OF CALCUTTA. **7 W. N. C., 27=30 C. 42.**

20 S. 574—30 C. 721 No. 2, 30 C. 927 No. 7 *supra*.

21 S. 579—7 C. W. N. 554 No. 9 *supra*.

22 Ss. 580, 7 C. W. N. 853 No. 14, 9 C. W. N. 18 No. 15 *supra*.

23 S. 628, 629—9 C. W. N. 18 No. 15 *supra*.

24 Ss. *631 (1), 449—Complaint—Punishment.*

Section 631 (1) of the Calcutta Municipal Act 1899 has no application to proceedings taken under Section 449 of the Act. By its terms it applies only to complaints made before a Magistrate in order to the punishment of a person for an offence against the Act or any rule, bye-laws or regulations made under the Act.

Proceedings under Section 449 are not instituted on "complaint" nor is the demolition of unlawfully executed work a "punishment" within the meaning of Section 631 (1). *In the matter of the* CORPORATION OF CALCUTTA v. KESHUB CHUNDER SEN. **8 C. W. N. 421.**

25 S. 631—7 C. W. N. 853 No. 14, 9 C. W. N. 18 No. 15 *supra*.

26 S. *634 (2)—Limitation—Suit against Corporation of Calcutta—"Accrual of the right to sue."*

The words "right to sue" in section 634 of the Calcutta Municipal Act do not mean cause of action. The "accrual of the right to sue" must apply to the date when the *month's* notice referred to in the section expires, from which date a plaintiff has three months within which to commence his action. CORPORATION OF CALCUTTA v. SHYAMA CHARAN PAL. **9 W. N. C. 217=32 C. 277.**

27 Sch. XVII Rule 24—7 C. W. N. 853 No. 14 *supra*.

(34)—Act I of 1903 (Bengal Tenancy Amendment Act).

1 S. 1—Release by co-sharer, if transfer—Non-payment of landlord's fee, if invalidates transfer. 12 C. W. N. 478.—*See Bengal Act VIII of 1885 S. 11, 12.*

2. S. 1—Retrospective validation of sales. 1 C. L. J. 500 See Bengal Act VIII of 1885 S. 148 (h).

(35)—Act VIII of 1905—(Bengal and Assam Laws Act)

1 *S. 1—Sambalpur District—Divisional Judge, appellate decision of—Second appeal to the Calcutta High Court—Bengal and Assam Laws, Act VII of 1905, Sch. D.—Act II of 1904, before repeal by Act VII of 1906—C. P. C. S. 587.*

The District of Sambalpur was part of the Central Provinces until 16th October 1905, when it was added to the Province of Bengal by proclamation.

Held: That under Act VII of 1905 an appeal preferred on the 21st December, 1905, against an appellate decision of the Divisional Judge of Sambalpur of 22nd August 1905 lay to the Calcutta High Court and not to the Judicial Commissioner of the Central Provinces. A second appeal though not expressly provided for by Act II of 1904 (which was in force at the time this appeal was preferred) lay under S. 584 of the Civil Procedure Code, the Court of the Divisional Judge being a Court subordinate to the Calcutta High Court since Act VII of 1905 came into operation. BALBHADRA v. MUSSTT BHAVANI. **6 C. L. J. 233; 11 C. W. N. 957; 34 C. 853.**

36) Act I of 1907 (Bengal Tenancy Amendment Act.)

1. S. 54—Application to set aside rent sale—Right accrued previous to Act I. of 1907, but application after repeal. Effect. 35 C. 543. See Bengal Act VIII of 1885 S. 143 No. 237.

Bengal Regulations. *See Regulations.*

Bequest.

1 To adopted son. 28 M. 363. *See Hindu Law—Will.*

2 To class—32 C. 992 and 29 C. 699. *See Hindu Law—Will.*

3 For charitable purposes. 31 C. 111, 31 C. 166, 31 C. 895. *See Hindu Law—Will.*

4 To daughter and her sons. 24 M. 299 and 32 C. 396. *See Hindu Law—Will.*

5 For feeding Brahmans. 12 C. W. N. 1083. *See Hindu Law—Will.*

6 To heir. 30 C. 683. *See Mohammadan Law—Inheritance.*

7 To idol. 30 C. 521, 29 C. 260 and 26 M. 433. *See Hindu Law—Will.*

8 To mother. 32 C. 1051 and 4 B. L. R. 55. *See Hindu Law—Will.*

9 To son to be born. 5 C. W. N. 729. *See Hindu Law—Will.*

10 To stranger. 26 B. 497. *See Mohammadan Law—Will.*

11 Of self acquired property. 24 M. 429. *See Hindu Law—Will.*

12 Of specified sum. 5 B. L. R. 729—32 I. A. 105 P. C. *See Annuity No. 3 col. 2170 p. I.*

13. To wife 5 B. L. R. 335. See Hindu Law—Will.

14. To Widow—5 C. W. N. 300 See Hindu Law—Will.

Conditional—15 M. L. J. 111—28 M. 173—See Hindu Law—Will.

Berar Land Revenue Code.

Interest of co-occupant in survey number sold by auction to satisfy mortgage decree against it—Whether co-occupant can claim pre-emption regarding such property.

The plaintiff was joint sharer in certain survey numbers in Berar. His co-sharers mortgaged the fields (including his shares) and the mortgagees got a decree for sale of the mortgaged property, and brought it to sale. The plaintiff sued to enforce his right of pre-emption in respect of the shares, other than his own, which had been so sold by auction.

Held that the lower Court was right in holding that the suit did not lie, as it can lie only under Chapter XVIII of the Berar Land Revenue Code, since in Berar pre-emption is a right created by statute, and as it did not appear that any provisions of the Code were applicable to the present case. MAIDABI *v.* TEJABAI, **4 N. L. R. 138.**

Betrothal

Exchange-marriages. Validity of—Damages in case of breach. Hindu law—Custom.

Betrothal (*Contd.*)

Where the only consideration for the marriage of a girl is a sum of money to be paid for her, the contract would be one void as opposed to public policy.

A family arrangement amongst persons of the same class, by which the family A. gives a girl to be taken as a wife, on equal terms, into a family B, and a girl of a family B is, at the same time, given as a wife into family A, stands on a totally different footing from what is really the sale of a girl, the suitability of the marriage and the prospective happiness of the girl being entirely lost sight of in the latter case in view of the pecuniary gain.

A number of *Khatris*, all of the same caste and community, arranged a number of marriages amongst themselves, none of which was shown to be *prima facie* unsuitable or undesirable. There was nothing to show that the performance of any one of the betrothal contracts was to be made dependent on the previous performance of any of the others. The arrangements were made independently of each other, though at one and the same time.

Held, that the betrothal contracts were not opposed to public policy and damages could be recovered on breach of them. AMIR CHAND *v.* RAM. **95 P. L. R., 1903-50 P. R. 1903.**

Bhagdari and Narvadari Act.

See Bombay Act V of 1862.

Bhet Begari.

1 *Gaontia—Bhet begari—Lumberdar—Services—Money payments.*

Before any Gaantia can recover *bhet begari* dues from the lumberdar he must plead and prove that the services were commuted by the ryots for money payments and that such payments have been realized by the lumberdar.

Bhet begari is the name given to the unpaid services which have customarily been rendered to gaontias by their ryots. KUNJBAN GAONTIA *v.* SHAMSUNDER &c., **14 C. P. L. R. 1901 P. 73.**

2 *Lumberdar—Bhet begari—Ryots—Co-sharers—Value of labour.*

A lumberdar who exacts *bhet begari* from all the ryots in the village is bound to account to the co-sharers for the value of the labour of which he has deprived them. [XIV C. P. L. R. 73] explained

If a lumberdar exacts *bhet begari* from all the ryots in the village he is clearly bound to account to his co-sharers for the value of the labor of which he has deprived them. CHAMRA PANIGRAHI *v.* LAKHAN PANIGRAHI. **15 C. P. L. R. 1902 P. 14.**

Bhowli Rent.

Rent in kind (bhowli) commuted into rent in

Bhowli Rent *(Contd.)*

money (nakdi)--Court of Wards, power of, to make such commutation-Benefit of estate-Court of Wards Act (IX of 1879, B. C.), Ss. 14, 18 and 19—Bengal Tenancy Act (VIII of 1885, S. 40 —Commutation, permanent or temporary how ascertained—Onus—Substitution madeby Court of Wards, if binding and upon whom.

The powers of the Court of Wards are co-extensive with the powers of the proprietor of the estate in charge of the Court, subject to the qualification that the exercise of such powers is requisite for the proper care and management of the property of which the Court has taken charge (73 A 394 Dist).

Commutation of rent in kind into rent in money is in substance nothing beyond a variation of a condition of the lease under which the tenant holds and of the mode in which the rent is to be paid, and such an act by the Court of Wards, may be done for the benefit of the property and the advantage of the ward, and is not *ultra vires*. It is binding both upon the disqualified proprietor, as well as upon his successor, as though it had been that of his predecessor in title, unless the successor can show that the power of the Court to bind him was restricted in some particular way.

Per Mookerjee, J.--Every contract is *prima facie* permanent and irrevocable, and it lies upon a person who says that it is revocable or determinable, to show either some expression in the contract itself or something in the nature of the contract, from which it is reasonably to be employed that it was not intended to be permanent and irrevocable but was to be, in some way or other, subject to determination. The contract may, for instance, be shown to be for a limited time, terminable upon the happening of a particular contingency or terminable at the option of either party upon reasonable notice, In each case, however, it lies upon the party who asserts that the contract is terminable to show how and in what manner it is revocable or determinable (4 C. L. J. 537 at 542, 3 C. W. N. 151, 8 Ch. 942 at 949 ref.)

A commutation of rent may be permanent, so that one of the contracting parties cannot without the consent of the other, insist on reverting to produce rents. The question in each case is what was the intention of the parties; if they intended that the novation should be temporary, in other words, that the substituted agreement was to last for a specified period or during the continuance of specified circumstances, or that either party could resile from the substituted agreement, with or without noitce either party may claim to revert to the original agreement. If, on the other hand, no such intention is proved, the substituted agreement can be annulled only by consent of both the parties (6 C. L. J. 369, 21 W. R. 438 ref.) KASHIMAHTON *v.* MAHARAJA ISWARI PRASAD NARAIN DEO. **6 C L J 727.**

2 *Bhowli and Nagdi rent—Commutation--*

Bhowli Rent *(Contd.)*

Reconversion.

Where there has been a formal commutation of *bhowli* into *nagdi* rent, neither the landlord nor the tenant can, without the consent of the other, revert to *bhowli*. 21 W. R. 438 followed.

Where, however, there have been occasional deviations into *nagdi* not intended to be permanent, the landlord is entitled to claim *bhowli* rent. DURSAN SINGH *v.* MUSSUMMAT FASHIHUN. **6 C L. J. 369.**

(See Tenancy Acts of different provinces in their appropriate plans),

Bill of exchange.

1 *Civil Procedure Code (Act XIV of 1882), Chapters V and XXXIX--Suit on negotiable instrument not specifying interest--Interest—Claim for.*

When the plaintiff sued on a promissory note under Chapter XXXIX of the Civil Procedure Code and claimed interest not specified in the note

Held, that the plaintiff was not entitled to recover interest. The High Court, however, allowed the plaintiff to proceed under Chapter V of the Code. BHUPUTRAM *v.* RAJAH SIR SOURENDRA MOHAN TAGORE. **7 W. N. C. 412=30 C 446.**

2. *Bill of Exchange—Letter of credit—Change of bill from "document against payment" to "documents against acceptance"—Change made without consent of the drawer refusing to pay—Liability of drawer.*

The plaintiff purchased a bill of exchange drawn by the defendant on the firm Schmolze Richman and Co., of London, in terms of a letter of a credit issued by the latter at the instance of T. Smart and Co. London. The bill of exchange was accompanied by bills of lading and invoice of the consignment and it was sent to the plaintiff's office at London. It was marked D. P., *i. e.*, documents to be delivered against payment of the bill. The drawers refused to accept the same on the ground that the terms of the letter of credit was D. A. *i. e.* documents against acceptance. The plaintiff with the consent of the agent of T. Smart and Co. of London, subsequently changed the bill into D. A., which was then accepted by the drawees. The bill fell due on the 13th Feb. 1901 when the drawees having failed in the meanwhile refused payment. The plaintiffs then brought a suit to recover the amount of the exchange from the defendant.

Held, that the common intention of the parties was that the bill should be treated as D. P., and the alteration made in Lodon without the consent and confirmation of defendant made it impossible for the plaintiff to recover.—MESHA *v.* NATIONAL BANK OF INDIA. **5 B. L. R. 521.**

3. *Custom—Letter of credit—Dishonored—Meaning of.*

The primary purpose of a letter of credit

Bill of Exchange (*Contd.*)

is to secure an obligation to accept the Bill or draft; for when there is an acceptance that itself imposes an obligation to pay without any stipulation to that effect in the letter of credit.

In a letter of credit stipulating for security the purpose is to obtain that security at acceptance; for it is then that the acceptor's liability on the draft arises, and if he does not then obtain his security he may find, when the time for payment comes, that it is non-existent.

The words 'duly honored' in a letter of credit do not mean the final act of payment but refer to honor by acceptance. THE NATIONAL BANK OF INDIA LD. *v.* SALEH MAHOMMED BALAXA. **3 B. L. R., 396=25 B. 706.**

4. *Banker—Payment on forged cheque—Negligence—Liability of customer.*

When a Banker makes payment on a forged cheque, he cannot make the customer liable except on the ground of negligence imputable to the customer. BHAGWAN DAS *v.* CREET. **31. C. 249.**

5 *Negotiable Instruments Act (XXVI of 1881) sections 7, 32, 53, 64, 115, 134—Bills of exchange drawn on defendant and endorsed over to plaintiff by the Banks in whose favour they were drawn—Failure of defendant to pay—Suits to recover on the bills—Plaintiff's capacity—Holder deriving title from holder in due course—Bills accepted need not be dishonoured and protested—Acceptor liable at maturity—Assent not signed on the bills but on copies—Assent not valid.*

The plaintiff sued to recover on certain bills drawn on the defendant and endorsed over to the plaintiff by the Banks in whose favour they were drawn. The suits were dismissed on the grounds that (1) the suits were defective in form inasmuch as the plaintiff was suing as agent without disclosing his principals and (2) the suits were not competent as the bills had never been dishonoured and protested.

Held (1) that the bills were endorsed over to the plaintiff by the Banks in whose favour they were drawn, so that he was a holder deriving title from holders in due course, and as such he was competent to sue under s. 53 of the Negotiable Instruments Act (XXVI of 1881).

Held further (2) that the bills were made payable at Bombay. Therefore under sections 134 and 32 of the Act the acceptor became liable at the maturity of the bills and the suits were not bad because the bills had not been dishonoured and protested. Section 115 of the Act merely enacts that a bill is not dishonoured until it has been dishonoured by the drawee in case of need where such drawee is named in the bill. Presentment is not necessary to charge the acceptor. The acceptor is the principal debtor and his liability is independent of the presentment.

The acceptance having been signed on

Bill of Exchange (*Contd.*)

the copies of the bills and not upon the bills or upon one of their parts in accordance with section 7 of the Act—

Held that a material requirement of law had been omitted with the result that there was no valid acceptance ARDESHIR SORABSHA *v.* KHUSHALDAS, **32 B. 246.**

Bill of exchange, Act of England 1882.

1 Ss. 2, 7 (2) and 59—Plea that the holder is a mere benamidar and not entitled to sue invalid—Undisclosed principal cannot sue or be sued on a negotiale instrument—Law Merchant 30 M. 88—*See Col. 535 P. I.*

2 Suit on negotiable instrument not specifying interest—Interest, claim for. 30 C. 446. —*See Bill of Exchange No. 1.*

Bill of Lading.

1 *Maritime Law—Bill of Lading—Construction—Exception Clause.*

A Bill of Lading contained, in addition to an exception clause as regards "accidents, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servant of the Company," another clause which ran thus: "In all cases and under all circumstances, the liability of the Company shall absolutely cease when the goods are free of the ship's tackles, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

Held, Per *Subrahmania Aiyar, J.*—That the carriers were not exonerated from liability for their negligence in landing the goods.

Except when the words leave no option to the Court to construe them as otherwise than making out an agreement that the party holding the goods in a legal character contracts not to be responsible for breach of any of the incidents attaching to it in law, the agreement should be taken to provide only for some definite matter or matters in connection with the legal relation subsisting between the parties to the agreement.

Held, also—That the 2nd clause in the Bill of Lading puts an end to the Company's liability only as carriers when the goods leave the ship's tackle and constitutes their subsequent possession until delivery as that of bailees.

The defendant company undertook to carry some bags of rice belonging to plaintiffs and deliver them at Tuticorin. The goods were landed and stored on the foreshore at Tuticorin from the 24th to 30th of October. On account of heavy rains from the 27th of October, the goods were damaged. The finding was that the plaintiffs were not guilty of any negligence.

Held,—Per *Subrahmania Aiyar, J*:- That the defendant company, in landing the goods as they did without precautions to prevent damage to them, failed to take the same care of the plaintiffs' goods as a prudent person

Bill of Lading (*Contd.*)

would, in similar circumstances, have taken of like goods of his own, and that the damage was therefore the result of the Company's negligence and that the clauses in the Bill of Lading did not save them from liability.

Per Miller, J:—The exception clause being clear in terms was valid and even if the condition as to landing be struck out, any negligence on the part of the carriers in the landing of the goods will be saved by the exception clause.

That the exception clause, if not the clause relating to the condition as to landing, saved the defendants from the liability which would otherwise attach to them.

Per Curiam—Ambiguous expressions employed by a company for the purpose of limiting their common law liability have to be construed against the company. MAHAMAD RAVUTHAR *v.* THE BRITISH INDIA STEAM NAVIGATION COMAPNY **1 M. L. T. 387=16 N. L. J. 573=30 M. 79.**

2 *Liability for negligence and damage to goods—Bill of lading—Provision as to exemption from liability, effect of—English, American and Indian Law—Contracting against liability—Public policy—Contract Act, Ss. 23 and 151.*

The goods (rice bags) belonging to the plaintiff were shipped in a steamer belonging to the defendant company, for delivery to the plaintiff's agent at another port, and, on arrival at that port, were placed by the company on the foreshore, where, however, they were destroyed under the orders of the Municipal authorities, on the ground that they had become damaged by rain and unfit for consumption.

The condition in the Bill of lading ran thus:—"In all cases and under all circumstances, the liability of the Company shall absolutely cease, when the goods are free of ship's tackle, and, thereupon, the goods shall be, for all purposes and in every respect, at the risk of the shipper or consignee.

In a suit by the plaintiff for recovery of the value of the rice so damaged;

Held, per White, C. J., and Sankaran Nair J.—The contract was not terminated by the deposit of the goods on the foreshore, and it was for the defendants to show that the plaintiff's goods were ready for delivery at the time they were damaged, and not for plaintiffs to show they were not ready; and as there is no evidence to show that the bags were ever ready for delivery by being separated from the rest, the defendants were negligent. The Glendarrach (1894) P. 236 D.

Per Wallis, J.—The plaintiffs' claim is not so much for non delivery of the bags as for failure to deliver them in good order and condition, and the plaintiffs failed to prove that the condition of the bags, when put at their disposal, justified them in refusing to take delivery.

Held, also per White C. J. and Sankaran Nair, J. (Wallis, J., contra.)—A ship-owner is not exempted from liability for negligence,

Bill of Lading (*Contd.*)

unless the contract which exempts him is both clear and express; and as the contract in this case, though clear, is not express, the defendants are not protected by their bill of lading (1895) 2 Q. B. 301; 22 B. 184, *R*; 1 K. B. 750, *Expl* and *F.*, 2 K. B. 378; 1 K. B. 760; (1904) P. 236, 1 Q. B. 619; 26 L. T. 704, *doubted.*

Per White, C. J., and Wallis, J.—The law of the United States of America forbids a carrier to exempt himself by contract from liability for negligence, while the law of England does not. On a question of this character the courts in India ought to follow the law of England. 10 C. 489, 23 M. 400 referred to.

Per Sankaran Nair J.—The question of liability is not concluded by authority in India. A rule of English Common Law ought not to be followed, when it is opposed to the principles followed and acted upon by the Indian Legislature. A contract exempting a ship-owner from liability for the negligence of himself or his servants in not taking the care required by S. 151, Contract Act, is contrary to public policy and, therefore, void under S. 23 of that Act. Such an exemption clause is clearly against the interests of the mercantile community and not necessary in the interests of the ship-owners.

The reasons of the English and American rules on the subject considered. K. V. S. SHEIK MAHAMAD RAVUTHAR *v.* THE BRITISH INDIA STEAM NAVIGATION CO. LTD. **4 M. L. T. 110 (F. B.)**

3. Bill of Lading—Policy of sea insurance 30 C. 565 Col. 872 P. I.

4 Condition requiring notice of claim within prescribed period—Waiver of condition—26 B 562 Col. 1789 P. I.

5. *Ship—Charter party—Time charter—Sub charter—Bill of lading—Lien—"Without prejudice to this charter."*

By a charter party, the owners of a ship agreed to let and the charters agreed to hire the ship for six months. Shortly after the charter was made the ship was sub chartered to the plaintiff. The owners claimed a lien for freight due to them from charterers in the sub-charterer's cargo (sugar. The sub-charterer brought a suit to recover his sugar or its value and damages for its detention and the owners, defendants, pleaded lien. It was found that the subcharterer knew, in a general way, of the original charter and that the freight payable under it by the original charterers was payable monthly in advance. Apart from the bills of lading, there was no contract between the owners and the sub-charterer. The captain of the ship was authorised by the charter to sign the bills of lading at any rate of freight which the charterers or their agents might direct but without prejudice to that charter.

Held, that under the terms of the bills of lading the plaintiff was entitled to have his goods delivered to him on payment of

Bill of Lading (*Contd.*)

the bill of lading freight and that the owners had no lien apart from the lien which the charterers had in the goods of the plaintiff under the sub-charter.

That a notice by a shipper of a charter party has not the effect of incorporating into the bill of lading any terms which are inconsistent with it and which the captain was not bound to embody in the bill of lading. If the charter party shows that the captain exceeded his authority in signing the bill of lading and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charter party. If the shipper knew that there was a charter party, and had an opportunity of reading it and did not trouble himself about it, he might be treated as knowing its contents.

That under the terms of the charter party the bills of lading in this case were not mere receipts for goods given to charterers already bound to the shipowners by a charter party entered into between them and which the captain had no authority to depart from. The charterers were authorised to let other persons have the use of the ship for six months in any voyage in the waters mentioned in the charter and the captain was not only empowered to sign but was bound to sign the bills of lading at any rate of freight which the charterers or their agent might direct, without prejudice, to that charter.

That the words "without prejudice to the charter" in a charter party mean that the rights of the ship-owners against the charterers and *vice versa* are to be preserved or in other words "that it is a term of the contract between the charterers and the owners that notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered."

That a right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of justice can be expected to recognize it TURNER *v.* GOOLAM MAHOMED AZAM. **6 B. L. R. 743=28 B. 573=31 I. A. 222. (P. C.)**

Birt rights.

1. *In Oudh—Bai birt—Gonda Settlement Report—Birt zemindari—Heritable and transferable under-proprietary rights—Record-of-rights—Circular No. 2 of 1861, policy of.*

Under the Record-of rights Circular No. 2 of 1861, holders of *bai birt* tenures, created by talukdars or proprietors of estates in Oudh, and spoken of in the Gonda Settlement Report as *birt* zamindaries, acquired, upon the annexation of Oudh by the British Government, absolute under-proprietary rights as against the talukdars. Such tenures are heritable and transferable. RAJA MUHAMMAD MUMTAZ ALI KHAN *v.* MURAD BAKHSH, **11 C. W. N. 913=9 B. L. R. 851=17 M. L. J. 400. 6 C. L. J. 693 =2 M. L. T. 402=4 A. L. J. 737 (P. C.)**

Birt rights (*Contd.*)

2. *Birth rights, enjoyment of by one heir of mortgagee adversely to other heirs—Limitation.*

This was a suit for redemption by the representative of the mortgagor, and the question for decision was, which of the parties claiming to represent the original mortgagee was entitled to the mortgage-money.

Held, that the right of a Hindu to birth was in the nature of immoveable property, and that its enjoyment by one heir of mortgagee adversely, in his own right, for more than 20 years, extinguished the title of rival claimants to the subject-matter of the mortgage, and debarred them from claiming any share of the sum payable on redemption. MOHAN LAL *v.* JANKI. **34 P. R. 1908.**

Birt Tenures—Construction—Construction of Document—Birt-deed—Creation of a tenure or transferable right in land for consideration —Sale or lease—Pre-emption—Oudh Laws Act (XVIII of 1876) ss. 6, 7 (b), 9 and 10.

A deed ran as follows.—"Whereas I. S. have made a *birt* of and sold *(bai birt kiyao becha)* to T. one *bigha* and two *biswas* out of the share in my possession in *mouza*—in consideration of Rs. 100 therefore I have placed the purchaser (*mushtari*) in possession of the *birt* land *(arazi birt shuda).* He should occupy it himself or get it cultivated by others and out of the produce or income pay me eight annas in a year on account of revenue and retain the balance himself and retain the land generation after generation."

Held, that the transaction evidenced by the document was a sale of a transferable right within the meaning of the Oudh Laws Act and therefore pre-emption might be claimed under Chapter II of that Act. (Raja Kishen Dat Ram *v.* Raja Mumtaz Ali Khan, 6 I. A. 145: Nihal Chand *v.* Rai Singh P. R. N. 43 of 1892, referred to.) RAM FAQIR *v.* SHEO RATAN. **8 O C., 121.**

Blank paper—Signature on—Execution of deed—Admission of signature before Registering Officer—Certificate of registration—Power of Court to go behind.

The Registering Officer must register the document presented to him for registration, when the person by whom the document is purported to have been signed admits his signature to the deed, though he denies its execution. When a document is registered under such circumstances, the Court cannot go behind the certificate of registration.

Where the mortgage-deed for Rs. 21,750 contained the endorsement in the handwriting of the mortgagor, 'the mortgage-bond for Rs. 21,750, on account of *hundis* executed by me is correct.'

Held, that the words implied that the bond was written on the paper before the endorsement and signature were affixed to the deed.

Held, also, that the deed was valid, even if the mortgagor signed the blank sheet of paper with the above endorsement and the mortgage-deed was written afterwards, there being nothing to show that the mortgagee

Birt rights (*Contd.*)

had exceeded the implied authority given them to use the paper for the preparation of a mortgage bond for Rs. 21,750. DAVID YULE *v.* RAM KHELWAN SAHAI. **6 C W N 329**.

Board of Examiners.

1 *Duty of Board of Examiners for Pleadership and Mukhtarship Examination.*

The Board of Examiners for Pleadership and Mukhtarship Examination refused a candidate to be examined without entertaining his application and examining the certificates of character presented to them by the candidate relying on a decision of the previous Board arrived at some years previously that the candidate was not a fit and proper person to be accepted as a candidate

Held, that before the Board debar a person from presenting himself as a candicate, they ought to examine into his fitness at the time of his application. IN THE MATTER OF RUDRA NARAIN ROY. **28 C. 479.**

2 *Jurisdiction certificate—Solicitors Act, 1877 (40 and 41 Vict., ch. 25) s. 9—Special Bench,*

An application by a candidate against the refusal of the Board of Examiners for the Attorneyship Examination to grant him a certificate of his having passed a Final Examination should be made to a Special Bench constituted by the Chief Justice. The application refused on the merits of the case,

Per Woodroffe J:—By rule 116 of the Rules and Orders of this Court, discretion has been delegated to the Board of Examiners without any express reservation as made by S. 9 of the English Solicitors Act of 1887. The Court will not interfere with the exercise by the Examiners of the discretion confided in them, unless the Examiners refuse to exercise that discretion, or do not exercise that discretion honestly and conscientiously. IN THE MATTER OF PURNO CHUNDER DUTT. **35 C 915.**

Board's Circulars.

Copy—Time requisite for obtaining—Sending copy by post—Circular of the Board of Revenue 4—IX para 27—Rule 38 of the Judicial Commissioner's Court—Limitation.

Held, that under the circular of the Board of Revenue and the rules of the judicial Commissioner's Court with regard to copies, any person applying for a copy to be sent by post is entitled to have his wish complied with and if it is not complied with and he comes within any reasonable time from the date of his application to make enquiries he is entitled to have the time up to the delivery of the copy to him personally deducted from the period of limitation. MUSAMMAT FATIM-UN-NISA *v.* AMJAD ALI KHAN. **8 O. C. 150.**

Board of Revenue.

1. *Board of Revenue, sanction by—Manager—Power of*—Delegatus non potest delegare.

The maxim *Delegatus non potest delegare* is to be understood with this necessary qualification that in any particular case if no authority to delegate has been given, such authority may be implied from the circumstances of the case. JOGESHWAR NARAIN SINGH *v.* RAIRADHA RAWAN. **3 C. L. J. 165.** See for other facts of this case col. 459 and 811 P. I.

2 Dates of payment of kists of revenue—New Rules under S. 3—Notification of circulars of Board of Revenue—Partition of estate. 8 C. W. 826. *See col: 32.*

3 *Agra Tenancy Act (11 of 1901, Local), Ss. 177, 185—Landlord and Tenant—Execution of decree—Appeal—Révision—Jurisdiction of Board of Revenue.*

An application for execution of a decree for arrears of rent was dismissed by the Assistant Collector on the ground of a formal defect in the application. Instead of appealing from that order to the District Judge under the provisions of S. 177 of the Tenancy Act, 1901, the decree holder appealed to the Collector. The Collector dismissed the appeal, holding that no appeal lay to him but he reported the case to the Board of Revenue under the provisions of section 185 of the Act.

The Board had no power to pass any orders in the case as the suit was one in which the decree was appealable to the District Judge under S. 177. But the Board took up the case in revision and sent it back to the Court of first instance with directions that it should allow the decree-holder to amend the application for execution. Accordingly the Court allowed the application to be amended and subsequently granted execution.

Held, that the order passed by the Board of Revenue was *ultra vires*, and consequently the Assistant Collector had no power to re-hear the case. NARAINI *v.* PARSANNI. **A. W. N. 1905 P. 119=2 A. L. J. 331.**

4 Rules framed under—Liability of profits of a mela to road cess—28 C. 637—*See Bengal Act IX of 1880 S. 106.*

Boarding-house—License.

Act XLVIII of 1860 S. 11—Necessity of license for keeping a boarding house.

A boarding house in the town of Bombay in which the customers take their meals at regular hours requires a license under section 11 of Act XLVIII of 1880 although no drink or wines are consumed there.—KING EMPEROR *v.* SACOOBAI. **3 B. L. R., 765 (F. B.).**

Bombay Acts (2)—Act XX of 1839 (Hucks).

Hucks—Notification by the Bombay Government—Sukhadi and Reggi—Act XXXII of

Bombay Act (XX of 1839.) *(Contd)*

1839—Interest.

The *hucks* of Sukhadi and Reggi do not fall within the purview of the notification issued by the Government of Bombay on the 11th June 1841 issued under Act XX of 1839; and they, therefore, are not affected by Act XX of 1839. Interest prior to the institution of the suit cannot be given under Act XXXII of 1839, under a demand of payment has been made in writing. FEZATI GULAM ALI *v.* MAHOMED SADIKMIYA. **8 B. L. R. 798.**

(2)—Act XLVIII of 1860—(Bombay City Police act).

1 S. 11, 12—License—Eating house—Commissioner of Police—Discretion to refuse license—Construction. 26 B. 396 *See* Col. 447 P. I.

2 S. 11, 12—Power of High Court to order Commissioner of Police to grant license for eating house. 3 B. L. R. 653 *See* Col. 448 P. I.

3 Ss. 28, 129—Enforcement of public duties by public servant—Police Commissioner—Notice—Segregation of prostitutes—7 B. L. R. 161—*See Col. 446 P. I.*

(3) Act V of 1862 (Bhagdari and Narvadari Tenures Act).

1 *S 3—Bhag—Subdivisions of a Bhag—Limitation.*

Possession, acquired under an alienation made in contravention of s. 3 of the Bhagdhari Act, 1862, can become adverse and bar a suit for recovery by the individual alienor, or his representatives in interest. (4 Bom. L. R. 797, and 28 Bom. 398—6 Bom. L. R. 428 dist. and (1879) 4 App. Cas. 324 refd. ADAM UMAR SALE *v.* BAPU BAVAJI. **10 B. L. R. 1128.**

2 S. 3—Powers of Collector—Adverse possession—4 B. L. R. 797—*See Col. 2070 P. I.*

3 *Sections 3 and 5—Alienation of portion of share in the* narwa*—Appeal—Bombay Land Revenue Code, Act V of (1878), section 203—Adverse possession—Estoppel—Evidence Act (1 of 1872), section 115.*

A compromise which amounts to an alienation of an unrecognised sub-division of a share in a *narwa* is void under section 3 of Act V of 1862, Bombay, and cannot be given effect to by any Court.

An appeal against an order passed under section 3 of Act V of 1862, Bombay, lies to the Commissioner.

That Collector can, under section 3 of the Act, take action at any time and the plea of adverse possession cannot prevail against any order that he may make. It is of the essence of a title by adverse possession that it must relate to some property which is recognised by law. A person therefore cannot set up adverse possession in respect of an unrecognised sub-division of a share in a *narwa.*

Bombay Act (V of 1862) *(Contd.)*

Section 115 of the Evidence Act requires that to create an estoppel there must be a representation by means of a declaration, act or ommission, that a *thing is true, i. e.,* that the representation is as to some state of facts alleged to be at the time actually in existence. If the representation relates to promises *de futuro,* it can be binding not as an estoppel but as a contract. JETHABHAI PARBHUDAS *v.* NATHABHAI BAVAJI. **6 B. L. R. 428=28 B. 399**

(4) Act VI of 1863 (Bombay City Conveyances Act)

1 *S. 6—Specific Relief Act (I of 1877), S. 45—Procedure—License of conveyance.*

Under Rule 577 of the Bombay High Court Rules, applications under section 45 of the Specific Relief Act must be made by motion.

When the Commissioner of Police, Bombay, refused to grant licenses for victorias, on the ground that they were not of sealed pattern—

Held, that the Commissioner was not justified in requiring all hack victorias to comply with a sealed pattern. IN *RE* TAJA NOORA. **4 B. L. R. 768.**

2 *S. 6.—License of conveyance.*

When the Commissioner of Police, Bombay, refused to grant license for victorias, on the ground that they were not of sealed pattern—

Held, that the Commissioner was not justified in requiring all hack victorias to comply with a sealed pattern. HERBERT GEORGE GILL *v.* TAJA NOORA. **5 B L R 133=27 B 307.**

3 *S. 22—City of Bombay Municipal Act (III of 1888, Bom.), Sections 429, 430—Penal Code (Act XLV of 1860), Section 269—Dangerous disease—Infectious disease—Knowingly carrying of persons suffering from infectious disease in public conveyance.*

Section 430, sub section (3) of the City of Bombay Muncipal Act prohibits persons in charge of public conveyances from knowingly carrying therein any person suffering from a dangerous disease in contravention of section 429 of the Act.

Where the accused knowingly drove persons suffering from small-pox in a public conveyance—

Held, that he was guilty of an offence under section 430 of the City of Bombay Municipal Act, 1888, and section 269 of the Indian Penal Code.

Antimony between section 22 of the Public Conveyance Act, 1863 and sections 429 and 430 of the City of Bombay Municipal Act pointed out. EMPEROR *v.* MYAJI ALIJI. **7 B. L. R., 460.**

(5) Act II of 1864—(Aden Courts Act).

1 *S. 1—Letters Patent, cl. 13—Court of the Resident of Aden—High Court—Superin-*

Bombay Act (II of 1864) *(Contd.)*

tendence—Charter Act, Section 15—Transfer of case.

The Court of the Resident of Aden is subject to the superintendence of the High Court of Bombay with sufficient thoroughness and completeness so as to satisfy the requirements of clause 13 of the Letters Patent of 1865.

The High Court of Bombay can remove a suit from the Court of the Resident and to try and determine the same.

Clause 13 of the Letters Patent cannot be construed by reference to section 15 of the Charter Act; the power of transfer contained in the latter which is dependent upon the exercise of appellate jurisdiction has nothing to do with the power of removal conferred by the former and is based upon the power of superintendence. THE MUNICIPAL OFFICER, ADEN *v.* HAJEE ISMAIL HAJEE ALLANA. **8 B. L. R. 4, 3 C. L. J. 5= 10 W. N. C. 185=3 A. L. J. 53 (P. C.)**

(6)—Act XX of 1864—(Minors Act)

1 *S. 18—Guardian and Ward—Transfer of ward's property without sanction of Court—Transfer of Property Act (IV of 1882), Section 75—Mortgagee's right to recover money spent in defending his title against mortgagor.*

The term "immovable property" in Section 18 of Act XX of 1864, Bombay, means immovable property of any character or kind, whether held by the minor as owner or mortgagee or in any right. The guardian of a minor having any right to, or interest in, immovable property is barred from transfering such right or interest without the previous sanction of Court.

The sale of a minor's share in a usufructuary mortgage without the sanction of the Court to a mortgagee of the minor who has acquired a share in the equity of redemption cannot be supported on the ground that the sale operates as a redemption of the mortgage.

Under section 72 of the Transfer of Property Act a mortgagee in possession is entitled to add, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor.

Where it is found that the mortgagee has spent some money in defending his title against the mortgagor the Court is not justified in depriving him of his right for the mere fact that he did not give details of the money claimed by him either in his written statement or in the course of the trial. The details can be gone into after the redemption decree providing for an account has been passed.

The principle that money paid under a mistake of law cannot be recovered must not be pressed too far.

Where the administrators of a ward sold the ward's interest in a usufructuary mortgage to his co-mortgagee without the previous sanction of Court, both parties believing that no sanction was required and the sale was held void for want of sanction.

Held, that the co-mortgagee was entitled to take credit for the purchase-money paid by him, for the sum paid had formed part of the accounts between the parties to the mortgage who stood in a state of accountability to each other. 5 *Bom. L. R.* 421, (P. C.) s. c., 30 *Cal.*, 539 (P. C.) *distinguished.*

A contract by a minor, such as a mortgage, is void, and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid.

But the circumstances of a particular case may be such that having regard to section 41 of the Specific Relief Act, the Court may in adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require.

Where equities are equal priority prevails, and the doctrine of purchase for value with notice does not apply as between equitable estates. DATTARAM GOVINDBHAI GUZAR *v.* VINAYAK BALKRISHNA AGASHE. RAMCHANDA ANANT PARCHUR *v.* VINAYAK BALKRISHNA AGASHE. **5 B. L. R. 1906=28 B. 181.**

7 Act III. of 1869—(Local Funds Act) S. 8—Right to recover voluntary payments—Superior holder. 26 B. 564.—*See Col. 327 P. I.*

(8)—Act XIV of 1869—(Bombay Civil Courts Act)

1 *S. 16—Probate and Administration Act (V of 1881), Ss. 86, 51, 52—District Judge—Assistant Judge deciding applications wherein the subject-matter does not exceed Rs. 5,000 in value—Appeal to District Court—No direct appeal to High Court—Power of local Legislature to amend an Act passed by Supreme Legislative Council—India Council's Act (55 and 56 Vic. c. 14), S. 5.*

The Probate and Administration Act, 1881, being a law made by an authority in India, is subject to the powers of repeal or amendment granted to the local Legislature by S. 5 of the India Council's Act, 1892 (55 and 56 Vic c. 14).

Hence, the provision of the Bombay Civil Courts Act (Act XIV of 1869), section 16, by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject matter does not exceed Rs. 5,000 will lie to the District Court, is one which the local Legislature was competent to make. LAXMI TATYA LUGADE *v.* ABA APPAJI LUGADE. **10 P. L. R. 924.**

2 S. 16. Contribution, suit for—Putni taluq—Mortgage—Sale in execution—Arrears of rent due previous to sale—First charge. 32 C. 643. *See Col: 322 P. I.*

Bombay Act (XIV of 1869) *(Contd.)*

3. *S. 22 Civil Procedure Code (Act XIV of 1882), Section 16—Jurisdiction—Special jurisdiction—First Class Subordinate Judge—Jurisdiction over lands valuing less than Rs. 5.000 situated outside his ordinary jurisdiction but within his special jurisdiction.*

In execution of a decree lands belonging to plaintiff which were situated in the Gadag Taluka and below Rs. 5,000 in value were attached and sold by order of the First Class Subordinate Judge at Dharwar. The plaintiff then sued to set aside the sale and to recover possession of the lands. This suit was brought in the Court of the First Class Subordinate Judge at Dharwar. The defendants contended that the lands having been within the jurisdiction of the Gadag Court, and the defendants also having been residents of Gadag, the suit ought to have been instituted in the Gadag Court. It appeared that Gadag was within the ordinary jurisdiction of the Gadag Court and that it was further under a special jurisdiction of the Court of the First Class Subordinate Judge at Dharwar, in suits of Rs. 5,000 and upwards.

Held, that the First Class Subordinate Judge at Dharwar had no jurisdiction given him by law to try any case relating to immoveable property outside the local limits of his ordinary jurisdiction unless the value of the subject matter was Rs. 5,000 in value. SHANKERAPPA IRAPPA *v.* KOTRAPPA CHANNAPPA. **8 B. L. R. 516.**

4. *S. 32—Jurisdiction of Civil Court—Administrator General. Suit against—*

Held, that under section 32 of the Bombay Civil Courts Act, 1869, the District Court alone is competent to try a suit against the Administrator General whether the suit is brought against him in his official capacity or simply as representing the estate of a private individual. ANTONE *v.* ADMINISTRATOR GENERAL OF BOMBAY. **6 B. L. R. 546=38 B. 529.**

(9) Act VI of 1873 (District Municipalities Act).

1 S. 18—Municipalities—Special General Meeting President—Dispensation or remission—Promise—Contract by Corporation—Executed consideration. 28 B. 66. *See Col. 252 P. I.*

2 *S. 17, 48, 64—Public street—Street lighted and swept by Municipality—Municipality's rights in street.*

The mere circumstance that a street is lighted or swept by the Municipality is not of itself sufficient to convert a private into a public street. It is only public streets which are vested in the Municipality, while over private streets the Municipality may exercise certain powers, but the property in land in those streets does not necessarily belong to the Municipality. THE ANKLESVAR MUNICIPALITY *v.* RIKHAVCHAND. **25 B 315.**

3 *S. 30—Contract—Damages for breach of*

Bombay Act (VI of 1873) *(Contd.)*

executory contract—Contract not binding on plaintiff.

In a suit for damages for breach of an executory contract it is open to the defendant to show that it is not binding on him-inas much as it is not binding on the plain tiff. THE AHMEDABAD MUNICIPALITY *v.* SULEMANJI ISMALJI. **5 B L R 592= 27 B 618.**

4 *S. 33—Bombay District Municipal Acts, 1873, 1884 and 1901.*

A municipality in granting permission to erect a building can legally impose a condition that the person whom permission is granted shall leave a gully of certain dimension. MUNICIPALITY OF THANA *v.* FAZAL KARIM. **3 B B L R 842.**

5 *Ss. 33 and 42—Municipality—Bye-law 7—Power of Municipality.*

The plaintiff sued to obtain a perpetual injunction restraining the Ahmedabad Municipality, the defendant in the suit, from removing a balcony with overhanging eaves which the plaintiff had constructed over the *otta* of his house.

The defendant contended that the plaintiff was permitted to build the balcony subject to the condition that it should not extend to the east beyond a point five feet from the northern extremity of the eastern wall of the plaintiff's house : that the plaintiff had disregarded this condition and that therefore, under sub-clause 3 of section 33 of the late Bombay District Municipal Act VI of 1873 and by a bye-law No. 7 framed by the Municipality, the Municipality were entitled to require the removal of the structure completed in contravention of their orders.

It was contended for the plaintiff that the defendant, Municipality, had no power to order that the balcony should not be constructed over the space to which the Municipality referred in its prohibiting order and the plaintiff also alleged that as that space was not a public street, he was legally entitled to build the balcony over that space. It was found that the space on which the plaintiff's house abutted, which the balcony in question overhanging, was not a public street.

Per Patty J.—That the Municipality's orders being inconsistent with the provisions of the Act and in excess of the powers which it authorised the Municipality to exercise, the plaintiff's claim should be allowed.

Per Chandavarkar and Aston J. J.—That the order of the Municipality was within the jurisdiction of the Municipality under the provisions of Bombay District - Municipal Act of 1873 and the plaintiff's claim should be dismissed. TRIBHOVAN CHUNILAL *v.* THE AHMEDABAD MUNICIPALITY. **5 B L R 48=27 B 221.**

6 *S. 33 (b) (III of 1901), Section 48 (b)* iii *—Regulation of business.*

The accused was convicted for infringement of a bye-law which required places used for drying fish should be surrounded by a wall six feet high or with a fence, framed

Bombay Act (VI of 1873) *(Contd.)*

under section 33 (*b*) of the Bombay District Municipal Act, 1884 now replaced by section 48 (*b*) iii of the Act passed in 1901.

Held, that the by-law was *ultra vires* as both of these sections extended only to the regulation of business within the place used and gave no authority to require external structures. EMPEROR *v.* RAGHUNATH JEWABA. **4 B L R 685.**

7 S. 42—*See* 27 A. 221, No. 5 *supra.*

8 *S. 48—District Municipal Act (Bombay), II of 1884, Section 48—Notice of intended suit to Municipality.*

Held, that a notice of suit against a Municipality is not necessary under section 48 Act II of 1884 (Bombay) before filing a suit for a declaration that a privy built by the plaintiffs was built in accordance with, and not in contravention of, orders issued by the Municipality and for an injunction restraining the Municipality from pulling down the said privy. MUNICIPALITY OF PAROLA *v.* LAKHSHMAN DAS. **2 B L R 857=25 B 142.**

9 S. 48—*See* 25 B. 315, No. 2 *supra.*

10 S. 64—*See* 25 B. 315, No. 2 *supra.*

11 *Ss. 82 and 86—Bombay Municipal Act (III of 1901), section 86—House-tax.*

The plaintiff brought a suit for an injunction to restrain the Municipality of Surat, from recovering Rs. 52-8 0 as house-tax for the years 1894-99. Both the lower Courts rejected the claim on the ground that the plaintiff having omitted to appeal under section 86 of Act III of 1901, to the Magistrate against the notice of demand issued by the Municipality his suit was premature.

Held, that it is not correct that a suit in respect of a notice of the demand of a tax by a Municipality cannot be brought unless the party suing has filed an appeal provided by section 86.

There is neither principle nor authority for restraining by injunction one who alleges that he has a money-claim against another from enforcing that claim in the manner sanctioned by law, when relief can be obtained by him by any other usual mode of proceeding.

It is discretionary with a Civil Court to grant an injunction, and that discretion must be exercised judicially with extreme caution and only in very clear cases. CHUNI LAL THAKOR DAS MODI *v.* THE SURAT CITY MUNICIPALITY. **5 B. L. R, 267=27 B. 402.**

12. *S. 84—Jurisdiction—Proceedings commenced under the old Act—Repeal—Alteration of procedure—Bombay District Municipal Acts VI of 1873 and III of 1901—General clauses Act (Bom.) III of 1816, S. 8—VI of 1873, S. 84—III of 1901, S. 2 (1), (a), (b).*

In the absence of anything to the contrary, a repealing Act cannot affect jurisdiction rightly assumed in accordance with the provisions of the repealed Act. Where a second class magistrate dismissed proceedings commenced under S. 84 of the Bombay Act VI of 1873 on the ground that on the date of the hearing the repealing Act III of 1901 had come into force and according to that Act he had no jurisdiction, *held*, that proceedings instituted before the new Act had come into force must be concluded in accordance with the old Act, and that the magistrate was bound to hear and decide the case on the merits. MUKAND *v.* LALU. **3 B. L. R. 584.**

13. S. 86—See 27 B. 402 No. 11 *supra.*

14. *S. 96—Municipality—Permission to build -Procedure.*

The Municipality has a right, under section 96 of the Bombay District Municipalities Act, to call for further particulars, and when those particulars are furnished the applicant has to wait for one month......The question whether the Municipality has jurisdiction or right to call for information regarding ownership must be decided on the circumstances of each case. EMPEROR *v.* PRANSHANKER GAURISHANKER. **6 B. L. R. 581.**

15. *S. 159—Penal Code (Act XLV of 1860). Sections 186 and 343—Notice by Municipality to enter building—Obstruction to entry—Disobedience of order of public servant—Wrongful restraint.*

There is nothing in section 159 of the Bombay District Municipal Act authorising a Municipality issuing a notice under that section to give any direction to the person to whom the notice is given to do anything that they may require. The notice has to be simply an intimation to the occupier of the land that the Municipality will enter for the purposes mentioned in the section at a specified hour on a specified day. The power of the Municipality to enter, no doubt, carries with it by necessary implication an obligation on the part of the occupant of the land to whom the notice is given to give every reasonable facility to the Municipality to enter and not to obstruct. But if the occupant does anything to prevent the entrance, it cannot be said that he disobeys the notice, for the notice is a mere condition precedent to the right of the Municipality to enter. Once the notice is given, the right arises and if the occupant does any act to prevent its exercise, his act may amount to wrongful restraint or wilful obstruction but it has nothing to do with the question of obeying or disobeying the notice. EMPEROR *v.* PURSHOPTAM GOPALSHET GANDHI. **6 B. L. R. 538.**

10 Act I of 1874 (The Bombay Tramways Act).

1 S. 29, 30, 31—*Similar.*

Held, that the words 'Similar notice,' in Section 30 of the Bombay Tramways Act mean a notice in substance given within a similar time. The notice of the Municipality of their intention to purchase the Tramway, dated the 13th, and served on the

Bombay Act (I of 1874) (*Contd*).

14th March, was a good notice, so far as time was concerned.

Held, also, that section 30 gave the power to the Municipality to purchase at certain times, and section 31 gave the Tramway Company power to sell then or at any other time, and to sell to the Municipality or to any other corporation or person, and the Municipality had power, under the latter portion of the 31st Section to work or re-sell the undertaking and the notice of their intention to purchase was not bad, because it was given with the intention of re-selling. BOMBAY TRAMWAYS CO. *v.* BOMBAY MUNICIPAL CORPORATION.—**4 B. L. R. 384.**

2 S. 29, 30—*Property.*

The word "property," in section 30 of the Bombay Tramways Act 1874, has not the meaning of the right, title and interest of the Bombay Tramway Company in the subject-matter to which the section refers, and which it in part specifies, but means the subject-matter itself. *In re* INDIAN ARBITRATION ACT, 1899. **4 B. L. R., 856**

Bombay Tramways Act (I of 1874, Bom.), Section 30—Notice. Validity of.

Held, that notice served under section 30 of the Bombay Tramways Act was not illegal on the ground that the corporation in sending the notice did not act for themselves but for another person.

There is nothing in the Tramways Act which expressly or impliedly prohibits such a transaction; nothing to show that if the corporation exercise the powers conferred on them by section 30 and acquire the tramways, they are bound to keep them in their own hands and to work them themselves. 4 *Bom., L. R.,* 384 *confirmed.* THE BOMBAY TRAMWAY CO., LD., *v.* THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY. **6 B. L. R., 739=9 C. W. N., 337=28 B. 502=31 I. A., 169 (P. C.).**

11 Act III of 1874—(Bombay Hereditary village officers and vatan Act).

1 S. 3, 4—*Acts V. of* 1876 *section* 2 *Vatans in Guzerat.*

Held, that *vatans* in Guzerat do not cease to be vatan property held in connection with an hereditary office as defined in section 4 of Act III of 1874, simply because a service settlement has been effected and the word *vatan* used in section 2 of Act V of 1866 is not to be understood in a restricted sense by reason of such settlement. BAI JADAV *v.* NARSILAL HARDERAM. **3 B. L. R. 249=25 B. 470.**

2 *S. 9—Matadar's Act* (*VI of 1887, Bom.*), *Section 9*—Wanta Pasaita land—*Collector's Revenue Register—Recovery of service land—Alienation—Limitation Act* (*XV of 1877*), *Sch. II, Article 14.*

Bombay Act (III of 1874) (*Contd*)

In the Collector's Revenue Register land assigned as remuneration of officiating Village servants was designated as "*Wanta Pasaita.*

Held, that such a description of land is not inconsistent with the ordinary meaning of the word *Pasaita*, or, in any way, suggests that *Wanta Pasaita* land would remain "rent free," if it passed into the ownership of any person not a *Watandar* and not entitled to remuneration for the performance of village service.

The summary powers given by section 9 of the Vatan Act, III of 1874, to the Collector in respect of the recovery of service land alienated to a stranger or the profits thereof, are not controlled by the date of the alienation.

The fact that after the first alienation under which the *watan* passed there was another alienation does not seem to affect a case under S. 9 of the Act. BAI SHIVGANGA *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **7. B. L. R. 187.**

3 *S. 18 Act III of 1874 (Bom.), Section 18.*

The plaintiffs sued to obtain a declaration that they as vatandar Mahars are entitled to a third share in a certain vatan and to enjoy a third share in the profits of the said value and to recover Rs. 6 as damages from the defendants and to obtain an injunction restraining the defendants from obstructing them in the enjoyment of the said share.

Held, that having regard to section 18 of Bombay Act III of 1874 the Civil Courts have no jursidiction to make the declaration sought, and consequently cannot award damages or grant the injunction. 13 *Bom.* 83, *followed.* BHIVA *v.* VITHYA. **25 Bom. 186.**

(12)—Act II. of 1876 (Bombay city Land Revenue Act).

1. *S. 8, 9—Land Revenue—Enhancement, of assessment—Settlement of assessment—Meaning of "settlement"—Notice of assessment—No necessity of notice to owner of property before assessment.*

In 1884, the plaintiff acquired certain waste land from the Collector of Bombay, who granted it on the plaintiff's agreement to pay ground-rent at one pie per square yard per annum. In 1899, the Collector enhanced the assessment or ground-rent on the land to eight pies per square yard. The plaintiff protested against the enhancement and brought the present suit against the Collector, contending that the enhancement was illegal, first, because he had acquired the land on a permanent tenure at a fixed assessment, and, secondly, because there had been no "settlement" with him as required by Act II of 1876, inasmuch as he had received no prior notice from the Collector of the intention to enhance the assessment.

Bombay Act (II of 1876) *(Contd.)*

Held, (1) that there was no evidence in the case to show that the assessment had been permanently fixed; (2) that the words "settlement of assessment" in S. 9 of the Bombay City Land Revenue Act (Bom. Act II of 1876) do not by themselves imply the necessity of prior notice to the superior holder before the assessment is enhanced. They mean no more than that when the settlement is fixed the fact shall be communicated to the superior holder.—VINAYAR *v.* SECRETARY OF STATE, **3** B. L. R. 910=**26** B. **339**.

2. *S. 8 and 27—Power of Collector to enhance rent.*

In a suit in which the plaintiff sued the Collector of Bombay praying that it may be declared that there was a right on his part, in limitation of that right of Government, to hold the plots of land in dispute at the fixed and uniform rate of rent mentioned in the plaint, the facts were that one of the plots was granted to the vendor of the plaintiff for ever subject to a right of redemption but without any mention of assessment, and the other two plots were given subject to the payment of all taxes, rates, charges, assessments, leviable or chargeable in respect of the premises, or anything for the time being thereon; all the plots were sold to the plaintiff with the consent of the Government who was a party to the deed of sale, the deed of sale recited that the sale was subject to the payments of all assessments leviable or chargeable in respect of the lands sold; before the sale deed was executed the plaintiff was informed by the Collector that the land would be assessed at the rate of 9 pies per square yard and no hint was given at the time that there would be a right to enhance the assessment in future, the plaintiff having accepted the proposal was entitled to the declaration asked for by him. DADOBA JANARDHAN *v.* THE COLLECTOR OF BOMBAY. **3 B. L. R. 603=25 B. 714**.

3 *Ss. 8 and 26—Power of Collector to enhance rent on land sold—Sale of encroached land.*

In a suit in which the plaintiff sued the Collector of Bombay praying that it may be declared that there was a right on his part, in limitation of the right of Government to hold the piece of land in dispute at the fixed and uniform rate of rent mentioned in the plaint, and that Government had no right to enhance the same

Held, that the plots of land which were sold by Government at a certain ground rent must be held to have been sold for their full price subject to the payment of a fixed ground rent without any intention to reserve the right of enhancing it.

Held, also, that the Collector's levying the full penalty and ground-rent under S. 26 of Bombay Act (II of 1876) in respect of the plot encroached upon by the plaintiff amounted to a sale of the land to him for its full price. The Collector could have either removed the encroachment and resumed the land or proceeded under that section. Where adopting the latter alternative he proposed that the plaintiff should retain possession of the plot upon payment of five times the value of the land and five times the ordinary revenue and the fixed amount as annual ground rent and the plaintiff was allowed to remain in possession under it, *held*, that there was a proposal and an acceptance amounting to a contract by which the Government and the plaintiff were bound and the rent could not be enhanced. JETHBHOY RUTTONSEY *v.* THE COLLECTOR OF BOMBAY. **3** B. L. R., 621.=**25** B. **752**

4 S 26—*See* 25 B. 752 No. 2 *supra.*

5 S 27—*See* 25 B. 714 No. 1 *supra.*

(13) Act III of 1876 (Bombay Mamlatdars Courts Act)

1 *S 1—Act II of 1906—General Clauses Act (Bombay Act I of 1904), S. 7—Bombay Act II of 1906, S. 23—Proceedings commenced under the old Act—Right of appeal given by the new Act can be of no avail—Right of appeal is not a matter of procedure.*

A suit, under the Mamlatdar's Courts Act, 1876, was commenced on the 24th February, 1906. On the 29th October, 1906, the new Mamlatdar's Courts Act, 1906 came into operation, which repealed the former Act. On the 26th January, 1907, the Mamlatdar dismissed the suit. The plaintiff presented, on the 12th March, 1907, a petition for revision to the Collector. It was under S. 23 of the new Act. The Collector held on the 6th April, 1907, that he had no jurisdiction to entertain the application.

Held, (1) that the repealing Act could not give the right of revision in respect of proceedings commenced under the Acto f 1876.

(2) that, on the words of the General Clauses Act, 1904, (S. 7), it would be wrong to hold that the Collector had jurisdiction; because, so to hold would be to affect a legal proceeding in respect of a right which had accrued under the old Act.

To disturb an existing right of appeal is not a mere alteration of procedure. (1905) A. C. 369, *followed*; 9 Bom. L. R 527 and 9 Bom. L. R. 1028, *not followed.* NANA ABA KALCAR *v.* SHEKU AUDU BOKADE. **10** B. L. R. 330=32 B. 337.

2 *S. 1—Possession—Possession of under-lessee.*

An under-lessee is deemed to be in possession by a right derived from his landlord's lessor. 1 *Bom. L. R.* 71, *followed.* VAGHOJI *v.* SHIVRAM WAGHOJI **4** B. L. R. 53.

3 *S 1 Possessory suit—Injunction—Disobedience of the injunction—Power of the Mamlatdar to punish for contempt of Court.*

A Mamlatdar deciding a possessory suit under the provisions of the Bombay Mamlatdars' Courts Act III of 1876 (Bom.) has not the power as a Court to commit to prison for contempt of Court for failure to carry

Bombay Act (III of 1876) (*Contd.*)

out an injunction. RAVJI KHANDU CHAMBHAR *v.* S. B. FRASER. 8 B. L. R. 638.

4 *S. 1—Possessory suit—Suit against Collector—Mamlatdars' jurisdiction to entertain the suit.*

A Mamlatdar's Court, under Bombay Act III of 1876, has no jurisdiction to try a suit to which a Collector is a party.—23 *Bom.* 760; 1 *Bom. L. R.* 414, *qualified.* MOTILAL VIRCHAND *v.* THE COLLECTOR OF AHMEDABAD. 8 B. L. R. 904=2 M. L. T. 13=31 B. 86 (F. B).

5 *S. 4—Jurisdiction.*

Held, by the Full Bench (Whitworth, J. *dissenting*) that a *mamlatdar* has, under Bombay Act III of 1876 jurisdiction to enquire into a case where it is alleged that an upper riparian proprietor has unduly interfered with the flow of water in a natural water-course from which a lower riparian owner also takes water. SOM GOPAL BHOGALE *v.* VINAYAK BHIKAMBHAT. 25 B. 395 (F. B).

6 *Ss. 4, 5, 15—Injunction—Jurisdiction to grant injunction when the issues are framed under S. 15 (a).*

The plaintiff owned two pieces of land between which was the land of the first defendant. To pass from one piece of his land on which stood the plaintiff's house to another which was his field, the plaintiff used to pass through the defendant's land. The defendant then put up a shed at the one end of the plaintiff's passage in his land and a cactus fence at the other end. The plaintiff thereupon adopted proceedings under the Bombay Mamlatdars' Courts Act, 1876, asking the defendants to remove the cactus and the shed and to make the passage clear and unobstructed as before. The Mamlatdar raised the issues indicated in S. 15 (*a*) of the Act: but rejected the plaint on the ground that inasmuch as the first paragraph of S. 4 of the Act does not mention the words "the use of roads or customary ways to fields," he had no jurisdiction to grant to the plaintiff any relief.

Held, that the Mamlatdar had jurisdiction under S. 4 to grant an injunction in case of obstruction or disturbance to the use of roads or customary ways to fields. A deprivation of an use is a disturbance. The Mamlatdar was therefore in error in supposing that the terms in which the statutory issues are framed for a case where the plaintiff does not aver deprivation of an use, deprive the Mamlatdar of the jurisdiction to try the issues (*a*) and give such relief as he has jurisdiction to give under the second paragraph of S. 4 of the Act. BHAU MANGESH WAGLE *v.* AHMEDBHOY HABIBBHOY. 8 B. L. R. 312.

7 *S 4 and 15—Use.*

Section 15 of the Mamlatdars' Act must be read subject to S. 4. A person is in the enjoyment of a use within the meaning of S. 15 when but for the obstruction he complains of he would be in use. NANABHAI *v.* DWARKA DAS. 3 B. L. R., 681.

8 *S. 5*—See 32 B. 337 No. 4, 8 B. L. R. 312 No. 6 *supra.*

9 S. 8—Right to recover voluntary payments—Superior holder 26 B. 504. *See col. 327 P. I.*

10 *S. 10—Criminal Procedure Code (Act V of 1898), section 145—Mamlatdar—Possessory suit—Magistrate—Order regarding possession—Jurisdiction.*

The jurisdiction of a *mamlatdar* to entertain a possessory suit, under Bombay Mamlatdars' Courts Act, 1876, is not taken away by the fact that a Magistrate has previously passed an order, regarding the same property, under section 145 of the Criminal Procedure Code 1898. NAGAPPA *v.* SAYAD BADR-UD-DIN. 3 B. L. R., 919= 26 B. 353.

11 S. 13—Regular suit for possession—Limitation—25 B. 82—*See Col. 1839 P. I.*

12 S. 15—See 8 B. L. R. 312 No. 6, 3 B. L. R. 681 No. 7 *supra.*

13 *S. 17—Mamlatdar's decision. Execution of—Limitation Act, not applicable when—Imperative duty.*

Where a Mamlatdar's decision, in a possessory suit instituted under the provisions of the Mamlatdars' Courts Act, 1876, awards possession, S. 17 of the Act imposes on him the duty to issue an order to the village officers to give effect thereto. That duty is no sense conditional on an application being made to the Mamlatdar for the purpose; it is absolute and unqualified.

Where an imperative duty of the character above described is imposed upon a Court, then the Limitation Act has no application. 4 *Mad.*, 172, 6 *Bom.*, 586, 7 *Bom.*, 316, 8 *Bom.*, 377 *followed*, BABAJI KHANDUJI *v.* KUSHABA RAMAJI, 8 B. L. R. 218-30 B. 415.

14 Ss. 18, 21—Claim disallowed Mamlatdar—Suit to establish—Limitation. 28 B. 601. *See Col. 1838 P. I.*

(14) Act X of 1876—Bombay Revenue Jurisdiction Act.)

1 *S. 4—" Any other written grant "—" Treaty "—Construction of document—Name given by parties to document—Injunction.*

Clauses (*h*), (*i*), (*j*) and (*k*) of section 4 of the Bombay Revenue Jurisdition Act are independent of one another; the source of title referred to in each stands apart from the rest and each clause is connected only with that portion of the proviso which precedes clause (*h*). The words " such exemption " in clause (*j*) referred to the exemption mentioned in that portion. The exemption contained in clause (*j*) relates to a written grant other than that which falls within clauses (*h*) and (*i*).

The word 'treaty' in section 4 of the Bombay Revenue Jurisdiction Act must be interpreted strictly and must be held to mean an agreement between two or more independent sovereign powers or states.

Bombay Act (X of 1876) *(Contd).*

Generally speaking the name given by the parties to a document is not conclusive as to its nature, but the designation given by the parties themselves to it cannot be lost sight of where the document is ambiguous and is susceptible of more than one construction as to its nature and scope.

According to the amendments made by Act XVI of 1877 nothing contained in section 4 of Act X of 1876 prevents the Civil Courts in the districts mentioned in the second schedule annexed to the Act from exercising jurisdiction over claims against Government to hold land wholly or partially free from payment of land revenue.

Held, that the plaint was open to the objection and the suit as framed was bad but permission to amend should have been granted.

The High Court remanded the suit for re-trial after granting permission to the plaintiffs to make the necessary amendment. KALABHAI BAPUJI CHUDASAMA *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **6 B. L. R. 648=29 B. 19.**

See for other facts col. 425 p. 1.

2 *S. 4—Proviso—Suit by alienee of revenue for disturbance of possession by stranger or government—Statute restricting jurisdiction—Construction of—*

The proviso to section 4 of the Bombay Revenue Jurisdiction Act contains no exceptions in respect of holdings unaccompanied by proprietary right in the soil, and there is no saving clause which would suggest that such a claim to such holding might fall within the purview of the Pensions Act. The right of alienee of the revenue to sue for disturbance of his possession by a stranger or by Government is clearly recognized by the proviso and the only condition required is that the claim should be under an enactment, instrument, sanad, written grant or judgment such as is described in the proviso.

The general presumption is against construeing a statute as ousting or restricting the jurisdiction of the superior Courts. The intention must be expressed in clear terms; not merely implied, but necessarily implied; the general rights of the subjects are not hastily to be assumed to be interfered with and taken away by any Act of Parliament. Such statutes are to be strictly construed when their language is doubtful. A construction which would impliedly create a new jurisdiction is to be avoided, especially where it would have the effect of depriving the subject of his freehold or of any common law right, or of creating an arbitrary procedure. But when a power has been conferred in unambiguous language by statute, the Courts cannot interfere with its exercise and substitute their own discretion for that of persons or bodies selected by the Legislature for the purpose.

There is no presumption against the finality of a decision by an authority with statutory powers to pronounce in respect of a duty or liability created by the statute.

The presumption is against the intention to bar the cognisance of the Courts when proprietary rights are concerned, unless such intention is unambiguously expressed or is a necessary implication. BALWANT RAMCHANDRANATH *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **7 B. L. R. 479=29 B. 480.**

See for other facts Col. 111, 141, 1828.

3. S. 4 *(a)—Suit against Government—Bombay Act (III of 1874).*

The plaintiff brought a suit for possession of land claiming title under a person who was put into the occupation of the land free from assessment as the reward for his service against the Secretary of State for India in Council and another person who was put into possession by the Collector and from whom the Sanadi service formerly rendered by plaintiff was thenceforth accepted.

Held, that the suit against the Secretary of State for India was barred by section 4 (*a*) of Act X of 1876 and it could not be urged for the plaintiff in support of the claim that his claim was for possession of land, while the property that appertained to his office was not the land but the revenue arising from the land.—APPAJI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **6 B. L. R. 438=28 B. 435.**

4 *Ss. 4 (b), 5—Bombay Land Revenue Code, Section 52, 217—Landlord and tenant —Inamdar's right to recover assessments Kowl, Effect of.*

The plaintiff, Inamdar, sued to recover from the defendant, occupancy tenant, the assessment of the lands held by him, in accordance with the survey rates. The defendant pleaded that under certain Kowls held by him he had acquired the right to hold the lands permanently on payment of a fixed sum as rent. The plaintiff contended that this objection could not be raised in Civil Court.

Held, that an objection to come within either of the two heads of clause (*b*) of section 4 of Act X of 1876 (the Bombay Revenue Jurisdiction Act) must be an objection which reaches them directly *i. e.*, an objection to them *per se* which admits the liability to pay land revenue on the part of the objection but quarrels with its amount or incidence or the validity and effect of the notification of Survey Settlement as *by themselves* objectionable, not because some other right affects them or makes them inapplicable to his particular case.

The effect of proviso to section 4 is that where an occupancy tenant holding under Government is called upon to pay land revenue according to the Survey rates it is open to him to resist the claim of government in a Civil Court on the ground that he holds under a written grant or

Bombay Act (X of 1876) *(Contd.)*

an enactment &c. which prevents Government from claiming more than can be recovered under grant or enactment, &c.

"Objections" in section 4 clause (*b*) may be raised by a suit or in defence to a suit but in whichever way they are raised they must be of the particular nature described in clause (*b*). Where they fall outside that class they can be raised in defence to, as well as by, suit.

Sections 52 and 217 of the Bombay Land Revenue Code do not affect the right of a party who holds lands under Government or an Inamdar by virtue of a special grant. The effect of the first is to give the Collector the discretion to fix the assessment, the effect of the second is to render the occupants in alienated villages subject to a settlement like the occupants in unalienated villages. But neither section takes away any legal right which an occupancy tenant may have acquired independently of his bare status as an occupancy tenant liable to pay the land revenue according to survey rates.

When it was proved that for more than 12 years preceding the suit the defendant had paid assessment according to the Kowl held by him and not the higher survey rates and there had been no demand on the part of the Inamdar and no refusal on the part of the tenant in respect of rent at a higher rate than that fixed in the Kowl.

Held, that if the tenant disputed more than 12 years before suit the Inamdar's right to recover otherwise than under the Knowl and thereafter for 12 years he went on paying the reduced assessment under it, the Inamdar's right must be held to be barred the question did not depend on mere demand and refusal. LUKSHUMAN NARAYAN *v.* GOVIND MAHADEO. GOVIND MAHADEO *v.* LUKSHUMAM NARAYAN. **5 B. L. R. 694=28 B. 24.**

5 *S. 11--Bombay Land Revenue Act (V of 1879), S. 203.*

The plaintiffs sued for a declaration that the village of B. together with the land, trees, water courses, etc, was of the plaintiff's *khobi wahivat* and that the defendant had no right of taking any *vasul* more than the Survey Assessment and that the plaintiffs had the right of taking by *thal* the *vasul* of all lands assessed and unassessed and *kharaba* etc., if cultivated. They also sued for damages and injunction and mesne profits. The suit was dismissed on the ground that the suit was barred by section 42 of the Specific Relief Act.

Held, that the ground on which the suit was dismissed was wrong.

It was contended on appeal that the suit was bad, for the provisions of section 11 of Act X of 1876 had not been observed.

Held, that the contention had no force, for the act or omission which was the cause of action was not an order or decision in respect of which there was a right of appeal under the Land Revenue Code. SAKHARAM KRISHNA *v.* THE COLLECTOR OF RATNAGIRI. **6 B. L. R. 142=23 B. 332.**

See for other facts col. 431.

(15) Act V of 1878 (Abkari Act)

S. 16—Country liquor—Attachment in execution of a money decree. Sale—Collectors permission—Reference to High Court—Action by a third person not a party to the suit. 10 B. L. R. 13=32 B. 157 Col. 1164 P. I

(16) Act V of 1879 (Bombay Land Revenue Code).

1 *S. 15—Mamlatdar—Substitute's jurisdiction to exercise powers of Mamlatdar.*

A substitute designated under Section 15 of the Bombay Land Revenue Code, 1879, cannot exercise the powers conferred by the Mamlatdars' Courts Act, 1876, on the Mamlatdar, to whose office he has temporarily succeeded DEORAR *versus* NARAYANDAS HARAKCHAND. **25 B 318 F B.**

2 *S. 37--Khoti Tenure—Khots have a right to cultivate land left dry in a river adjoining their land—Alluvion—Khots as farmers:*

Where the Khots of a village claimed a right to occupy and cultivate land left dry in the river bed as far as the middle of the bed opposite their Khoti villages:

Held, that they were entitled to this right and that S. 37 of the Land Revenue Code was not a bar to such a right,

Held, further, that the soil of land covered with water may, together with the water and the right of fishing therein, be specially appropriated to a third person, whether he has land or not on the border thereof or adjacent thereto. THE SECRETARY OF STATE *v.* VASUDEO SAKHARAM. **31 B 456, 9 B L R 719.**

3. *S. 43 Rule 33—Natural produce—Fees for excavated stones and earth. Imposition of --Trespass to goods--Compensation--Damages.*

The plaintiff acquired under a lease a piece of land at Matheran from the Government (defendant). The lease provided that the lessee should build one bungalow, and that he would not carry on any excavation on the land without the previous permission in writing of the Collector. Plaintiff then applied to the Superintendent of Matheran asking for permission to dig stones for building purposes and the permission was granted. After this when the bungalow was in course of construction, the plaintiff received from the Superintendent a notice calling on him to erect boundary pillars on his land: with this requisition he complied, using for the purpose stones, which he had previously excavated under the permission already granted. Upon this the plaintiff was called on by the defendant to pay Rs. 2-2-0 as the price for the stones used, and upon his refusal to make the payment, the amount of Rs. 2-2-0 was realized by the defendant by attachment and sale of the moveable proper-

Bombay Act (V of 1879) *(Contd.)*

ty of the plaintiff. The plaintiff then brought a suit praying, *inter alia*, for a declaration that he had right to use the stones without payment of any fees and for damages (Rs. 200) for recovering the amount realized from him.

Held, (1) that the suit must be treated as one for damages in respect of trespass to goods and the plaintiff was entitled to recover from the defendant Rs. 2-2-0 as the only legal damages he had suffered, and that the claim for Rs. 200, which was apparently for annoyance and insult suffered by him, could not be decreed.

(2) That the plaintiff was not liable under section 43 of the Land Revenue Code, 1879, for the expression "any other natural product" does not include excavated stones.

(3) That under rule 38 of the Land Revenue Code also the Collector was not justified in recovering the amount claimed by defendant. MADHAVDAS GOKALDAS PASTA *v.* SECRETARY OF STATE FOR INDIA. 6 B. L. R. 1117.

5 S. 52, 217--Landlord and tenant--Inamdars right to recover assessments—Kowl. Effect of. 28 B. 74.--*See Bombay Act X. of 1876 S. 4 (h) No. 4.*

6 *Ss. 56, 57, 153—Land Revenue Code (Act V of 1879, Bom.), Sections 56, 57, 153—Arrears of assessment--Non-payment by Khatedar--Lands in possession of a holder under a mortgage--Forfeiture of lands for non-payment of assessment—Re-grant of the lands to the holder by the Government--Relations between the original mortgagee and holder.*

Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation.

When arrears of assessment are levied by sale, then section 56 of the Bombay Land Revenue Code, 1879, in persuance of an obvious policy, empowers the Collector to sell freed from all tenures, incumbrances and rights created by the occupant.........or any of his predecessor in title or in anywise subsisting as against such occupant. Should the Collector otherwise dispose of the occupancy, the section affords no such protection and the legal relation must be determined by reference to the ordinary law. So judged, the effects of a forfeiture and subseqnnt acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties. AMOLAK BANECHAND *v.* DHONDI KHANDU BHOSLE. 8 B L R 360=30 B. 466.

7 S. 83—*Permanent tenant, position of.*

The position of a tenant of a Bhagdari land, who is presumed to be a permanent tenant under section 83 of the Land Revenue Code, 1879, is not affected in any way by the prohibition contained in the Bhagdari Act against alienation. NAHACHAND *v.* KEKHUSHRU. 9 B L R 50; 31 B. 183.

8 *S. 84—Annual tenancy—Determination—Notice by landlord.*

An annual tenancy to which the Land Revenue Code applies, cannot be determined without a notice in writing by the landlord or by the tenant. OCHHAVLAL *v.* GOPAL. 9 B. L. R. 1332=32 B 73.

9 *S. 84--Landlord and Tenant--Ejectment—Notice to quit—Necessity of proving service of proper notice to quit.*

The plaintiffs sued to eject the defendants from certain land, alleging that they were yearly tenants. The defendants (*inter alia*) pleaded that they were permanent tenant. The plaintiffs at the hearing did not prove service of notice to quit as required by section 84 of the Land Revenue Code (Bom. Act V of 1197), but contended that service of notice was admitted by the defendants in their written statement.

Held that the defendants in their written statement, although not expressly denying the receipt of a notice, disputed its legality, and thereby threw on the plaintiffs the burden of proving the service of a proper notice. No such proof was given. Consequently, even assuming that the defendants were yearly tenants, the plaintiffs had not proved the termination of the tenancy or their right to recover possession. GANOO *v.* SHRI DEV SIDHESHWAR. I. L. R. 26 B. 360.

10 *Ss. 119, 120, 121—Land Revenue—Boundary dispute—Settlement of such dispute by Collector—Civil Court's jurisdiction.*

S. 121 of the Land Revenue Code (Bom Act V of 1879) must be read along with Ss. 119, 120, of the Code. It is only when a boundary dispute arises between the owhers of adjoining lands, and the Colllector is called upon to determine the dispute, that his determination becomes final under s. 121 of the Code so as to oust the jurisdiction of the Civil Court. LAKSHMAN *v.* ANTAJI. 2 B. L. R. 1033=25 B. 312.

11 S. 153—See 30 B. 466 No. 6 *supra.*

12 S. 203—Execution of decree—Appeal against order passed by Collector—7 B. L. R. 682 Col. 1178 P. I.

13 S. 203—28 B. 332—*See Bombay Act X of 1876 No. 5.*

14 *S. 214--Rule III (c)--Cutting tree standing in an assessed occupied survey number.*

The accused was convicted, under Rule 111 (*b*), section 214 of the Land Revenue Code, for cutting a tree standing in an assessed occupied survey number.

Held, that the conviction was illegal EMPEROR *v* VENKAPPA. 4 B. L. R. 625.

15 S. 214—Right to recover voluntary payments. 4 B. L. R. 299—26 B. 504 col. 327 p. I.

16 *S. 214, Rule 19 and 21--Landlord and Tenant--Lease--Condition--Condition binding tenant to reclaim land--Meaning of the word "reclaim"--Construction.*

On the 16th June 1835, certain marshy land, adjoining the sea, comprising about 730 acres, was leased by Government to the plaintiff in perpetuity, subject to the condition *(inter alia)* that if the whole of it was not reclaimed *(navasadhya)* by the end of

Bombay Act (V of 1879) *(Contd.)*

ten years, the lease might be cancelled. At the end of the ten years, only 83 acres of the land were actually under cultivation. The remainder had been rendered safe against the inroad of salt water. In March 1896,, the Government cancelled the lease, on the ground that the plaintiff had not brought tha whole of the land into cultivation. The plaintiff thereupon instituted this suit, praying for a declaration that the Government had no right to cancel the lease, and for an injunction restraining it from taking possession of the land. He contended that under the condition he was only to reclaim the land from the sea and that he had done so; that he was not bound to render the land fit for cultivation, but that, if he was, he had done so as far as it was possible.

Held, awarding the plaintiffs claim, that on the construction of the lease the term "reclaim" *(navasadhya)*, as used in the grant, meant nothing more than recovering the land from the dominion of the sea, and did not include the further obligation of rendering the land fit for cultivation. The plaintiff, having erected the necessary embankments to shut out the sea, was entitled to say that he had reclaimed the land and satisfied the terms of the grant.—SHAMRAO PANDURANG *v.* SECRETARY OF STATE, **25 B. 32.**

17 S. 217—28. B. 74. No. 5 *supra.*

(17) Act VII of 1879. (Irrigation Act.)

Ss. 3, 5, 8, 27, 87 and 285—Bombay Irrigation Act (VII of 1879) Sections 5, 8 and 28—Canal—Nala—Stream—Riparian rights—Interference by Irrigation Department.

The Irrigation Department claimed the right of making a *bund* in a nala—as against the defendant who held land past which the nala ran. It was contended that the nala was not a canal within the meaning of section 3 of the Bombay Irrigation Act, 1879.

The nala was crossed at a considerable distance to the north of the defendant's land by a Government Irrigation canal. The water flowing in the nala was derived from two sources, (1) from rain water from the hills and catchment area of the nala, and (2) from percolation water or waste from the canal. Apart from abnormal periods of drought, the second of the two sources was perennial and the more important of the two. There was a surface flow, in the portion of the nala under dispute, before the canal was made, and the flow lasted through the rains and for a portion of the cold weather.

Held, that the Irrigation Department had failed to establish the right claimed, the nala not being a canal but a stream, and the defendant had a right to the natural stream as incident to his holding. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BALWANT GANESH OZE. **5. B. L. R. 790 =28. B. 105.**

(18)—Act XVII of 1879. (Dekhan Agriculturists Relief Act).

1 S. 1—Written document—Oral evidence for contracting the document—Oral evidence permissible to show that contract was obtained fradulently. 30, B. 426 Col. 207 P. I.

2. *S. 2—Agriculturist—Assignee of Government assessment*—Inamdar,

A man is not excluded from being an agriculturist merely because he may happen to be an assignee from Government of assessment, if, in fact, he by himself or by his servant or by the tenants earns his livelihood wholly or principally by agriculture.

An *inamdar* even if he be, as *inamdar*, merely an assignee from Government of assessment, still may earn his livelihood wholly or principally by agriculture in respect even of the land included within the limits of the *inam.* Thus, an *inamdar* who is merely an assignee of Government revenue may also have occupancy rights, in respect of the lands over which he has these *inam* rights. It is clear that an *inamdar* may have occupancy rights and in respect of those occupancy rights there may arise an income which would make the person, who also happens to be an *inamdar*, an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, 1879. PERSHOTAM MURLIDHAR *v.* SITARAM BALKRISHNA. **8 B. L. R. 606.**

3. *S. 3. Cl. (x).*

A suit for land revenue does not fall within section 3 of the Dekhan Agriculturists' Relief Act 1879.

The last clause of sub-section (*w*) relates only to contractual engagements. But the liability for land-revenue does not spring from a contractual engagement, nor is the claim in respect of it one for rent or damages within the meaning of sub-section (*x*). SHEIKH GULAM *v.* KASHINATH. **25 B. 244.**

4. *Ss. 3 and 11—Suit on mortgage against agriculturist—Jurisdiction.*

S. 11 of the Act applies only to suits of the description mentioned in S. 3, cl. (*w*), *i,e.,* to suits for money due, on account, for the price of goods sold, and on contractual engagements. Clause (*y*), however, of the same section refers specifically to suits for the sale of the mortgaged property. So, where the money to be recovered is charged on immoveable property and the claim is to enforce that charged, the suit is excluded from the scope of the clause (w) (25 B. 244 247) Ref.

Held, that a suit against an agriculturist to enforce a mortgage claim, in the Court within whose jurisdiction the mortgaged property was stuated, fell under the specific description in cl. (*y*), and that the more general description in cl. (*w*) was not applicable, and that S. 11 of the Act was therefore no bar to the jurisdiction of the Court. NUR MAHOMED LALAN *v.* SAYAD ROSHAN SHAH, **1 S. L. R. 246.**

Bombay Act (XVII of 1879) *(Contd.)*

5. *S. 12—Suit—Accounts—'Claim' interpretation of.*

The existence of a dispute as to the amount of the creditor's claim is a preliminary condition to the necessity for the inquiry directed by S. 12 of the Dekhan Agriculturists Relief Act, 1879. The word 'claim' in the section means not merely the amount of the principal lent, but the aggregate of the sums payable in consequence of the liability created by the terms of the contract of lending embodied in the bond. PATLUBIN HAMBIRJI *v.* NARUBIN HARI. **7 B. L. R. 688.**

6 Ss. *12, 13—Usufructuary mortgage—Redemption—Accounts taken—Result of the account.*

The provisions of S. 13 of the Dekhan Agriculturists' Relief Act, 1879, are imperative. The amount due in a suit for redemption of a usufructuary mortgage in which the provisions of S. 12 of the Act have been complied with, is the amount which is found to be due upon taking accounts in the manner provided by S. 13. It is not enough that the Court should ascertain the consideration for the mortgage bond after an inquiry under S. 12 and then proceed to pass a decree for the amount. DADABHAI MUSE YALLI *v.* DADABHAI YALLI ABHRAM. **10 B. L. R. 745=32 B. 516.**

7 S. 12, 13—Withdrawal of suit—Withdrawal in appeal—Change in substantive law during progress of a suit—Law applicable to the suit. 10 B. L. R. 625.—*See Act V. of 1908 (C. P. C.) O. XXIII. R. 1.*

8 Ss. *12, 13 and 71 A—Restrospective effect—Enactment relating to procedure—Construction of statutes.*

Ss. 13 and 71 A of the Dekan Agriculturists Relief Act 1879, do not apply to suit instituted before the Act came into force in the particular district in which the suits are instituted.

S. 12 of the Act must be allowed a retrospective effect only in so far as it regulates the procedure of the Court. The portion of the section "and secondly, with a view to taking an account between such parties in manner hereinafter provided" must be denied a retrospective effect. 8 Bom. L. R. 798 approved. FATEMABEBI BUDRUDDIN *v.* GANESH BALLAL JOGLEKAR. **9 B. L. R 917; F. B.**

9 S. 13—see 32. B. 516 No. 6, 10. B. L. R. 625 No. 7, 9 B L. R. 917 No. 8 *supra*

10 *S. 15 (b)—Decree for redemption—Payment by instalments—Failure to pay the instalments—Directions consequent upon the failure.*

In a redemption decree, passed under the provisions of the Dekkhan Agriculturists' Relief Act, 1879, the Subordinate Judge made the decretal amount payable by instalments; and further ordered: "On failure to pay any two successive instalments, defendant No. 1 do recover the whole amount due by sale of the mortgaged property and

Bombay Act (XVII of 1879) *(Contd.)*

the deficiency if any from the plaintiffs personally." On appeal the High Court annulled the above order and substituted in its place the following direction: If the sum payable under the direction aforesaid is not paid when due, then defendant No. 1 will be at liberty to apply to the Court for such order as he may be entitled to under section 15 *(b)*, sub-section 2 of the Dekhan Agriculturists' Relief Act. PANDHARINATH SAKHARAM *v.* SHANKAR NARAYAN JOSHI. **8. B. L. R. 488.**

11 *S. 15 (b)—Decree for redemption—Power to order instalments—Interest provided by the decree cannot be subsequently cancelled:*

S. 15 (*b*) of the Dekhan Agriculturists' Relief Act 1879 does not allow the Court to cancel a direction for payment of interest contained in the decree. The section says that the Court in the course of any proceedings under a decree for sale may direct that any amount payable by the mortgagor under that decree, shall be payable in such instalments, on such dates and on such terms as to the payment of interest as it thinks fit. But the interest is as much payable under the decree as the principal, and the section does not say that the Court may direct that any amount payable under the decree shall not be payable; it merely empowers the Court to modify, in the particular manner there described, the terms of the payment. GOKALDAS *v.* GOVIND.—**9 B. L. R. 1334=32 B. 98.**

12 *S. 15 B—Decree—Instlements—Power to award fresh instalments.*

Where a decree allowing instalments has already been obtained, Section 15-B of the Dekhan Agriculturists' Relief Act, 1879, does not permit the executing Court to reconsider the whole matter afresh with a view to the substitution of some new scheme of instalments.

The second clause of section 15-B of the Dekhan Agriculturists' Relief Act, 1879, refers only to those cases where directions for payment have already been given under the first clause. SHANKAR SHAMRAO *v.* SHANKARAGANDAYYA. **10 B. L. R. 538.**

13 *S. 15 (b)—Decree—Instalment.*

S. 15 B. of the Dekhan Agriculturists' Relief Act gives a discretionary power to the Court to make the decretal amount payable by instalments in the course of any proceeding in execution of a decree for redemption, foreclosure or sale. The power can be exercised by the Court *suo motu*, and at any time in the course of a proceeding. It is a power not subject to limitation. BALAJI BHAWANRAO *v.* DATTO RAMCHANDRA. **9 B. L. R. 1026.**

14 *S. 15 (b)—Power of Court as to payment of interest—Discretion.*

Sub-S. 1 of S. 15 (*b*) of the Dekhan Agriculturists' Relief Act 1879 does not make it compulsory on the Court to award interest under the section. There is a discre-

Bombay Act (XVII of 1879) (*Contd.*)

tion in the Court as to whether or not interest should be allowed. NATHU LAKSHMAN *v.* VAZIER BHAU. **9 B. L. R. 550**=31 B. 450.

15 *S. 15 (b)—cls. (1) and (2)—Decree on mortgage—Payment by instalments—Sale on default in payment of an instalment—Application to make the decree absolute—Extension of the provisions of the Dekkhan Agriculturists Relief Act (XVII of 1879) to the District—Application for payment by instalments.*

The Court of the First Class Subordinate Judge of Dharwar passed a decree on a mortgage which directed payment of the debt by instalments and on default of the payment of an instalment the debt to be recovered by the sale of the mortgaged property.

The judgment-debtor having failed to pay an instalment the decree-holder applied for the decree to be made absolute. In the meanwhile the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were extended to the Dharwar District and the judgment-debtor having thereupon applied for instalments under section 15B of the Act

Held, that there is nothing in section 15B of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to warrant the view that the legislature intended that when a decree allowing instalments had already been obtained, the whole matter should be re-considered afresh in execution with a view to substitute some new scheme of instalments.

Held, further, that the second clause of section 15B refers only to those cases where directions for payment have already been given under the first clause of that section. SHANKAR SHAMRAO *v.* SHANKAR GAUDAYA **32 B 445.**

16 Ss. 15 (b) and 20—Decree—Execution transferred to Collector—Partial execution —Application for instalments—31 B. 120 Col. 1982 P. I.

17 *S. 20—Civil Procedure Code (Act XIV of 1882), s. 13—Suit on a promissory note—Issue as to payment by instalments—Finding in the negative—Extension of the Dekhan Agriculturists' Relief Act (XVII of 1879) to the District—Application for instalments—Res judicata*

In a suit instituted in the Court of the First Class Subordinate Judge of Ahmedabad on a promissory note an issue was raised as to whether the amount sued for should be made payable by instalments and the finding was in the negative. The suit was decreed on the 21st July 1905. The Dekhan Agriculturists' Relief Act (XVII of 1879) was extended to the Ahmedabad District on the 15th August 1905. Thereupon the defendant having applied for payment by instalments the application was dismissed on the ground that the question of instalments was *res judicata*.

Held, that the section 13 of the Civil Procedure Code (Act XIV of 1882) was not applicable. Section 20 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) contemplates that even when a decree has been passed which does not allow of instalments, the Court should have power to allow instalments in execution. BAI DIWALI *v* PATEL GIRDHAR. **10 B. L. R. 577**=**32 A. 391.**

18 S. 20—31 B. 120 No. 16 *supra.*

19 *S. 22.*

Under section 22 of the Dekhan Agriculturists Relief Act, immoveable property belonging to an agriculturist cannot be sold in execution of any decree or order, unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates, and the security still subsists. The word 'specifically' has no greater force than the word "specific" in section 58 of the Transfer of Property Act. BALSHET *v.* DHONDO RAM KRISHNA. **3 B. L. R. 545.**

20 S. 44—Partition—Joint family property—Conciliation agreement—Consent decree —7 B. L. R. 659, 660—30 A. 101 Col. 142 P. I.

21 *Ss. 46, 47—Conciliator's certificate obtained in the name of one co-parcener—Suit on behalf of the family—The remaining co-parceners joining as plaintiffs to the suit—Hindu Law—Manager—Powers to represent the family.*

In a suit brought on behalf of a joint Hindu family the Conciliator's certificate required by section 46 of the Dekhan Agriculturists' Relief Act (XVII of 1879) was obtained in the name of one of the co-parceners alone but all the co-parceners joined as plaintiffs and admitted in the plaint that the certificate had been obtained on behalf of the joint family. It was objected to this suit that as the certificate was in the name of one of the plaintiffs the suit could not lie.

Held, overruling the objection, that the certificate obtained by one of the co-parceners, who was either the managing member of the family at the time the certificate was obtained or who though not manager obtained it with the consent and on behalf of the joint family, acting as its agent, was sufficient to support the suit.

The rule of Hindu law is that a joint family is represented in all transanction or concerns with the outside world by its *karta* (manager) provided these are for the benefit or necessity of the family; and that any co-parcener who does not occupy that position of manager can represent and bind the family in such transaction or concerns, provided he was either previously authorised to represent it or, in the absence of such authority, the other co-parceners subsequently by words or conduct ratified his acts. VITHU DHONDI *v.* BABAJI BAHIRU. **10 B. L. R. 505**=**32 B. 375.**

22 *S. 63 A. Transfers of Property Act s. 59—Executi n of deed—Absence of attestation—Signature by the writer of the deed—Sig-*

Bombay Act (XVII of 1879) *(Contd.)*

nature by Registrar under section 63 A of the Bombay Act XVII of 1879—Not valid attestations.

A deed of mortgage bore at its conclusion the signature of the writer of the deed and also the signature of the Sub Registrar under s. 63-A of the Dekhan Agriculturists' Relief Act, 1879. It was not separately attested by two witnesses as required by s. 59 of the Transfer of Property Act, 1882.

Held, that niether the one nor the other signature can be treated as an attestation; and the deed, therefore, was not validly executed.

An attesting witness is a witness who has seen the deed executed and who signs it as a witness. RAMU SHIVJI BARATE *v.* LAXMANRAO KRISHNA. **10 B. L. R. 943.**

23 S. 71, 9 B. L. R. 917 No. 8 *supra.*

24 *Ch. II.—Suit based on dispossession of an existing possession—Incidental reference to a mortgage in plaint.*

A suit based on a dispossession of an existing possession does not fall within chapter II of the Dekhan Agriculturists' Relief Act (Act XVII of 1879). An incidental reference to a mortgage in the plaint does not affect the question when the suit is one to recover possession from a person who is not the mortgagor. *Mulchand Ravji* (1833 P. J. p. 184) followed. KRISHANJI *v.* HARI. **6 B. L. R. 188=28 B. 635.**

(19) Act I of 1880 (Khoti Settlement Act)

1 *Secs. 3 (5), 9, 10—Privileged occupant—Dharekari, quasi--Dharekari,—Occupancy tenant—Transfer of land to another on sale—Not a resignation so as to be at the disposal of the Khot.*

By transferring his land on sale, an occupant does not resign it within the meaning of section 10 of the Khoti Act (Bom. Act I of 1880), so as to place the land at the disposal of the Khot. RAMCHANDRA *v.* DATTATRAYA. **9 B. L. R. 320=31 B. 267.**

2 *S. 6, 9—Landord and Tenant—Occupancy tenant—*Khot—*Mortgage by tenant—Forfeiture of tenancy.*

There is no authority for saying that an occupancy tenant, whose tenancy is not determined, forfeits his tenancy by parting temporarily with the possession of his land to another without resigning the land as completely as would be necessary, in the case of privileged occupants of another sub-class, to place the land at the disposal of the *khot*.

And so long as his tenancy is not determined, the land is not at the disposal of the *khot*. And the *khot* cannot claim to treat the person in possession under a right derived from the occupancy tenant either as a trespasser even as a yearly tenant, so long as the privileged occupant's rights remain undetermined by resignation, lapse or duly certified forfeiture. YESA *v.* SAKHARAM GOPAL GANU, **7 B. L. R 941=30 B. 290.**

Bombay Act (I of 1880) *(Contd.)*

3 *S. 8—Khoti nisbat land—Customary rate of that.*

S. 8 of Act I of 1880 (Bombay) provides that tenant other than occupancy tenants shall hold their lands on the terms agreed on between the *Khot* and themselves, and in the absence of such agreement shall be held liable to pay rent to the *Khot* at the same rates as are paid by occupancy tenants, for all *Khatedars* other than certain specified classes.

Held, that the rate payable by the defendant in respect of *khot-nisbat* lands must be determined in accordance with section 8 *i. e.*, in accordance with the rates fixed for occupancy tenants. KRISHNOVA NAYAK *v.* KESHAV BALKRISHNA. **4 B. L. R. 606 =27 B. 71.**

4 *S. 9—Mortgage--Occupancy rights—Estoppel.*

In a suit on a mortgage of occupancy rights for sale of the mortgaged property the defendants, sons of the mortgagor, pleaded that their father had no right to transfer the occupancy rights and the mortgage was ineffectual.

Held, that the defendants were estopped from raising the plea. The mortgagor could not question his right of transfer, and the defendants who inherited the occupancy rights as heirs, such rights being heritable, were also estopped.

Section 9 of the Khoti Act (I of 1880, Bombay) is not retrospective. JAYRAM BAPU CHAWAN *v.* NARAYAN AMBAJI CHAVAN. **5 B. L. R. 652.**

5 S. 9—*See* 31 B. 267 No. 1, 30 B. 290 No. 2 *supra.*

6 *S. 10—Occupancy tenant--Resignation to khot.*

When an occupancy tenant transfers land to another on a sale deed, he cannot, according to the ordinary usage, be said to have resigned the land. Though the consent of the Khot is not necessary to a resignation, still the resignation must be made to the Khot, and it is only to the Khot that the resignation can be made. As to whether or not a particular transaction is a resignation to the Khot must depend upon the circumstances of each case. BADESHAH MAHAMADSHAH *v.* NARAYAN ANANT SAMANT. **9 B. L. R. 829.**

7 S. 10 Khot--Khoti Khasgi lands--Lapsed lands—Khot's power over lapsed lands --Dunlop's proclamation of 1824 6 B. L. R. 864 Col. 239 P. I.

8 S. 10--31 B. 267 No. 1 *supra.*

9 S. 16, 20, 21—Khotk-sharer refusing his consent--Settlement register—Limitation 3 B. L. R. 181 Col. 1910 P. I.

10 S. 21—*Settlement officer, decision of—Suit to alter or modify decision—Limitation —Starting point--Limitation Act Art. 120.*

The suit contemplated by section 21 of the Bombay Act I of 1880, which may be brought for the purpose of having the decision of a Settlement Officer set aside or modified is governed by Art. 120 of the Limitation Act 18 B. 344 foll.

Bombay Act (I of 1880) (*Contd.*)

The starting point of limitation for bringing a suit to have the decision of a Settlement Officer set aside or modified is the date when the decision is duly pronounced after notice to the parties and that is *prima facie* the date the decision bears. But if due notice was not given and the party affected became aware of the decision only subsequently he will have six years from such later date within which to bring his suit--GOPAL *v.* KRISHNA. **3 B. L. R. 420.**

11. S. 33—Rent Amount—Wrong decision —Fresh suit—Resjudicata 3 B. L. R. 450 Col. 958 P. I.

(20)—Act I of 1884 (Local Boards Act).

Right to recover voluntary payments. 4 B. L. R. 299—26 B. 504 Col 237 P. I.

(21)—Act II of 1884 (District Municipal Act).

1. *Municipality—Non-repair of roads—Cause of action.*

The plaintiff sued the defendant, Municipality, for damages for injury caused to his horse and carriage in consequence of the neglect of the Municipality to repair a road. The Municipality pleaded that it could not be held answerable for damages arising from a mere non-feasance on its part.

Held, that as the default leading to the damage was a mere non-feasance the plaintiff's suit must fail, for no duty towards the plaintiff was imposed on the Municipality which they negligently failed to perform. ACHRATLAL HARILAL *v.* THE AHMEDABAD MUNICIPALITY. **6 B. L. R. 75=23 B. 340.**

2. S. 27 (2), (17), and 30—Special general meeting—President—Dispensation or remission. 28 B. 66 Col. 252 P. I.

(22)=Act III of 1888 (City of Bombay Municipality Act).

1. *S. 3 (u) 222, 504—Drains—Manholes—Drains above the surface of ground driven through private property — Compensation — Awards—Cheif Judge of Bombay Small Cause Court.*

A manhole is included in the expression "any other device for carrying off sewage &c." and falls within the terms "drain" as defined in S. 3 (*u*) of the Bombay City Municipal Act of 1888. The expression "the Commissioners may carry any Municipal drain into through or under any land whatsoever within the city" covers a drain which is above the surface of the ground. The words "into, through or under" are meant to include drains passing over the land. Reading Ss. 222 and 504 of the Bombay City Municipal Act of 1888 together it is plain that the object of the Act is that if any damage is done or any portion of a man's property is taken away by the commissioner's action under S. 222, the amount of compensation should be assessed under S. 504 of the Act by the Chief Judge of the Small Cause Court, Bombay.—DATTATRAYA *v.* MUN. COM. OF BOMBAY. (RUSSELL J.) **9 B. L. R. 1321.**

2. *Ss. 22, 23, 25, 33, 34—C. P. C., S. 11—Jurisdiction—Election cases.*

The Chief Judge of the Small Cause Court at Bombay is the sole tribunal indicated under the City of Bombay Municipal Act to determine questions relating to disputed elections. No other Court has jurisdiction to hear suits arising under the Act. The word "election" in S. 33 of the City of Bombay Municipal Act is designed to express something wider than a legally valid election. The words used in this section are consistent with the view that an election, which in fact took place under conditions that made it possible that there should be a valid election, can be questioned. There is enough in S. 33 to bring it within the exception to S. 11, C. P. C., and bar the cognizance of suits falling under the Act by any other Court. The jurisdiction of Courts can be excluded not only by express words but also by implication. BHAISHANKAR *v.* MUNICIPAL CORPORATION OF BOMBAY. **9 B. L. R. 417.**

See for other facts Col: 922 P. 1.

3. *S. 24, 398, 410 (1)—Municipality—Selling or exposing for sale without license fish intended for human food—Sale from a place between high and low water mark—Private market—Onus probandi—City of Bombay—Bombay General Clauses Act (I of 1904, Bom.), Section 3 (10).*

The accused was charged with selling or exposing for sale, without license from the Municipal Commissioner, fish intended for human food on the Chowpati Foreshore contrary to the provisions of Section 410 (1) of the Bombay Municipal Act. The accused sold a fish from a basket which he had placed on the sand at some distance from the water, the place being between the high and low water-mark. The fish sold was a fresh fish and it had been recently brought from one of the boats then in the Back Bay.

Held, that the accused was liable under section 410 (1) of the Act, for it would be impossible to say that this fresh fish had been sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, after it had been brought from the vessel which was in the water."

It was contented that the place where the fish was sold was a "private market."

Held, that the foreshore of Chowpati could not be held or at least was not shown to be a "private market" within the meaning of section 398 of the Bombay Municipal Act.

Held, also, that having regard to the definition as given in section 3 (10) of the

Bombay Act (I of 1880) *(Contd.)*

Bombay General Clauses Act, the Bombay Municipal Act applied to the spot in question. EMPEROR *v.* BUDHOOBAI. **7 B. L. R. 726.**

4. Ss. 25, 33, 34---9 B. L. R. 417 No. 2 *supra.*

5. S. 195, 527—Municipality—Notice of suit when necessary- Refound on town duties. 28 B. 387 *See Col: 1811 P. I.*

6. S. 222—See 9 B. L. R. 1321 No. 1 *supra.*

7. Ss. *231, 471, 514—Notice to make drains —Illegal notice. Non-compliance of—Negotiations after notice—Fresh notice—Limitation period for prosecution.*

A written notice was served on the accused on the 27th May 1903 under section 231 of the Bombay Municipal Act requiring him to construct a drain or drains from such parts of his premises as acquired to be drained and to execute out certain other works within a fortnight. Upon service of the notice the accused addressed a letter, dated the 29th May 1903, to the Municipal Commissioner sending the notice complaining that his premises were provided with sufficient means of effectual drainage and asking information regarding the works he was directed to execute. In reply to this letter the Municipal Commissioner informed the accused that enquiries would be made in the matter of his complaint. Afterwards the Municipal Commissioner on the 3rd October 1903 gave a fresh notice to the accused directing him to construct a drain "in the *gully* on the west of his premises, this drain to be so constructed that it shall adjoin the west wall of the building." On dafault by the accused he was prosecuted and convicted under section 471 of the Bombay Municipal Act. On revision it was contended that the prosecution not having commenced within three months from the 27th May 1903 the complaint should not have been entertained by the Magistrate and that the notice given on the 3rd October 1903 was illegal.

Held, that the prosecution was within time but the notice being illegal the conviction must be set aside.

That as both the accused and the Municipal Commissioner had entered upon a course of negotiation which had the effect of keeping the original notice in abeyance leading the accused to believe the Municipal Commissioner would not enforce the strict rights under it the parties must be regarded after that as having waived the notice and treated it as non-existent and unenforcible. It was therefore competent to issue a fresh notice.

If parties who have entered into definite and distinct terms involving certain legal results—certain penalties of legal forfeiture —afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense, or held in

Bombay Act (I of 1880) *(Contd.)*

abeyance, the person who might have otherwise enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties. The principle is applicable in a criminal case when the complaint is as to an offence of non-compliance with a requisition that can be kept in abeyance or cancelled by the authority making the requisition.

That as there is nothing in the language of section 231 of the Bombay Municipal Act authorising the Commissioner to direct that the drain shall be made so as to adjoin any particular part of wall of the premises the notice was illegal and it was not the duty of the accused to comply with its terms.

That the accused could not be punished for non-compliance with requisitions which were more or less ancillary to the principal requisition, *i. e.*, the making of the open drain. EMPEROR *v.* NADIRSHA H. E. SUKHIA. **6 B. L R., 667=29 B. 35.**

8 *S. 297—Alteration of line of public street.*

When a line on each side of the street was prescribed by the Commissioner in accordance with section 297 of Act III of 1888, it was not open to him subsequently to prescribe a different line setting back the line so prescribed. ESSA JACOB HAJI JAMAL *v.* THE MUNICIPAL COMMISSIONER OF BOMBAY. **25 B 107.**

9 *Ss. 342, 527—Notice--Injunction. Suit for--Re-construction and Repair. Difference between--Regular line of street—Duty. Prompt execution of—*

Section 527 of the City of Bombay Municipal Act does not apply to a suit to restrain a Municipality by injunction from doing an act which is threatened but not done. 25 Bom. 142, 2 Bom., L. R. 837 *followed.*

It is of importance that public officers should not be encouraged to sleep at their posts and postpone the fulfilment of their duties in the expectation that their delay will be condoned and their demands conceded, whatever may have been the lapse of time or the change of circumstances. L. R. 1 App. Cas. 611 at p. 630.

The word "reconstruction" as used in section 342 clause (*d*) of the City of Bombay Municipal Act has some other element than that of addition, alteration or repair. If the repair is of an ordinary and casual character, it is non-re-construction of any portion of the building. If, on the other hand, the repairs are of a more or less substantial character, affecting the stability of the building, they are re-construction, whether the repairs are done inside or outside the building. In each case, it is a question of fact whether the partial work done with reference to a building are mere repairs or are re-construction of a portion of the building. The difference between *repair* and *re-construction* is one of decree and can be made out by finding whether what has been done adds to and was intended to add the structural capacity

Bombay Act (I of 1880) (*Contd.*)

of the building. DEWAKABAI *v.* THE MUNICIPAL COMMISSIONER OF BOMBAY. **6 B. L. 1023.**

10 *S. 354—Municipal Commissioner's power to remove objectionable structures—"Appear,"—"Danger," —Discretion vested in the Commissioner—Court's interference with the discretion—Commissioner can act through agent—Right of the party to be heard in answer to his notice—Injunction to restrain Commissioner from pulling down a building.*

The primary object of S. 354 of the City of Bombay Municipal Act, 1888, is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers must be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals. In the first place, it must appear to the Commissioner that a structure is in a ruinous condition or likely to fall or in any way dangerous to any person occupying, resorting to or passing by such structure. He may next by written notice require the owner or occupier to pull down, secure or repair.

The word "appear" in the section does not involve "appears to the eye." It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representations. But the Commissioner's action when "it appears" is judicial, so that he must exercise his discretion in determining what action should be taken. He does not satisfy this test, where he merely signs the notice which is spent to him by the Executive Engineer because it has previously been signed by that officer. It is only by aid of a fiction that it can be said that a notice signed in this way by the Commissioner complies with the section, which should be considered as a notice to show cause. It is not invalid; at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right.

Danger means peril, risk, hazard, exposure to injury from pain or other evil, and can vary in degree according as the apprehended injury is expected to occur at once at some future time. S. 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first the degree of danger must be ascertained and then the appropriate precautionary measure prescribed.

Discretion must not be arbitrary. The very term itself standing and unsupported by circumstances imports the exercise of judgment, wisdom and skill as contra-distinguished from unthinking folly, heady violence or rash injustice. 15 P. A. St. 304 F.

The legislature has vested in the Commissioner a discretion in the matter (S. 355) and the Court would not interfere in this exercise merely because the object in view might be carried out in some other way, nor would it lightly impute to him bad faith. But the Court is, in the first instance, entitled to inquire whether the discretion has been exercised. The discretion has to be exercised, first in coming to a conclusion as to the state of the structure, and then in fixing upon the remedy.

It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore it is a sufficient exercise of his discretion, in deciding what structures are dangerous, if he appoints a competent person to present to him what structure are dangerous. But if a notice is issued based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken.

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down dangerous, condition that would be *prima facie* evidence that the person appointed by the Commissioner had not exercised his discretion.

When the Commissioner has *per force* to act on the advice of his expert advisers, it must be proved that they decided judicially what advice they should offer. If they did not, the provisions of the section have not been complied with. In other words, the Commissioner can exercise his discretion through an agent; but it follows that, if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

Under certain circumstances, the safety of the public must be considered in priority to the right of private individuals as in the case of imminent danger; but where there is no suggestion of imminent danger the person affected is entitled to be heard as a matter of common justice. LALBHAI TRICAMLAL *v.* THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY. **10 B L. R. 821.**

11 *S. 394 Municipality—License—Specific Relief Act (1 of 1877), s. 45—Discretion.*

The power of the Municipal Commissioner of Bombay to grant a license under s. 394 of the City of Bombay Municipal Act (III of 1888) includes the power to refuse it.

Per Curiam: The Court cannot substitute its judgment for that of the Municipal Commissioner. Unless it is clear beyond doubt that the Municipal Commissioner is using his authority with some indirect motive and for a collateral purpose, for which the Legislature has armed him with the power, the Court cannot interfere with his discretion.—HAJI ISMAIL *v.* MUNICIPAL COMMISSIONERS OF BOMBAY, AHMED MOOSA *v.* MUNICIPAL COMMISSIONERS OF BOMBAY. **5 B L R 1001 —28 B. 253.**

Bombay Act (I of 1880) (*Contd.*)

12 *S. 394—'Premises'—'Open ground.'*
The word 'premises' in Section 394, Municipal Act, Bombay, includes open ground. S. B. MASTER *v.* DHARAMSI JETHA. **3 B. L. R. 436.**

13 S. *394 (a), (1) Oil, scoring of—Intention—Domestic use—License.*
Held, that the wording of section 394 of the City of Bombay Municipal Act requires that the premises, in order to attract the operation of the section, should be used for the purposes of storing. The phrase "for the purpose" indicates that it must be the intention of those using the premises to store: that storing must be the object aimed at—the final cause for which the premises are used. The actual use is up itself insufficient in the absence of proof as to the object aimed at. The purpose to store must be the dominant motive. EMPEROR *v.* WALLACE FLOUR MILL CO. **6. B. L. R. 735,**

14 *S. 394 (1), (c) Use of stables by tenant—Liability of landlord.*
Where the landlord let his stables to the accused who used them without a license in contravention of the provisions of Section 394 1) (c) of the City of Bombay Municipal Act for the purpose of keeping horses for sale or hire—
Held, that the landlord was not guilty of any offence. It was immaterial that the landlord was aware, when letting them of the use to which the stables would be put by his tenant. EMPEROR *v.* MIRZA MAHOMED SHIRAZI. **4. B. L. R. 944**

15 S. 398—*See* 7 B. L. R. 726 No. 3 *supra.*

16 S. 410—*See* 7 B. L. R. 726 No. 3 *supra.*

17 S. 429, 430—Dangerous disease—Infection -Public conveyance. *See* Bombay Act V of 1863 S. 22 No. 3.

18 S. 471—*See* 29 B. 35 No 7 supra.

19 S. 504—see 9 B. L. R. 504 No 1 supra.

20 *S. 518—Penal Code (Act XLV of 1860), Section 21—Public Servant—Municipal servant— Indian Councils Act, 1861 Sections 39, 40 and 43.*
A municipal servant under the Bombay Municipal Act is a public servant under section 21 of the Indian Penal Code.
Under section 43 of the Indian Councils Act, 1861, the Local Legislature has the power to alter in any way the Indian Penal Code or any other Act of the Supreme Council with the previous sanction of the Governor-General.
But mere omission to obtain a previous sanction does not render any law or regulation invalid provided it is assented to by the Governor-General subsequently as required by sections 39 and 40. EMPEROR *v.* ELIAS EZEKIEL **6 B. L. R. 54.**

21 S. 514—See 29 B. 35 No 7 supra.

22 S 527—See 25 B. 387 No 5, 6 B. L. R. 102 No. 9 supra.

(23) Act VI of 1888 (Gujrat Taluqdar's Settlement Act.)

1 *S. 2 (a)—Talukdar—Purchaser from "Talukdar"—Definition.*
The term "Talukdar" as defined by s. 2 (a) of the Gujrat Talukdars' Act (Bom. Act VI of 1888) does not include a purchaser of a Talukdar's share sold in execution of a decree passed against him. NARANDAS *v.* PARSHOTTAM. **I. L. R., 26 B. 757.**

2 S. *21*—"Talukdar"—"Talukdari *estate.*"
In Bombay Act VI of 1888, the expressions "*talukdar's* estate" and "*talukdari* estate" denote different matters. The expression "*talukdari* estate," in section 21 of the Act, means an estate of *talukdari* tenure.
A Civil Court cannot entertain a suit for the partition of such estates. PARSHOTAM VALLU *v.* BAI PUNJI. **4 B. L. R. 817.**

3 *S. 31—Talukdar's estate—Interpretation.*
The expression "Talukdar's Estate" in S. 31 of the Talukdari Settlement Act, 1888, means the estate held by the Talukdar as a Talukdar. It does not, therefore, include that which a Talukdar owns as assignee of a mortgage debt by a private investment of money. KHODABHAI *v.* CHAGANLAL. **9 B. L. R. 1122.**

(24) Act II of 1890 (Salt Act).

Salt. Removal of—Intention.
The provisions of section 47 of Act II of 1890, Bombay, do not in express terms or by necessary implication make intention or knowledge an essential ingredient of the offence under clause (*a*) of the section. What is prohibited by the Act is the removal of the Salt in contravention of any license or permit and that shows that the removal is prohibited in itself. EMPEROR *v.* MAGAN LAL DULABHA. **6 B. L. R. 93=28 B. 346.**

(25) Act I of 1894 (Bombay corporation Act).

Bombay corporation—Powers of—Power to work tramways—Quaere.
Whether the Bombay corporation has the power to work the Bombay Tramways referred to in Bombay Act I of 1894. 4 B. L. R. 384.—*See Bombay Act I of 1874 S. 29 No. 1.*

(26) Act IV of 1898 (Bombay city Improvement Trusts Act).

1 *Land acquisition—Compensation—Mode of assessment—Valuation by Tribunal of Appeal—Appellate Court—Duty of.*
The property acquired by the City of Bombay Improvement Trust was for the purposes of fixing compensation treated by the Tribunal of Appeal under two categories, the first part being regarded as fully developed and the portion lying at the back as capable of further development. The compensation awarded represented the capitalized rentals of the front portion in its present condition and of back portion as hypothetically developed. The rental was capitalised at 16⅔ years purchase for the front and 16 for the back premises.

Bombay Act (IV of 1890) *(Contd.)*

On appeal dispute between the parties was limited to the premises at the back and in respect of them to three points, (*a*) whether the Tribunal ought to have allowed four upper floors to the hypothetical chawls thereon, (*b*) whether the Tribunal was wrong in allowing only 16¾ and 16 years purchase, and (*c*) whether sufficient allowance was made by the Tribunal for the risk attendant upon a scheme of development such as that adopted by it as the basis of its reward. The scheme of development adopted provided for the erection of four blocks of chawls running practically at right angles to the front premises, and according to the scheme these chawls were to have three upper floors for residential purposes, while in each case the ground floor was to be used for godowns. *Held*, that though the High Court was in no sense bound by the determination of the Tribunal, its opinion was entitled to the greatest weight.

That it could not be said that a scheme of development involving four upper floors was so obvious that it would enter into the calculations of an intending purchaser and influence his offer. That there were no materials on record to justify the High Court's upholding the contention that, contrary to the Tribunal's conclusion, four upper floors should be allowed.

That the amount of purchase fixed by the Tribunal was fair and reasonable, that the allowance made at ¾ years rental for the risk attending upon the proposed scheme of development was adequate. ANANDRAV VINAYAK *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **7 B. L. R. 580=29 B. 565.**

2. Jurisdiction of High Court to enquire into the validity of Acts passed by Local Legislative Councils—Court of Justide 27 B. 424 Col. 1199 P. I.

3. *S. 48 (11)—Bom. Act XVI of 1904—Award by Tribunal of appeal—Cross objections—Civil Procedure Code (Act XIV of 1882) S. 561.*

S. 48 (11) of the City of Bombay Improvement Act (Bom. Act IV of 1898) does not provide for leave to appeal being granted to any individual but for a certificate that the case is a fit one for appeal, that is, the whole case and not any particular part of it. The consequence of the grant of the certificate is that there shall be an appeal to the High Court from the award or any part of the award, and this must mean that there shall be a right to appeal or, to use the language of the Civil Procedure Code (Act XIV of 1882) that an appeal will lie to the High Court and the respodents will be entitled to object in the manner provided by S. 561 of the Code.

Per Jenkins, C. J:—The enquiry is essentially one where experience is of the greatest use, and in this respect the Tribunal is in a far stronger position than this Court. It has been in existence and at work now for some years, and though its members have changed from time to time, still it must have gained, from the multiplicity of cases that have come before it, an insight into the value of land in Bombay, which we do not possess, and an experience which must make this Court slow to interfere with its adjudication on a question of value, involving no legal principle, in this absence, of evident error. And all the more must this be so when regard is had to the constitution of the Tribunal.—RAGHUNATHDAS *v.* SECRETARY OF STATE, **I. L. R., 29 B. 514.**

27 Act III of 1901 (District Municipalities Act.)

1 *S. 54—Corporation's* bona fide *act—Imperative duty and permitted act—Karachi Municipality—Dust-bins—Nuisance—Courts' interfere with acts of a Corporation.*

Where the plaintiff sued for an injunction prohibiting the Municipality from placing a common dust-bin on the corner of a garden immediately in front of his house, *held*, that as S. 54 of Bombay Act III of 1901 imposed an imperative duty on the Municipality to make reasonable provision for cleaning public streets, as the streets could not be kept clean, under the circumstances obtaining in Karachi, without keeping dust-bins in some specified spaces; and as it was not shown that the Municipality was either negligent or not acting with *bona fides* in placing one at the particular site, the plaintiff was not entitled to the injunction sought for, although the dust-bin in this instance was a source of nuisance to him.

Held, also that to ascertain whether or not a nuisance is such as to give one a right of action, inquiry should be made into the authority under which the Municipality purported to act, the law on which point may be thus summarised.

(1) Apart from the terms of the statute which constitutes it, the Corporation has no more authority to infringe a private right than the ordinary citizen.

(2) The Corporation can do an act which constitutes a nuisance, if, and only if the power to do the act is expressly set forth in the statute or is necessarily deducible therefrom.

(3) Where the Corporation has merely permissive and not imperative authority to do a thing, the inference is that th discretion should be so exercised as not to prejudice the common law rights of others.

(4) If the Corporatipn acts within its express or implied authority without negligence and with *bona fides*, no action lies against it at the suit of a person who sustains a private injury by its exercise.

(5) The Courts put a wider and more liberal construction on the powers vested for the benefit of the public as a body, such as a Municipal Corporation. HANSRAJ HIRJI *v.* THE KARACHI MUNICIPALITY. **1 S. L. R. 228.**

Bombay Act (III of 1901) *(Contd.)*

2 *S. 160—Municipality—Acquisition of land—Difference as to price—Completed contract—The price can be fixed, by the Court in cases of difference.*

The Poona City Municipality having determined to acquire a portion of the plaintiff's house for the purpose of widening a street, the plaintiff expressed his willingness to allow the Municipality to acquire the same; but they could not agree as to the price. The question was referred to arbitration as required by S. 160 of the Bombay District Municipal Act, 1901; but the proceedings before the arbitrators were not successful. The plaintiff then applied to the District Judge under S. 160 (3) of the Act, requesting him to ascertain and determine the compensation payable. The District Judge made his award. The Municipality appealed from the award contending that they no longer required the plaintiff's premises and that there never was a completed contract with the plaintiff.

Held, (1) that there was a contract of sale at a fair valuation, where the Court not only can provide, but under a special statute is compelled to provide, the means of ascertaining the price: and of such a contract specific performance would be awardable.

(2) that, therefore, there was a contract between the parties from which the Municipality could not recede.

As a general rule where the agreement is that the price of the estate shall be fixed by arbitrators and they do not fix it, there is no contract, as the price is of the essence of the contract of sale, and the Court cannot make a contract where there is none. But the applicability or otherwise of this doctrine depends upon whether the fixing of the price is of the essence of the contract of sale. 19 ves Jun, 429. followed.

Where there is a definite and a completed contract to give and take the estate upon terms to be settled thereafter and the valuation cannot be made *modo et forma* the Court will substitute itself for the arbitrators 5. Ch. App. 519. referred to. THE POONA CITY MUNICIPALITY *v.* RAMACHANDRA G. KARYE, **10 B. L. R. 617.**

(28) Act I of 1904—(General Clauses Act, Bombay).

S 7—Proceedings commenced under the old Act—Right of appeal given by the new Act—Whether can be of any avail—Right of appeal is not a matter of procedure 10 B. L. R. 330—32 B. 337—*See* Bombay Act III of 1876 S. 1.

(29) Act II of 1806 (Mamlatdar's Courts Act).

1 *Enactment relating to procedure—Retrospective effect—Construction of statutes.*

The Mamlatdar's Courts Act (Bombay Act II of 1906) being an enactment relating to procedure should be given retrospective effect. No person had a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed, for the time being, by or for the Court in which he sues. GULAM RASUL *v.* BALU SAYOJI. (BEAMAN J.) **9 B. L. R. 527.**

2 *S. 4—Mamlatdars' Courts Act (Bom. Act II of 1906), section 5—Mamlatdar's Court—Suit for possession of a house situate within a town—Jurisdiction—Act of procedure—Repealed statute.*

A suit for the recovery of possession of a house situate within a town was instituted in the Court of a Mamlatdar while the Mamlatdars' Courts Act (Bom, Act III of 1876) was in force, but before the suit was finally decided that Act was repealed and the Mamlatdars' Courts Act (Bom., Act II of 1906) had come into operation.

Held, that the Mamlatdar had no jurisdiction to decide the suit.

Per curiam:—The repealed statute is, with regard to any further operation, as if it had never existed. *Regina* v. *Denton* (1852) 18 Q. B. 761, followed and applied. VAJECHAND *v.* NANDRAM. **9 B. L. R. 1028=31 B. 545.**

3 S. 7, 23—32 B. 337—*See* Bombay Act III of 1876 S. 1.

4 *S. 19 (b)—Possessory suit—Landlord and tenant—Trespasser dispossessing the tenant during the duration of tenancy—Landlord suing to recover possession within six months from the determination of the lease.*

On the 5th June 1905, the plaintiff let certain lands to defendants Nos. 1 and 2. During the continuance of the tenancy defendant No. 3, a trespasser, dispossessed defendants Nos. 1 and 2 and got into possession of the lands in November 1905. The tenancy determined on the 6th June 1906. On the 29th October 1906, plaintiff filed a possessory suit in the Mamlatdars' Court against the defendants Nos. 1—3 to recover possession of the lands. The defendant No. 3 contended that her adverse possession having commenced more than six months before the institution of the suit, the Mamlatdar had no jurisdiction so far as the plaintiff's claim against her was concerned.

Held, that the plaintiff's remedy having been to bring his suit under clause (*b*) of S. 19 of the Mamlatdars Courts Act (Bombay Act II of 1906), on the expiry of the Tenancy, the fact that a trespasser got into possession during the continuance of the Tenancy but more than six months before its determination, did not oust the Mamlatdar's jurisdiction.

Per Chandavarkar, J. The Mamlatdar's Courts Act (Bombay Act II of 1906) is a remedial measure and must be liberally construed so as to advance the remedy. DEU DADA GAVLI *v.* SITARAM. **9 B. L. R. 1179=32 B. 46.**

Bombay Act (II of 1906) *(Contd.)*

5 *S. 23—Criminal Procedure Code—S. 195 cl. 7 (3)—Perjury in a possessory suit—Sanction to prosecute not given by Mamlatdar—Appeal to District Judge—Collector has no jurisdiction to hear the appeal.*

An appeal from an order passed by a Mamlatdar refusing sanction to prosecute for perjury in a possessory suit under the Mamlatdars Courts Act (Bombay Act II of 1906) lies to the District Court. The Collector has only the revisionary power granted to him by section 22 of the Mamlatdars' Courts Act 1906 for the limited purpose specified in the clause. He does not on that account become the principal Court of jurisdiction within the meaning of the expression as used in Sub-Cl. (7) of section 195 of the Code of Criminal Procedure. 5 B. L. R. 206 fol, NARAYAN *v.* TUKARAM. **9 B. L. R. 896.**

Bombay High Court's Rules.

Rule 577—Application under section 45, Specific Relief Act, frame of case in which a petition was treated as a notice of motion --4 B. L. R. 768--*See Bombay Act VI of 1863 S.* 6.

Bombay Regulations.

See Regulations.

Bona fide.

1 *Claim of right—Practice—Rule to show cause—Explanation by Magistrate—Penal Code (Act XLV of 1860), Section 426—Mischief—Good faith—Way, right of.*

Though it is open to a Magistrate called upon to show cause to submit his remarks in answer to the grounds urged by the petitioner who has obtained a rule, it is not open to the trying Magistrate to submit observations with a view to supplement or add to his judgment.

The accused was convicted of the offence of mischief for removing portions of a fence. On revision it was contended that in as much as the accused acted in good faith no offence was committed. The High Court set aside the conviction on the ground that there was a fair conflict of evidence upon the question whether the accused was not acting in the exercise of a *bona fide* claim of right of way over the land across which the fence had been put so as to stop the way. MADHU SUDAN DAS GUPTA *v.* SASTI PROSAD NANDY. **7 C. W. N. 859.**

2. *Execution of decree—Mode of—Instalments remitted by money-order—Decree-holder accepting two instalments—Refusal of third instalment—Tender.*

The receipt by the decree-holder of two instalments remitted by money-order without objection is sufficient authority to the judgment-debtor to send subsequent instalments in the same manner. When the decree-holder does not refuse at once to receive payment of the money-order for the third instalment at the Post Office, he cannot contend that default has been made in paying the third instalment.

Ordinarily, a tender of money in payment must be made with an actual production of the amount in cash (or in notes, where notes are legal tender), and if a debtor sends a cheque or bill without any authority or request by the creditor that the amount should be remitted in that manner, the creditor is not bound to accept it in payment. Tender of the amount due at the house of the creditor by a Post Office peon holding a money-order sent by a debtor, is a good tender by the debtor.—37 *R. R.*, 623, *referred to.* KISHAN PRASAD *v.* BENI RAM. **W. N., A., 1901. p. 168=24 A. 85.**

3. Litigating—13 M. L. J. 68 Col: 1034 P. I.

4. Parties, substitution of—Application for executors to be impleaded as legal representatives of the deceased defendant. 7 C W. N. 529 Col: 1393 P. I.

5 *Private Fisherman's protection—Private Fisheries Protection Act (II of 1889 B. C.) Section 3*—Bona fide *claim.*

Held, that the conviction of the accused under section 3 of Act II B. C. of 1889 (Fisheries Protection Act) is illegal, where the accused had taken a lease from a certain person and upon the basis of that lease he claimed to exercise the the right of fishing in the water in question.

Held, also that the Magistrate was wrong in holding that before the accused took the lease he ought to have satisfied himself thoroughly that his lessor had a good title to the property, that being hardly a matter that properly comes into consideration under the Act. *In the matter of* NAZIR MALITA *v.* HARICHARAN PARUI. **6 W. N. C. 118.**

6 *Purchaser for valuable consideration—Undervalue—Equity—Fraud—Notice.*

A purchaser for valuable consideration without notice is an object of solicitude to a Court of Equity, and against one who can predicate this of himself, it does not adversely exercise its jurisdiction.

Mere undervalue does not exclude a man from the category, for if the consideration be valuable, its adequacy will not be investigated. CHITAMBAR SHIRINIVASBHAT *v.* KRISHNAPPA. **4 B. L. R. 249= 26. B. 543.**

7 *Purchase without notice—Civil Procedure Code, 1882, Sec. 31—Misjoinder of Cause of Action—Pardanashin lady—Document executed by Guardian—Minor—Agreement by guardian on behalf of minor.*

A Mahomedan widow and her daughter instituted a suit against other heirs of the deceased and their transferrees for their shares in the property, left by him, the widow alleging that certain conveyance and release which she was induced to execute under a false representation were invalid; and the daughter relying on this and on the

Bona fide (*Contd.*)

further allegation that the widow had no power in any case to execute the release so far as the daughter's share was concerned. The defendants objected that the suit was bad for misjoinder and multifariousness.

Held, that the suit was properly framed as in the circumstances the two causes of action might properly be brought in the same suit.

The Court, in dealing with cases where the disposition of property by a *purdah* woman is concerned, must be satisfied that she understood the full import and effect of the document she executed.

If a *de facto* or actual guardian has entered into an agreement on behalf of the minor, and it is shown to have been for the minor's benefit, a Court of Equity will hesitate to disturb it, but if the agreement is not shown to have been for the benefit of the minor the Court will certainly refrain from giving effect to it.

The plea of purchase without notice, though it may be good against an equitable claim, is no defence against a legal claim.—AMIRBIBI *v.* ABDUL LATIF. **3 B. L. R. 658.**

8 Test of—Fraudulent conveyance—Transfer to one creditor—Good faith—27 B. 322 Col. 579 P. I.

Bond.

1 *Accounts settled, receipt executed for amount due—Whether constitutes a bond—Cause of action—Rate of interest—Reg. I of 1010.*

Plaintiffs advanced moneys to the defendants at 15% interest. On a certain day the accounts were settled and a sum of money was found due to the plaintiffs for balance of principal and interest on that day, and the defendants made the following entry in the plaintiffs' account book, viz., "we shall repay the sum we borrow with interest at 15%, and this entry was followed by an entry of the amount then found due.

In a suit on the receipt it was held that the receipt was bound superseding the prior cause of action and creating a new cause of action for the amount mentioned therein from the date of such receipt. 20 T. L. R. 213, 33 C. 1047, 23 M. 21; A. S. Nos. 312 and 402 of 1080. 8 B. 194, 6 B 683, 8 B. 405, 4 A. 330. A. S. No. 280 of 1080, R. SANKARA AIYAR *v*, SUBRAMANIA DIKSHADAR. **23 T. L R. 17.**

2 *Administration—Sureties—Administration bond—Letters of administration—Fraud—Administrator converting assets to his own use—Transfer of bond to Administrator-General—Succession Act (X of 1866), S. 242—Contract Act (IX of 1872) S. 20—Mistake.*

The Appellant was one of two sureties of an administration bond given to the High Court at Calcutta, on the strength of which that Court, on 15th August 1902, granted letters of administration to the estate of a person, who, it was alleged in the petition, had

Bond (*Contd.*)

died in England intestate. The Administrator, a member of a well known firm of Solicitors in Calcutta, who represented himself to be the attorney of a fictitious person called the next-of-kin of the deceased, got possession of the assets in India which consisted of bank shares and converted them to his own use. It was subsequently found that he had obtained the letters of administration by fraudulent misrepresentation to the Court of which fraud however the sureties were not cognizant. He absconded but was apprehended, tried, and convicted. The grant of administration in his favour was cancelled and in May 1904 letters of administration, with a will annexed, were granted to the respondent, the Administrator-General of Bengal, to whom the administration bond of 16th August 1902 was transferred, and who brought a suit against the defaulting administrator and the sureties on the bond. The former did not appear. The first Court made a decree against the defendants for the amount of the proceeds of sale of the bank shares, which was upheld by a majority of the Court of appeal.

Held affirming the decision of the Courts in India, that the sureties were liable. The bond did not become void, when the letters of administration were cancelled and, while they remained unrevoked, the grantee was, to all intents and pusposes, administrator of the estate in India of the deceased, and for his acts and defaults as administrator the sureties were and remained responsible.—DEBENDRA NATH DUTT *v.* ADMINISTRATOR-GENERAL OF BENGAL. **35 C. 955.**

3 Administration bond.—*See Administration bond. Col. 2034 P. I.*

4 Alteration of—Suit for recovery of money due on a bond—Forged bond—Material alteration, if and when vitiate instrument—Party—3 C. L. 363 Col. 1784 P. I.

5 *Alteration of—Mortgage suit by puisne mortgage for redemption of prior mortgage and sale of hypothecated property—Material alteration discovered in bond tendered by prior mortgagee's heir in evidence—Effect of such alteration.*

A suit was brought by a puisne mortgagee for the redemption of a prior mortgage and sale of the hypothecated property. The prior-mortgagee being dead, the plaintiff, puisne mortgagee, impleaded in his suit the heirs of the prior mortgagee as co-defendants. The prior mortgage-bond when produced by the heirs of the prior mortgagee was found to have been tampered with and to have a material alteration made in it, *viz*, the area stated in the bond as hypothecated was increased from *4 biswas* to 4 *biswas* and 7½ *biswansis.*

Held, per Stanley, C. J. and Banerji, J. (*Aikman, J, dissenting*) that the fact that prior mortgage-bond was tampered with and had a material alteration made in it, did not render the instrument void *in toto* so as to justify the Court in ignoring its existence and passing

Bond (*Contd.*)

a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it or any part of that amount. An interest in the mortgaged property having unquestionably vested in the prior mortgagee, the bond was admissible in evidence, and a Court administering justice could not divest such interest without seeing that the money for which it formed a security had been satisfied.

Held, per Aikman, J., that in consequence of the alteration the bond was not admissible in evidence and the claim of the prior mortgagee's heirs in respect of it should fail *in toto*, no present right to the property being conveyed by a simple mortgage—13 *M. and W.* 343, 11 C., 27, 1 Smith L. C. 10th edn. 747, 4 All., 62, 7 Cal., 616, 7 Bom., 418, 9 Mad., 399, 9 Mad., H. C. R. 247, 9 Q. B. D. 555, 23 Mad., 137, 23 R. R., 756, 46 R. R., 770, 8 Ir. C. L. R., 35, 10 Sim. 420, L. R. 5 C. H., 497, 14 M. and W. 47, 16 Q. B. 432, 1 H. and N. 893, 2 H. Bl. 259, Ir. Rep. 3 Eq. 519, 9 M. I. A. 1 referred to. MANGAL SEN *v.* SHANKAR SAHAI AND TAJAMMUL HUSAIN KHAN. **A. W. N. 1903 P. 122=25 A. 580 (F. B.)**

6 Co-obligee—Suit by obligee, some of whom are minors after the prescribed period of limitation. 25 A. 155 Col. 1751 P. I.

7 Guarantee, revocation of—Surety bond—Liability of surety to a firm which has undergone change in its constitution—21 C. 597 Col. 379 P. I.

8 *Bond by guardian—Liability of minor—Necessaries—Bond to keep alive debt due for necessaries, when binds minor's estate—Limitation—Personal liability.*

The proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the promise will not bind the minor, unless it has been made merely to keep alive a debt, for which the ward's property was liable. (26 M. 330 refd.).

Where the promise is to pay money, which has been expended for necessaries, the estate of the minor may be liable, not on the promise, but because the money has been supplied. (17 M. 306 and 20 B. 61 refd.)

It is established law that a guardian cannot bind his ward's estate, except by a document purporting to bind it.

When a third person enters into dealings with the guardian of a minor, and advances money for necessaries for the minor or for the benefit of his estate, and takes a bond for the debt from the guardian, the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt. BHAWAL SAHU *v.* BAIJ NATH PERTAB NARAIN SINGH. **12 C. W. N. 256=3 M. L. T. 156=35 C. 320.**

9 Instalments—Bond payable by—Default—3 A. L. J. 463 Col 1853 P. I.

10 For arrears of rent—Difference between a mortgage and a charge—Equity can

Bond (*Contd*).

not over-rule law—4 C. L. J. 219 Col. 717 P. I.

11 Instalments—Bond payable by—138 P. L. R. 1903 Col. 772 P. I.

12 Instalments—Power to sue for whole amount on default of payment—5 A. L. J. 72—30 A. 123 Col. 1854 P. I.

13. *Instrument evidencing loan of paddy and providing for its return on certain date, whether bond—Limitation.*

The suit was on an instrument for certain quantity of paddy, which provided for the payment of the principal amount of paddy advanced on a certain date, and in default of such payment for payment on demand with interest at certain rate.

Held, in a suit on the instrument, that the instrument was not a bond falling within either Art. 57 or Art. 97 and that the suit fell under Art. 95 of the Limitation Regulation. (10 T. L. R. 897 B. H. C. R. 36 21 T. L. R. 194 refd.) NARAYANAN KRISHNAN *v.* KANAKKU NARAYANNAN KRISHNAN, **23 T. L. R. 48.**

14. Stamp—Promissory note-29 B. 82 Col. 871 P. I.

15. Stamp—Acknowledgment bond—101 P. L. R. 1903—35 P. R. 1903 Col. 872 P. I.

16. *Bond debt—Hindu Law—Son—Father—Burden of proof—Debt for immoral purposes.*

When a Hindu son comes into Court to assail a decree passed upon a mortgage against his father, the son must show the debt to have been of such a nature that he, as the son of a Hindu, would not be under a pious obligation to discharge it. 14 A. 179, 8 A. 279, 9 A. 493, 13 A. 216, 21 A. 193, 28 C. 517, 24 A. 211 referred to. KANHAI MUBAY *v.* SETH BRINDRAWAN **16 C. P. L. R. 1903 P. 169.**

17. *Bond for arrears of rent—Suit upon a bond—Cognizance of a Court of Small Causes.*

A suit upon a bond given for arrears of rent is cognizable in a Court of Small Causes. GOVIND VISHNU KUK DE *v.* MAROTI NARAYAN JOSHI. **15 C. P. L. R. 1902 P. 52.**

18. *Bond—Non-receipt of consideration—Burden of proof—Admission—Consideration different from that described in the bond.*

A defendant who is sued on a bond and who pleads non-receipt of consideration cannot be deemed to have discharged the burden of establishing his case merely by reason of an admission on the part of the plaintiff that the actual consideration was different from that described in the bond. 3 B. 159 22 A. 370 referred to. LALSINGH *v.* CHAIT RAM, **15 C. P. L. R. 1902 P. 24.**

Book.

See Account Books—Evidence.

Boundaries.

1 *Confusion of—Jurisdiction of Court—Equity.*

Held, that the Court has no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud or confusion, when one party has ploughed too near the other, or the like. *1 W. and T L. C.*, 172 *followed*. KAVASJI JAMSETJI *v.* HORMASJI NASSARVANJISHET. **6 B. L. R., 782=29 B. 73.**

2 *Confusion of—Landlord and Tenant—Presumption as to permanent tenancy—Estoppel.*

When it appeared that the *Mutwalli* in granting leases always limited the tenant's rights to the term of his own incumbency; that when any change of tenant took place which he chose to recognise, he took care to grant a new lease to the new tenant and not merely one confirmatory of the old; that the occupation of the defendant's predecessors in the land did not go further back than about 1840, and that the person whom the defendant represented was never recognised as a tenant by the landlord who always paid rent in the names of the old tenants.

Held, that the plaintiff was entitled to eject the defendant and permanent tenancy could not be presumed—5 C. W. N., cclxxix, 858, 5 C. W. N. 801 distinguished, 27 Cal, 570 S: C 4 C. W. N. 210, referred to.

In order to raise the equitable estoppel against the landlord, it is incumbent upon the tenant to show that the conduct of the landlord, whether consisting in abstinence from interfering or in intervention was sufficient to justify the legal inference that he had, by plain implication, contracted that the right of tenancy under which the tenant originally obtained possession of the land should be changed in to a perpetual right of occupation.—3 *W, N.*, 502; *S. C.*, 21 *All.*, 496; *L. R.*, 26 *I. A.* 58, *followed*.

If the tenant obliterates the boundaries of the various plots of land and is unable to point them out, he is bound to make good to the landlord the quantity of the land to which the latter is entitled. ISMAIL KHAN MAHOMED *v.* L. P. D. BROUGHTON **5 W. N. C., 846.**

3 Description of in plaint -5. C. W. N. 121 and 7. C. W. N. 615—See Bengal Act VIII of 1885—S. 148.

4 Dispute cases—Settlement of such dispute by collector—Civil Courts jurisdiction 25 B. 322. See Bombay Act V of 1879. S. 119 No. 10.

5 Dispute cases—Alluvion, diluvion—Evidence—Possession—Burden of proof—Reports—Maps, &c. referred to in such order. 29 C 187 P. C. Col. 156 P. I.

6 Dispute cases—Duty of Court to settle boundary, when evidence insufficient—Second appeal. 11 C. W. N. 230 Col 178 P. I.

7 Marks Act XXVIII of 1860 Madras s. 25—Bar to private rights—Omission to observe procedure. 28 M. 257 Col. 185 P. I.

Brahmo.

1 Adoption—Brahmo father's right to give his son for adoption. 30 C. 990 Col 2050 P. I.

2 Applicability of Sikhs—Brahmos—Effect of lapse from orthodox practices—Hindu. 7 C. W. N. 895=84 P. R. 1903=31 C. 11 P. C. Col. 514 P. I.

3 *Brahmo—Marriage-Marrying again during the lifetime of a wife.*

Held, that marriage contract by a person belonging to the progressive Brahmo-faith with a woman when he has a living wife is void. SONALUXMI *v.* VISHNUPRASAD HARIPRASAD. **6 B. L. R. 58=23 B. 597.**

Breach of contract.

1 *Landlord and tenant—Reclamation of land—Construction of lease.*

A lease was cancelled by the landlord on the ground that the tenant had failed to carry out the condition of the lease in that he did not reclaim the whole of the land so as to render it fit for cultivation, the tenant claimed that he had carried out the terms of the lease which related to the reclamation of the land.

Held, that the term 'reclamation' in the lease was used in its stricter sense and the condition was satisfied when the land was rendered dry and protected against the sea tides and the test of cultivation could not have been in the contemlaption of the parties. SHAMRAO PANDURANG *v.* SECRETARY OF STATE. **25 B 32.**

2 Receipt for money, containing terms of sale, signed by vendor and not by purchaser—Contract in writing registered. 25 M. 55 Col. 1892 P. I.

3 Contract in writing registered—Signed by one party thereto. 25 M. 50 Col. 1893 P. I.

4 Breach of contract in writing registered—Lease of villages. 25 M. 587 Col. 1893 P. I.

5 Suit for "breach of promise of marriage", Contract of marriage between intended bridegroom and parent of intended bride. 24 M. 652 Col. 752 P. I.

7. *Vendor and puchaser—Sale of jote for arrears of rent—Liability of vendor.*

The plaintiff purchased certain jotes from the defendant and in the sale deed it was stipulated that the arrears of rent which were due to the landlord up to the time of sale were to be paid by the vendor failing which if the vendee should have to make the payment, he would be entitled to recover the amount as a loss sustained by him. The landlord obtained decrees for arrears of rent due prior to the purchase by the plaintiff and also for the rents which had accrued due subsequent to the purchase and to satisfy the decrees a portion of the property covered by the deed of sale to the plaintiff was sold. Subsequent to the plaintiff's purchase and while he was in possession, the landlord sued the old recorded tenant for arrears of rent, obtained decrees and in execution of

Breach of contract (*Contd*).

these decrees himself became purchaser. The plaintiff brought the present suit to recover possession of the land on the ground that the sale was a collusive one and in the alternative to obtain damages for the loss sustained by him by the sale of the property.

Held, that as the sale in execution was due mainly, if not entirely, to the failure on the part of the defendant to comply with the stipulation contained in the *kobala*, the plaintiff was entitled to recover from the defendant the sum which was due as arrears from him to pay off which property of the plaintiff was sold. SYED KUTAB ALI SHAH FAKIR *v.* AZIBULLA MONDUL. **7 C. W. N. 905.**

8. *Breach of contract—Sale and purchase—Damages, Measure of—Market-rate—Artificial inflation of prices—Legitimate mercantile transaction.*

It is settled law that the market value of a marketable commodity at the time when the contract was broken controls the measure of damages for breach of a contract for the sale and purchase of such commodity, and damages are estimated at the difference between the contract price and the market value or price at the time of the breach.

Where, however, the defendants argued that the high price of rice in the market on the contracted date for delivery was entirely due to the operations of the Syndicate to which the plaintiffs belonged and that the Syndicate's purchases were not *bona fide* mercantile transactions

Held,—that, even assuming that this was proved, it is not for Courts to dictate to merchants what transactions they may and what transactions they may not enter into. The transactions were not illegal or immoral and were not gambling transactions. To refuse to accept the market-rate actually ruling, admittedly—if a genuine rate—the proper measure of damages, on the ground that the rate was intentionally forced up by the plaintiffs' purchases, would introduce into commercial transaction elements of uncertainty and confusion, the results of which cannot be foreseen. MAHOMED ESOOF ISMAIL AND COMPANY *v.* KHOO SIN THWAK AND KHOO KOK ON. **1 L. B. R. 1900.=1902 P. 146.**

Breach of trust.

1 Compromise entered into between trustee and defendants pending appeal giving up claim—Breach of trust—12 M. L. J. 360 col. 1596 p. I.

2 Joint Mitakshara family—Suit against father—Breach of trust—Legal necessity. 2 C. L. J. 321 col. 411 p. I.

3 Public charitable and religious trust—Removal of trustee - Manager's possession. 2 C. L. J. 460 col. 1218 p. I.

Bribery in election.

Election of member—Disqualification of candidate—Bribery—15 M. L. J. 449—29 M. 166 col. 71 p. I.

Broker.

1 *Broker—Definition of—Duties of—Advances—Undertaking refund of money to constituents—Guaranteeing repayment of advances how far within ordinary business of broker.*

A broker is an agent employed to make bargains and contracts in matters of trade, commerce and navigation between other parties for a compensation called brokerage. His duties are merely to bring about a contract and do not ordinarily include the undertaking to refund advances made to constituents and giving of guarantee for the repayment of advances with profits. L. R. 7 Q. B. 616, 623 ref. to. D. Mc. LAREN MORRISON *v.* S. VERSCOYLE. **6 C. W. N. 420 at 440, 441.**

2 Broker—*Fraud—Sale—Payment of price to agent—Apparent authority of agent—Rights and duties of third party.*

In a question between a principal and a third party who has dealt *bona fide* with the agent of the principal, the true limit of the agent's power to bind the principal is the apparent authority with which the agent is invested. In the absence of express authority a party who is employed to find a purchaser for a property is not authorised to receive the price, much less to take in exchange another property. If the purchaser pays the price to the person so employed by the seller, and that person embezzles the money, the seller can recover the price from the purchaser.—LIVERSEY *v.* COLIN CAMPBELL. **1 A L J 124.**

3 Broker—Partnership—Agency—Participation in profits—Scope of authority—Negligence—Loss—Innocent parties—Hindu Law Kurta—Powers of—D. MCLAREN MORRISON *v.* S. VERSCHOYLE. **6 C. W. N. 429.**

See Partnership.

4. Liability of—Onus probandi—Revision—10 C. W. N. 14 Col. 1341 P. I.

Brokerage.

1. *Brokerage. Commission agent's right to—*

The plaintiff, commission agent, was entrusted by the defendant to negotiate a loan on the first mortgage of certain property. He brought a creditor who was willing and who actually placed money in the hands of the attorney of the parties. The defendant was bound to satisfy the lender as to his titles, but the attorney found out certain defects and the transaction fell through.

Held, that the plaintiff had fully made out his title to the remuneration agreed to between him and the defendant since the agent did complete what was required of him, and the circumstances were enough to justify the attorney in advising the lender not to advance the loan. GOBINDA CHANDRA KHATICK *v.* J. ECLICES. **7 C. W. N. 237=30 C. 202.**

2. *Brokerage on wagering contract—Collateral agreement devoid of the element of*

Brokerage (*Contd*).

wagering--Indian Contract Act S. 30.
A contract by way of wager is not an illegal contract, although or because it cannot be enforced in a Court of law. Although a contract to pay differences only on contracts for the purchase and sale of rice is void as being of the nature of a wager, collateral agreements which are themselves devoid of the element of wagering, though they may be entered into with knowledge of the nature of the pricipal contract, are not avoided by section 30 of the Indian Contract Act, or by any other provision of law, M. A. OOTHMAN *v.* KONG YEE LONE AND CO. **1 L. B. R. 1900=1902 P. 128.**

Brothers, meaning of.

Hindu Law—Migration of family—Family custom—Presumption. 29. C. 433. Col. 2167 P. I.

Budhist Law.

1 *Adoption—Proof.*
Adoption among Buddhists is a mixed question of fact and law. Courts are bound to insist upon strict proof thereof. An essential point is publicity of the relationship, and of the intentions of the adoptive parents in regard to the inheritance of their estate by the adopted child. Residence together in one house is not sufficient indication of the relation of the parties being that of adopted child and adoptive parent.
Ma Gun v. *Ma Gun*, S. J. L. B. 25. cited' *Maung Ming* v. *Ma Kin*, Chan Toon, 157, and *Ma Mein Gale* v. *Ma Kin*, Chan Toon, 168, approved. *Ma Pau* v. *Ma The The and others* I. L. B. R. 1900—1902 P. 273.
2 *Adoption—Keiktima and apatittha children—Evidence,*
An alternative claim to the status of adoption either by the *keiktima* or by the *apatittha* mode may be made.
Evidence in the case considered, and kind of evidence necessary to prove adoption discussed with reference to previous rulings.
Maung Aing v. *Ma Kin*, I. L. C, *157; Ma Sa Yi* v. *Ma Me Gale*, 2 L. C, 181; *Ma Gun* v. *Ma Gun*, 1 L. C., 147; *Ma Gwin* v. *Ma Yin*, 1 L. B., 151; *Ma Mein Gale* v. *Ma Kin*, 1 C 162 *Ma Gyan* v. *Maung Kywin*, 1 L C 393; *Ma Thine (Thaing)* v. *Ba Pe*, 2 L. C.. 53; *Ma Tin Shwe* v. *Dan Gyi*, 2 U. B. R. (1897 - 1911) 142 cited. *Ma Mya Me* v. *Ba Dun* 2 L. B. R. 1904 P. 224.
3 *Held*—that when a Buddhist parent has given his child in adoption to another he is entitled until the child has grown up, to cancel the adoption, and recall the child
Reference:—
Maunkye, Book 8. sections 3 and 4. MAUNG SEIN *v.* MA MON. **U. B. R. 1903 P. 1.**
(*Budhist Law--Adoption*).

Budhist Law.

4 *Probabilities in favour of or against adoption--Adoption not published and not notorious --Valid adoption according to requirements of Burmese Buddhist Law.*
The plaintiff, an adult, claimed to have been adopted by his uncle. He was able to adduce, from the relationship between himself and his uncle, from the latter's circumstances, from his uncle's public letters, through witnesses, and from other sources, a good deal of evidence calculated to render his contention probable and successful. It appeared, however, that the plaintiff, when called upon to state his father's name, gave, not his adoptive, but his natural father's name, thus making it doubtful, whether the idea of giving up all his prospective rights in his natural parents' property, as the result of the adoption, presented itself to his mind at the time of the alleged adoption, and, also, that his relationship with his uncle was not published generally and was not notorious, as it ought to have been, had it been true.
Held, that he failed to prove that he had been validly adopted according to the requirements of the Burmese Buddhist Law.
In the absence of anything to show what is necessary to constitute the adoption of an adult, the general principle is that an adult cannot be adopted without his or her consent. But as an adult (cannot be deprived of any rights without his or her consent) —an adoption depriving rights of inheritance in natural parents' property--it must appear that he or she consented to renounce all his or her prospective rights in his or her natural parents' property.
Per Fox, C. J.--Notoriety amongst the people with whom the parties ordinarily mixed in social life is what is required in evidence of the adoption of an adult. 11 B. L. R. 240—2 L. B. R. 224 foll. 1 Ch. T. L. C. P., 168 ref.
Per Hartnoll J.--When a person claims a share in an estate on the ground that he was adopted as an adult, the burden of proof lies heavily on him, the more especially as such an adoption is not usual even if it is sanctioned by the *Dhammathats*. MA GYI *v.* MAUNG PO THA. **14 B. L. R., 15.**
2 *Alienation.*
1 Inheritance--Sale of undivided estate by co-heir--Suit to set aside limitation--3 L. B. R. 1905 P. 7 Col. 1819 P. I.
2 Suit for redemption--Joinder of parties--Mortgage--3 L. B. R. 1905 P. 15 Col. 658 P. I.
3 *Budhist Law: Husband and wife—Power of husband to alienate joint property.*
Subject to the reservation noted below, a Burmese Buddhist husband cannot sell or alienate the *hnapazon* property of himself and his wife without her consent or against her will. Ma Thu *v.* Ma Bu, (1821) S J. L. B. 578 followed. Ma Ko *v.* Ma Me, (1874) S. L. J. B. 19; Maung Twe *v.* Ramen Chetty, (1900) I. L. B. R. 11; On Sin *v.* O Net, 2 U. B. R. 1892 —96, page 303: referred to.

Budhist (*Contd.*)

A sale by a Burmese Buddhist husband of the *hnapazon* property of himself and his wife made without her consent constitutes a valid transfer of his share and interest in the property sold. Maung Weik *v.* Shwe Lu, (1902 I. L. B. R. 184, over-ruled.) Ma Me *v.* Maung Gyi, (1893) 2 U. B. R. 1892-96, 45; Guna *v.* Kyaw Gaung, (1895) 2 U. B. R. 1892—96, 204; Ma Thaing *v.* Tha Gywe, (1902) 2 U. B. R. Ex: of Decree, 1; Maung Hmon *v.* Maung Meik, (1904) 2 U. B. R. Budd: Law—Divorce, 1; Ma Po *v.* Shwe Mi, Chan Toon's L. C. I., 418; Saw Ngwe *v.* Thein Yin, (1902) I. L. B. R. 198; Kyi Kyi *v.* Ma Thein, (1905) 3 L. B. R. 8; Soobramonian Chetty *v.* Ma Hnin Ye, (1899) P. J. L. B. 568; Tha Nu *v.* Kya Zan, (1903) 2 L. B. R. 167; referred to. MA SHWE U *v.* MA KYU. **3 L. B. R. 1905 P. 66.**

3 *Brothers and sisters.*

1 *Buddhist Law—Succession—Brothers and sisters already divided—Estate of divided deceased sister—Equal rights of elder brothers or sisters on failure of younger brothers or sisters—Exclusion of children of brother predeceasing his divided deceased sister.*

In the case of brothers and sisters already divided, the elder brothers or sisters inherit only on failure of younger brothers or sisters; but the second of such elder brothers or sisters would not exclude one older than himself or herself. The principle that property does not ascend does not operate in such a case, the eldest is not barred from equal rights with the second.

It is a principle of Buddhist Law that only those closely related should inherit, and that relations of the same degree should inherit to the exclusion of those of a more remote degree, *e.g.*, that children should exclude grand children. There are certain exceptions to this rule (*e.g.*, in cases where there has been no division). In such cases, elder brothers within reach of the inheritance would share equally, and one brother so within reach dying before distribution, his children would take *per stirpes* and not *per capeta.* In cases where there has been division, however, if the eldest brother predeceases his sister, his children cannot succeed to her estate where there is a surviving second brother; the surviving second brother is the sole heir. MAUNG HMAW *v.* MA ON BWIN AND THREE OTHERS. **1 L. B. R. 1900—1902, P. 104.**

4 *Divorce.*

1 A Burman Buddhist husband or wife may sue and obtain a divorce, on condition of surrendering all the joint property and paying the joint debts, and the costs of litigation, when the other party is without fault and does not consent.

Authorities:—

Dr. Forchhammer's Jardine Prize Essay.
Maine's Ancient Law.
Jardine's Notes on Buddhist Law.
Institutes of Manu (Sacred Books of the East).
Moyle's Rulings and Notes on **B. L.**
Dhammapada ... }
Questions of King Milinda } (Sacred
Puudarika Suddharma ... } Books of
Bhuddhist Suttas ... } the East.)
Kinwun Mingyi's Digest II.
Attathaukepa.
Richardson's Manugye.
S. J. L. B., 391.
Do. 607.
Do. 610.
U. B. R., 1897, 1901, II, 28.
I. L. B. R., 7.
Chan Toon's leading Cases, II, 177.
Civil Appeal No. 299 of 1899 (unpublished).
U. B. R., 1902, 1903, II B. L. Div., P. 6.
1 I. L. R., 2 Bom., 624.
Mi Kin Lat *v.* Nga Ba So.
U. B. R. 1905. P. 3-17 (Budhist Law—Divorce).

2 *Child of divorced couple—Rights of inheritance—Maintenance or renewal of filial relations sufficient to entitle plaintiffs to inherit property acquired during second marriage.*

There seems to be a great weight of authority in favour of the proposition that a child of a divorced couple is entitled to inherit from the parent with which he or she lives, and is generally not entitled to inherit from the other parent, (when that other parent has married again and has children by the second spouse property acquired during the second marriage' and that visiting the other parent and receiving presents or even maintenance from him does not constitute a continuance or resumption of filial relations, such as would entitle the child to inherit such property. B. S. J. 184; B. S. I. 296. ; P. J. L. B. 469 ; U. B. R. (867-01), p. 116, 1 L. B. R. 861, F. P. ; J. L B. 299, Diss-; 2 L. B. R 85, R.

The fact that the divorced wife and the children received nothing at the time of divorce makes no difference, at any rate so long as it was not alleged that there was any property to divide. MA PAW *v.* MA MON. **14 B L R 236 = 4 L. B. R. 272.**

3 *Held*, on the authority of the Manugye, Book XII, section 3, that on divorce by mutual concent:—

(1) A wife is entitled to one-third of *atet* property, where the relation of *missayo* and *nissito* subsists with respect to that property, and she is the *nissito.*

(2) She is entitled to one-third of undivided ancestral property inherited by her husband during the marriage.

(3) The profits of such *atet* and inherited property are *lettetpwa.*

(4) The wife is entitled to a half share of such *lettitpwa* property, where it appears that it was acquired by the joint exertions of the parties.

References:—

X., B. L. R. 49.

Budhist Law (*Contd.*)

U. B. R. 1892-96, II, 121.
——— 1827-01, II, 39 (affirmed).
———1897-01, II, 146
———1902-03 B. L. Inheritance, page 1 (affirmed).
S. J. L. B. 110—I L. C. 195.
1 Chan Toon's L. C. 74.

MI MYIN *v.* NGA TWE, NGA NYO, MIO GYI. **U. B. R. 1906 P. 19.** (*Budhist Law Divorce*)

4 *Budhist law—Suit for divorce—Claim to partition of property—Causes of action distinct.*

A suit for divorce and for partition of property do not constitute a single cause of action. Partition of property is not an essential feature of a divorce. The termination of the marriage status in itself is a sufficient cause of action, and till that cause is settled the grounds for partition do not arise and may vary according as the decree for divorce is based on findings of fact as to which party is in fault. A suit for divorce need not therefore contain a prayer for division of the property.

Ma Gyan v. *Maung Su Wa*, U. B. R., 97, p. 1, dissented from. MAUNG THA CHI *v.* MA E. MYA. **1 L. B. R. 1900—1902 P. 7.**

5 *Held*, that there is no distinction in Budhist Law between the respective interests of a husband and wife in jointly acquired property, when the parties have been married • before *(eindaunggyi)* and when the parties have not been married before.

References:—
2 U. B. R., 1892-96 page 41.
————————page 45.
Attathankepa, sections 391, 394.
Jardine's notes on Buddhist Law, Marriage, page 31.
Digest of Buddhist Law, Volume II, sections 254, 257.

MAUNG HMON *v.* MAUNG MEIK MAUNG MIN DIN. **U. B. R. 1904 P. I.** (*Buddhist Law—Divorce*)

6 *Held*, that in a divorce as by mutual consent between parties not previously married the wife is entitled on partition to one-third of property inherited by the husband during coverture and *vice versa*.

References:—
Attathankepa, sections 391—393.
Chan Toon's Leading Cases on Buddhist Law, pages, 74, 84, 133, 143, 195, 369, 391 and 463.
Jardine's Notes on Buddhist Law, page 2, and paragraphs 56, 66.
Kinwun Mingi's Digest, Volume II, Marriage, section 254.
Manukye XII, 3.
Spark's Code, section 35, and paragraph 10 of introduction.
Wagaru, section 41.
Wunnana, section 170.
2 U. B. R., 1897-1901, Divorce, page 39

Kin Kin Gyi *v.* Maung Kan Gyi (deceased) by his legal representatives (1) Ma Mya, (2) Mi On Cheik (a minor by her guardian Ma Myit), (3) Ma Hla Win, (4) Ma Ta I (a minor by her guardian Ma Hla Win). U. B. R. 1902 P. 1. (Budhist Law—Divorce).

7 *Held*, that when under Buddhist Law a suit has been brought for divorce without partition of property, a subsequent suit for partition of the joint property is maintainable.

References:—
Chan Toon's Leading Cases, Vol. II, page 31.
U. B. Rulings, 1897—1901, page 28.
U. B. Rulings, 1902, Buddhist Law, Divorce, page 6.
I. L. R 22 Madras, page 24.

MAUNG THA SO *v.* MA MIN GAUND. **U. B. R. 1903**—12 (*Budhist Law—Divorce*).

8 The rule laid down in Ma Gyan *v.* Maung Su Wa (2, U. B R. 1897—1901, Buddhist Law—Divorce page 28) that under Buddhist Law a suit for bare divorce without partition of property will not lie, discussed, modified and partly dissented from.

Held, that misconduct on the part of a husband, which may not in itself be sufficient to entitle a wife to divorce under the rule of separation where the husband is the offender, may nevertheless be sufficient to entitle her to insist on a divorce as by mutual consent.

References.
2, U. B. R., 1897-93, Buddhist Law—Marriage—Divorce, page 1,
P. J. L. B. 1900, Vol. I, Part I, page 7.
S. J. L. B. 1872—92, page 607.
Attathankepa Wunnana—393.
Manukye V—18. 24.
Manukye XII—3.
Wini Saya Paka Thani—54.
Jardine's Notes on Buddhist Law, Appendix, page 8.

MAUNG PYA *v.* MA ME. **U. B. R. 1902 P. 6**—(*Budhist Law—Divorce.*)

5 *Ecclesiastical Jurisdiction—Civil Court whether can give effect to an order of the Thathanabaing or of any other ecclesiastical authority until such order is confirmed by a judgement and decree of the Civil Court.*

A Civil Court cannot give effect to an order of the *Thathanabaing* or of any other ecclesiastical authority until order is confirmed by a judgment and decree of the Civil Court.

The decision of the *Taungbyin Sayadaw* cannot be treated as if it were a judgment and decree of a Civil Court, and it cannot be executed without even giving the other party an opportunity of showing cause against its execution.

So far as the Civil Courts are concerned, the Sanad is merely an authoritative declaration that for the time being the *Taunggwin Sayadawg* is the ecclesiastical who has supreme control as *Thathanabaing*. SHIN KUTHALH *v.* SHIN SANDA **U. B. R. 1908 P. 1.** (*Budhist Law Ecclesiastical*).

6 *General Act V of 1881—(Probate and Adminsitration) S. 23—Object of granting letters of administration—Right of younger daughter of deceased Burman Buddhist to letters of ad-*

Budhist Law (*Contd.*)

ministration during the life-time of mother—Agreement of parties, whether can change personal law.

In the case of one of a Burmese Buddhist married couple dying, it can rarely, if ever, be necessary that letters of administration to the deceased's estate should be granted after the period of limitation for the recovery of debt owing to or by the deceased has expired.

A younger daughter of a deceased Burman Buddhist is not, during the life-time of her mother, proper person to be granted letters of administration to the estate of her deceased father, especially where the application was made 18 years after the death of the father.

If a child of Burmese Buddhist parent has a right to prevent his or her suviving parent from wasting the one-half of the property in which the parent has only a life-interest, the proper method of enforcing such right is by a regular suit. Procedure under the Probate and Administration Act cannot be used for such purposes.

If a person was not in fact governed by the Burmese Buddhist Law of inheritance, the agreement of the parties cannot make such law applicable. S. J. L. B. 378 ref. MA PE *v.* THEIN YIN, **4 L. B. R. 287.**

7 *Gift.*

Held, it depends on circumstances whether the Buddhist or Muhammadan Law applies to gifts. Where a gift is not a question of inheritance, succession, religious institution or usage it is governed by the Contract Act.

According to the latest authorities actual delivery of possession is not necessary under Muhammadan Law.

By Muhammadan Law the husband's share, where there are children, is one-fourth.

References—

Amir Ali's Muhammadan Law, Vol. I, 64.

Civil Appeal No. 208 of 1905 (unpublished).

I. L. R. 28 All., 147.

S. J. L. B. 30.

U. B. R. 1892-96, II, 400.

———1897-01, II, 62.

———1902-03, II, B L. Gift 1.

ABDUL GHAFUR, FATIMA BIBI *v.* DEYAN SINGH, LEGAL REPRESENTATIVE OF MAN SINGH. **U. B. R. 1907 P. I.** *(Budhist Law—Gift).*

8. Husband and wife.

1. *Buddhist law—Husband and wife—Act done by husband in pursuance of common business binding on wife—Sale of immoveable property by husband without knowledge of wife—Apparent acquiescence, subsequent to sale, by wife, no proof of consent—Presumption.*

For many purposes Burmese husbands and wives may be regarded as partners and where the husband manages a business on behalf of himself and his wife, acts done in pursuance of the common business would no doubt bind the wife. But this principle cannot be applied to such a transaction as the sale of immoveable property belonging to both. In such a case further evidence is required besides the fact that the transaction was in some way connected with a business in which it might be presumed that the wife was concerned, and besides the fact that the wife made no open protest against such sale.

Because a wife consents to, or acquiesces in a *mortgage*, the presumption does not arise that she also assents to a *sale* of the property. Nor should apparent acquiescence subsequent to the sale be regarded as proof of consent by the wife to such sale.

Maung Tun Myat *v.* Ramman Chetty, P. J. L. B., 37.

Soobramonian Chetty *v.* Ma Ye, P. J. L. B., 568.

Ma Thu *v.* Ma Bu, S. J., 578 referred to. MAUNG TWE *v.* RAMIN CHETTY. **11 L. B. R. 1900-1902 P. 11.**

2 *Held*,—that a Burmese Buddhist wife is entitled to sue her husband during marraige to recover, with interest, money raised on mortgage of her separate property and lent to her husband for his separate use.

References:—

Maunkye VI §43

Upper Burma Rulings 1902—Buddhist Law Marriage, p. 1.

2 Upper Burma Rulings 1892—96, p. 159. MA MON *v.* MAUNG SO, **U. B. R. 1904 P. 1.** *(Budhist Law—Marriage).*

9 Inheritance.

1 *Buddhist Law: Inheritance—Share of child of deceased first wife in property inherited by father after first and before second marriage—Inherited property.*

A, a Burman Buddhist, died leaving (1) a son by hs deceased first wife, (2) his second wife, and (3) children by his second wife. He had inherited property, moveable and immovable after the death of his first wife and before his marriage with his second wife.

Held,—that the son by the first wife was entitled to a half share of the property so inherited. Ma Ba We *v.* Sa U, 2 L. B. R. 174; Chit Saya *v.* Mein Gale, 2 L. C. (Chan Toon) 97; Po Sein *v.* Ma Pwa, 1 L C. (Chan Toon), 292; Shwe Ngon *v* Ma Min Dwe, S. J L. B. 110; Mi Ka *v.* Maung Thet, S. J. L. B. 6; Myat Kaung *v.* Ma Gyaing, P. J. L B., 534; Tun Lu Leik *v.* Po Yauk, S. J. L. B., 255; referred to. MA LEIK *v.* MAUNG NWA **4. L. B. R. 1907. P. 110.**

2 *Buddhist Law-Inheritance—Orasa child—Eldest surviving child—Grandchildren.*

The rule, that if the *orasa* son or daughter predeceases his or her parents, his or her eldest son, or his or her children together receive the same share as their youngest uncle or aunt, does not apply to the children

Budhist Law *(Contd.)*

of the eldest surviving son or daughter unless he or she is technically the *orasa*.

The children of younger sons or daughters who die before their parents receive one-fourth of the share to which their parents are entitled. PO SEIN AN BATIN SHWE KA *v.* PO MIN AND MA SHWE KYAN. **3 L. B. R. 1905 P. 45.**

3 *Eldest daughter's share in property, inherited by her mother from her mother.*

A female Burmese Buddhist inherited some property from her mother. She died leaving a husband and five daughters.

Held, that the eldest of the daughters was entitled to succeed to one-fourth share of the property. THA TU *v.* MAUNG BYA. **4 L. B. R. 181.**

References:—3 L. B. R. 8; 2 L. B. R. 255, *R.*

4. *Buddhist Law—Inheritance—Shares of children of the same parents dividing an inheritance after their parent's death.*

Where children of the same parents divide an inheritance after their parent's death, no decisive, definite rule of unequal division can be extracted from the Dhammathats either by consensus of all or by definite weight of authority. In view of this fact and of sections 60 and 61 of the *Digest* which lay down a general principle that if all the children share equally in the work and responsibilities of the family each is entitled to an equal share of the inheritance, the principle of equal division may be taken as an established rule of law.

Ma Saw Ngwe v. *Ma Thein Yin*, (1902) 1 L. B. R., 198; *Ma Po* v. *Ma Swe Mi* (1897) 1 L. C., 418; *Ma E Mya* v. *Ma Kun*, (1892) 2 L. C., 107; *Maung Pan* v. *Ma Hnyi*, (1897) 1 L. C., 441; *Po Lat* v. *Mi Po Le*, (1883) 1 L. C., 238; *Ma Ba We* v. *Mi Sa U*, (1903) 2 L. B. R., 174; followed. MA KYI KYI *v.* MA THEIN. **3 L. B. R. 905 P. 8.**

5 *Held*, that the rule excluding the daughter of a divorced wife who has lived with her mother, and has not maintained filial relations with her father, does not extend to the case where the daughter was born after the divorce, and the father left no other wife, child or grandchild.

Held, also—that in such a case when the father lived with his sister, the daughter's share as against the sister is half.

References.

U. B. R. 1892-1896, II, 22, 159.
1897—1901, II, 116, 135, 192, 66.
L. B. P. J. 469.
S. J. L. B. 184,
Chan Toon's L. C. II, 220,
Civ. 2nd App. No. 157 of 1904.

MI NYO *v.* NYEIN THAN. **U. B. R. 1906 P. 15** *(Budhist Law—Inheritance).*

6 *Budhist Law—Inheritance—Eldest daughter, claim of to a share of the general joint estate on the death of the mother—Rights of eldest child—Claim of eldest son to one-fourth share of the general joint estate on the death of the mother, when the father marries again.*

Budhist Law *(Contd.)*

The hasty abuse by a son of a father on a single occasion—conduct which was also forgiven and not made a ground for any public declaration by the father—is not such conduct as to deprive the son of any right to inheritance which he has.

The principle that an eldest daughter gets a one-fourth share of the general joint estate of the parents on the death of her mother, and an eldest son on the death of his father, simply because the daughter and son perform the family duties of the mother and father respectively, is not to be found clearly enunciated in the Dhammathats, although there are indications of such a principle. The eldest son gets the father's official and personal belongings when the father dies; the eldest daughter in a corresponding way takes her mother's official and personal belongings; but in regard to the one-fourth share, while some Dhammathats are indefinite, others appear to give rights to the eldest *child*. Occasional passages, however, put the daughter in an inferior position to a son.

It may not be very clear from the Dhammathats now available that a son can claim a one fourth share from his father when he lives separately and when the father does not marry again, but it is not open to reasonable doubt that when the father does marry again the eldest son, especially if he be the eldest child, can claim a one-fourth share of the general joint estate of the parents MAUNG SEIN KAUNG *v.* MAUNG PO NYEIN. **1 L. B. R. 1900—1902 P. 23.**

7 *Budhist Law—Inheritance—Share of grandchild of deceased first wife, when second wife and her child survive.*

A dies, leaving (1) a grandchild by his deceased first wife, the grandchild's mother, A's daughter, being dead, and (2) his second wife and (3) a child by the second wife

Under Buddhist law, the grandchild is entitled to nine-twentieths of the *atetpa*-property possessed by A at his second marriage, and to one-eighth of the *lettetpwa* of the second marriage. Ma Pu *v.* Ma Le, (1901) I. L B. R., 93; 2 Leading Cases, 75 (Chan Toon); Saw Ngwe *v.* Thein Yin. (1901) 1, L B R, 198; 2 Leading Cases, 210 (Chan Toon); cited. SEIN TUN *v.* MI ON KRA ZAN. **3 L. B. R. 1906 P. 219.**

8 *Buddhist Law—Inheritance—Attetpa property—Lettetpwa property—Out of-time grandchild, Share of—Estate of grandparents.*

The plaintiff sued for three fourths of the "attetpa" property of her grandparents and one-eighth of the "lettetpwa" property.

Held, that as she was an "out-of-time grandchild," *i. e.*, her parents had predeceased the grandfather, she was only entitled to one-fourth of the above shares. MA PU *v.* MA LE **1 L. B. R. 1900-1902 P. 93.**

9 *Buddhist Law—Inheritance—Parents predeceasing grand-parents—Grand children representing deceased parents, Shares of.*

Among grand-children whose parents

Buddist Law (*Contd.*)

have predeceased their grand parents, the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child: the others only take one fourth of the share that their parents would have enjoyed. Maung Hma v. Ma On Bwin and others, I. L. B. R., 104: Ma Pu and two others v. Ma Le, 1 L. B. R., 93; Maung Hmu v. Maung Po Thin, 1. L. B. R. 50; Ma Po and another v. Ma Shwe Mi, Chan Toon's Rulings, 418; In re Mi Thaik 233, Chan Toon's Rulings; Ma Mya v. Maung Po Thin, P. J. L. B. 585 and In re Maung Seik Kaung, I. L. B. R., 23, referred to. MA SAW NAWE v. MA THEIN YIN. **1 L. B. R. 1900-1902 P. 198.**

10 *Inheritance—Nuns.*

In the absence of any evidence of an ordination ceremony a nun *(Mathila)*, so called is a lay devotee, and a woman does not lose her rights to her property by becoming a nun —*Orasa*,—the eldest born son, means the eldest son and not necessarily the eldest child.

Mi Min Din
Mi Tat
Nga on Gaing } v. Mi Hle
Mi at
Mi Min Gale

U. B. R. 1905 P. 11. *(Budhist Law—Inheritance).*

11 When a husband and wife die within a short time of each other, leaving neither descendants nor ancestors, the relations of both may inherit the estate.

References—

U. B. R., 1892—1896, 136.
U. B. R., 1897—1901, 166.
U. B. R., 1897—1901, 146.
Kinwun Mingyi's Digest—308, 309.
Chan Toons principles 149,
Manu Kye Dhammathat, Vol. 10, s. 56.
Attasan-Khepa Vannana, section 237.

MA KADU v. MA YOU. **U. B. R. 1905 P. 7.** *(Budhist Law—Inheritance).*

12 *Ownership by married couples—Devolution—Letters of administration—Proper person to administer estate.*

Under the Burmese Buddhist Law respecting the ownership of property by married couples, and the devolution of such property on the death of one of them, the widow or widower, as a general rule, is the proper person to administer the estate of the deceased. Though an absolute rule must not be laid down that in no circumstances should letters of administration be granted to any other person, as, for instance, a step daughter of the widower, it would require very special reasons to justify such a grant.

Where a widower is in possession of the estate as the natural and proper representative of the deceased widow, any person who claim a share of the estate can sue him for it, and the fact that letters of administration have not been issued is no obstacle to such a suit. NE WIN v. MA AUNG GALE. **4 L. B. R. 293.**

Budhist Law (*Contd.*)

13 *Property inherited by husband during marriage—Interest of widow—Widow's share in the joint property.*

In property inherited by a Burman Buddhist during his marriage, the interest which his widow takes, when children of the marriage survive their father, is the same as her interest in her deceased husband's share of the property jointly owned by him and her, *i. e*, a life estate with a power of sale in case of necessity,—2 Chan Toon's L. C. 95; 2 Chan. Toon's L. C. 77; S. J. L. B. 378, S. J. L. B. 108; and 4 L. B. R. 189. R. MA NYO v. MA. YAUK. **4 L. B. R. 256.**

14 *Share of child of deceased first wife in property inherited during second marriage.*

A Burman Buddhist had a child by his first wife. After the death of the first wife, he contracted a second marriage and by the second wife he had another child. During the continuance of the second marriage, he had inherited certain property from his mother. His second wife predeceased him. He died last, leaving him surviving the two children one by his deceased first wife, and the other by his deceased second wife.

Held, the two children were entitled each to a moiety in the property inherited by the deceased from his mother. S. J. L. B. 110, 177, 223 and 255; P. J. L. B. 261 and 418, R. MAUNG GALE v. MAUNG BYA. **4. L. B. R. 183.**

15 *Buddhist Law—Inheritance—Son of divorced wife—Filial relations—Maintenance by father—Revival of lost rights.*

A daughter and son lived with their mother after she had been divorced from their father. There was division of property at the time of the divorce, and further property was assigned to the children. At the time of divorce the daughter and son were aged six and eight years. The father died when the children were 11 and 13 years of age. They did not and could not of their own accord renew filial relations with their father. Though the father took an active interest in their education and held towards their support, he did not take them into his own household or family.

Held,—that under the circumstances mentioned the son as much as the daughter was excluded from inheriting in the deceased father's estate. The children of separated parents are included among those children who cannot inherit, and no distinction is made between sons and daughters. The mere fact of a father helping to educate or maintain a son is not sufficient to revive rights which such son had lost in law and intention at the time of his mother's divorce.

Mi Thaik v. Mi Tu, S J. L. B. 184; Ma Shwe Ge v. Maung San, S. J., L. B., 296; Maung Hmat v. Ma Po Zon, P. J., L.

Budhist Law (*Contd.*)

v., 469; Ma Pon *v.* Maung Po Chan, Chan Toon, 450, distinguished; Maung Ba Kyu B. Ma Zan Byu, P. J, L. B., 299, dissented from. MI SAN MRA RHI *v.* MI THAN DA U AND TWO OTHERS. **I. L. B R. 1900-1902 P. 161.**

16 In the case of collateral succession the general principle of the nearer relatives, excluding the more remote, takes full effect, and so long as there is a surviving brother he excludes the children of a previously deceased brother.

References:--

U. B. R. 1897-1901, 172 distinguished.

L. B. R., 104, Chan Toon's leading cases, II, 124 (followed).

Civil Second Appeal No II of 1903 (not reported).

MA MAGALE *v.* MA ME. **U B. R. 1905 P. 5.** (Budhist Law—Inheritance.)

17 *Buddhist Law—Inheritance—Suit for partition between son of head wife, son and daughter of second regular wife and son of slave-concubine—Shares to which each is entitled—Heirs inherit estate when the person from whom they inherit dies and not when their inheritance is partitioned.*

Plaintiff-respondent sued for partition and a fourth share of 5257 acres of land, the inheritance of Po Wa, who died in 1257 B. E. The defendants were the present appellants and two women Mi Hla U. and Mi Baya. The last-mentioned was the fifth wife of Po Wa. Appellant Nga Twe was a son of the first wife, Mi Ba Sha, appellant Nga Tun Aung a son, and Mi Hla U a daughter of the third wife Mi Ba Naung, plaintiff-respondent a son of the second wife, the fourth wife Mi Hla We died without issue. The plaint admitted that the second wife of Po Wa was a slave but claimed that plaintiff, her son, was a *keiktaza* son and entitled to inherit. The present appellants were the only defendants who appeared and defended the suit They denied that Po Wa was the father of plaintiff-respondent or that he married or even had intercourse with Mi Ba Kwe (the second wife.) The issues framed by the Court of First Instance were--(1) Is plaintiff a son of Po Wa and Mi Ba Kwe? (2) If so, is he a son who is entitled to inherit? (3) According to what share of the land is he entitled? On the first and second issues the Court of First Instance found for the plaintiff-respondent and in regard to the third the authorities cited being in conflict and not seeming exactly to cover the facts of the case proceeded to dispose of the matter after mature consideration and awarded the plaintiff-respondent one eighth. On appeal to the District Judge only two objections were raised, namely, that the Lower Court was wrong in its finding on the first and second issues. The District Judge agreed with the Court of First Instance and dismissed the appeal. On second appeal it was found to have been satisfactorily proved that plaintiff-respondent was a son of Po Wa and treated as such and that his mother was a wife of Po Wa. It was also found that the son of a slave concubine was one of the six kinds of sons who are entitled to inherit and that plaintiff-respondent was a *keiktaza* son. It was clear that the condition, namely, that the slave must have been openly treated as occupying the position of a concubine, was fulfilled in the case of Mi Ba Kwe. The petition of appeal went on to raise two points that were not raised in the Lower Courts: (1) as to the share to which plaintiff respondent as the son of a slave-concubine was entitled under the *Dhammathats*; (2) as to the right of the plaintiff respondent to share in the inheritance if it was acquired after the death of his mother and when he was no longer living. working and planning with his father. The record was found defective in that it omitted to show when Po Wa's father died or when he married his different wives. These and certain other questions of fact were referred to the Court of First Instance for further evidence to be recorded. It remained to be decided, if the land in question was not acquired while plaintiff-respondent's mother was living with Po Wa or while plaintiff respondent was living with Po Wa, whether the rule of joint living applies to property acquired by inheritance and whether it excluded plaintiff-respondent from taking the share he would otherwise have been entitled to of the land in question. The Lower Court found that Po Wa's father died in 1214 B. E. at which time Po Wa was living with Mi Ba Sha and Mi Ba Kwe and plaintiff Nga Aung was living with them. Po Wa had married Mi Ba Sha in 1211 and taken Mi Ba Kwe to wife in 1212. Both these women died of cholera in one day in 1221. Mi Baya was married about 1242 and died in 1262 childless.

Held, that the land in question was acquired by Po Wa on the death of his father in 1214 B. E. and not at the date of partition in 1246. Property is acquired by inheritance not by partition. Heirs inherit an estate when the person from whom they inherit dies and not when their inheritance is partitioned.

Held, also—that for the case where there is one head wife with one son, one free concubine with one son and one slave-concubine with one son, the slave concubine's son is entitled to one and a half shares against the head wife's son's four shares and the free concubine's two shares. Following the system of multiplying shares explained in section 2 of the *Manu Wunnana* and section 230 of the *Attathonhepa* the division in the present case should stand as follows—:

	Shares.
Son of head wife	4
Children of second regular wife married after death of first wife (between them).	4
Plaintiff respondent, son of slave-concubine	1½
Total ...	9½

In other words the plaintiff-respondent

Budhist Law *(Contd).*

was entitled to 3/19th

References:

Attathankopa, sections 230, 227.

Jardine's Notes, Part V, page 29, section 89 of the Wunnana.

Kin Wun Mingyi's Digest, paragraphs 30--36, section 16, Book XII, section 3, page 345.

Manu, page 418.

Maungye, Chapter X, sections 41, 44, 45 and 81; Chapter XII, sections 28, 29 30, 31 and 32.

Manu Wunnana, section 2.

Mayne's Hindu Law, page 79.

O'Kinealy's Civil Procedure Code, sections 541 and 542.

Printed Judgments, Lower Burma, page 299.

Selected Judgments, Lower Burma, page 184.

Selected Judgments, Lower Burma, page 296.

2, U. B. Rulings, 1897-98. Buddhist Law—Inheritance, page 51.

2, U. B. Rulings, 1897-98, Buddhist Law—Inheritance, page 55.

2, U. B. Rulings, 1897-98, Buddhist Law—Inheritance, page 65.

MAUNG TWE AND MAUNG TUN AUNG *v.* MAUNG AUNG. **U B. R. 1901. P. 121.** *(Budhist Law Inheritance).*

18 *Buddhist Law : Inheritance—Title of eldest son who has obtained his one-fourth share to share thereafter in the remainder of the estate.*

There is no authority for thinking that an eldest son, after having taken his one-fourth share of the estate of his deceased father, retains any right to a further future partition of, or any right in remainder of the estate except the right of pre-emption in case of sale by the remaining co-heirs. In such a claim for pre-emption the co-heirs would have to be made defendants or joined as plaintiffs.

Ma On and others *v.* Ko Shwe O and others, S. J. L. B., 378 ; Ma Ngwe *v.* Lu Bu and another. S J. L. B., 76 ; Maung Shwe Nhun and other *v.* Ma So and another, U. B. R., p. 97 of 1900: cited. MAUNG HMU *v.* MAUNG PO THIN. **1 L. B. R. 1900—1902 P. 50.**

19. *Buddhist Law—Inheritance—Suit for possession of land—Heirs on either side being uncles and aunts or their representatives——Shares to which each entitled.*

Plaintiff-appellants sued for possession of six plots of land measuring 780 acres to which they alleged they were entitled as heirs of Tun Maung deceased. The Court of First Instance dismissed the suit on the grounds that defendant-respondent, as the uncle and guardian of Tun Maung and as having paid his funeral expenses, was entitled to inherit on Tun Maung's death to the estate he left. On appeal the District Judge confirmed this decision.

The principal facts were ;

Budhist Law *(Contd).*

(i) that the land in question came from Tun Maung's maternal grandfather and was in fact his mother's (Mi Yan Gyaw's) share of the inheritance which, on the division after his mother's death, was put down as his share ;

(ii) that at this time Tun Maung's father, Yan Aung, was still alive and consequently that the land in question, his wife being dead, was his property till he died, when it became that of Tun Maung, the only or only surviving son of himself and Mi Yan Gyaw ;

(iii) that from or very soon after the partition, the land in question came into the possession of defendant-respondent on behalf of Tun Maung, then a minor, and that he has ever since enjoyed the usufruct of it ;

(iv) that Tun Maung lived partly at least with defendant-respondent when not in Lower Burma.

Both parties claimed to have paid the funeral expenses and defendant-respondent also alleged having paid Rs. 112 during Tun Maung's life-time to pay for his journeys to Lower Burma. The Lower Courts held that it was not proved that plaintiffs-appellants paid the funeral expenses and that it was proved that defendant-respondent did.

On this point it was clear from the evidence that the funeral expenses were met by contributions from the relations who happened to be at the place in Lower Burma where Tun Maung died, including plaintiff-appellant Tun Aung and by the people of the village.

The existing co-heirs were--two sons of an aunt, a son and a grandson of an uncle--on the mother's side. Three daughters of an uncle, two grand-daughters and one grandson of an aunt, an uncle, a daughter of a third uncle--on the father's side.

Held--that defendant respondent having for many years enjoyed the usufruct of the land in question, could not be allowed to plead payments on deceased's account as a reason for refusing to share the inheritance with any person who might be entitled to share it.

Held also,--that Tun Maung having inherited the land on the death of his father, his relatives on his mother's side had just as much right to inherit as those on his father's.

Held also.--that the plaintiffs-appellants represent an uncle and an aunt and are entitled to two shares out of six, the remainder being the shares of the remaining four uncles and aunts or their representatives.

References :--

Maungye, Chapter X, section 62.

2, U. B. R., 1892--96, page 184.

2, U. B. R., 1897-98, Buddhist Law--Inheritance, page 49.

Sparke's Code, Section 83.

Budhist Law *(Contd).*

Kinwun Mingyi's Digest, Volume I, page 640.

MAUNG TUN AUNG AND MAUNG HLA GYAW *v.* MAUNG YAN PYO. **U. B. R. 1901 P. 117** (*Budhist Law—Inheritance).*

20. *Buddist Law—Inheritance—Suit for share of inheritance between second wife of deceased and sons of first wife—*Atet oksa *and* auk oksa—*Children entitled to three-fourths of property to which they have a double claim and half of that to which they have a single claim.*

The plaintiff in the original suit was Ma Bola, widow of San Lon, whose second wife she was. The defendants were Tun Gyan and Maung Hlaw, sons of San Lon by his first wife Ma Thaik: Ma Balo had no children and Ma Thaik had no others besides defendants. Ma Balo sued for a half share of land amounting to 46 89 acres and for Rs. 1,024-15-0. The latter sum was made up of Rs. 727-8-0, being expenses of redemption and litigation, and Rs. 131-3-0, being five-sixths of the value of 175 baskets of paddy, which was *hna-pazon* property of Ma Balo and her late husband and Rs. 166-4-0, being a half share of the produce of five plots of land for the year 1261 B. E.

The defendants replied that the land sought to be partitioned, though admitted to have originally formed part of the estate of On Gaing, father of San Lon, had come into their possession as folows:—

- Plots 1—6, by gift from San Lon.
- Plot 7, by redemption by defendants.
- Plots 8—11, by occupation and cultivation for over 25 years, dating from the time of their own mother.
- Plot 12, by redemption by defendants.
- Plots 13—15, in the same way as Nos. 8-11.
- Plots 16—18, by gift from San Lon.

They denied that No. 12 had been redeemed by plaintiff and San Lon and therefore denied liability to pay Rs. 600 as half of the redemption money. They asserted on the contrary that they had redeemed the land and had given it to their father San Lon in exchange for a plot called *Tanbin.* They denied that plaintiff and San Lon spent Rs. 255 in litigation and consequently denied their liability to pay a half share, namely, Rs. 127-8-0. They also denied having got the paddy referred to in the last two items of the plaintiff's claim, asserting *(a)* that their father gave them 100 baskets and *(b)* that such produce as they got was the rent in kind of their own lands. They alleged that plaintiff's claims had been satisfied by getting a plot of land called *Legyi* and by four ticals of gold. They alleged that plaintiff had not cherished San Lon and had not joined in paying for his funeral, which cost Rs. 400.

The District Judge decreed plaintiff a half share of plots Nos. 1—18 and allowed her Rs. 232-8-0 for the last two items of her plaint. He found that defendants had redeemed plots Nos. 7 and 12 and set off Rs. [illegible]1 8 0 on that account. He also set off Rs. 200 for funeral expenses. In the result plaintiff had to pay defendants Rs. 722 and on making that payment was to obtain a half share of the land. Both parties appealed to the Divisional Court. The plaintiff objected to paying Rs. 600 as half share of the redemption money for plot No. 12. She objected to the District Judge's objection to her claim of Rs. 127-8-0 for expenses of litigation and she objected to paying Rs. 200 for funeral expenses. She did not appeal against paying half the redemption money for plot No. 7.

The defendants objected to paying Rs. 232-8-0 to plaintiff; they also urged that at most she was entitled to only a quarter share of land Nos 1—6. The Divisional Judge dismissed plaintiff's appeal in respect of the redemption money but allowed it on the other two points. He dismissed the defendant's appeal on all points. On second appeals the question for decision among others was whether the correct share to which plaintiff Ma Balo was entitled was half or quarter.

Held—that the three-quarters rule applies to *atet oksa* only. The principle is that children should get three-fourths of the property to which they have a double claim, *i. e.*, through both father and mother, and half of that to which they have a single claim.

Held also—that plaintiff was entitled to half share of her husband's ancestral property inherited during her coverture.

References:—

- *Attathankepa*, sections 212, 214, 215, 224, 226, 236.
- Digest of Buddist Law (Kinwun Mingyi), pages 463, 493, 499, 624.
- I. L. R., 25 Bom., page 362.
- *Manugye*, Volume X, sections, 2, 6, 8, 21.
- Notes on Buddhist Law (Sir J. Jardine), Part II, page 2: Part V, page 13; Part VI, page 5; Part VII page 15.
- Principles of Buddhist Law (Chan Toon), pages 96, 144.
- S. J., L. B., page 110.
- 2, U. B. R, 1892—96; B. L. I., page 159.
- 2, U. B. R., 1897-98; B. L. I., pages 9 and 65
- U. B. R., 1900; Limitation, page 25.

MAUNG TUN GYAW, MAUNG HLAW *v.* MA BALO, **U B R 1901 P. 131.** (*Budhist Law—Inheritance).*

10 *Marriage.*

1 *Buddhist Law: Husdand and Wife—grounds for divorce—Desertion—Section 17, Chapter V Manukye—Custom—Force of Dhammathats.*

Held, (*Fox J*. dissenting)—that desertion

Budhist Law (*Contd.*)

of the husband by the wife for one year, or of the wife by the husband for three years, does not *ipso facto* and without any further and expressed act of volition on the part of either party to the marriage, dissolve the marriage tie.

Ma Thin *v.* Maung Kyau Ya, 2 U. B. R. (1892 96) 56; Hurpurshad *v.* Sheo Dyal, (1876) L. R., 3 I. A., 259; Ramalakshmi Ammal *v.* Sivanatha Perumal Sethurayar, (1872) 14 Moore's I. A., 570; Maung Po Aung *v.* Ma Nyein, (1904) 10 B. L. R., 132; Po Maung *v.* Nagalingum Chetty, 2 U. B. R, (1892-96) 53; Maung Ko *v.* Ma Me, (1874) S. J., L. B., 19; Mi Nu *v.* Maung Saing, (1874) S. J., L. B, 28; Nga Nwe *v.* Mi Su Ma, (1880) S. J., L. B., 391; Ma Le *v.* Ma Pauk Pin, (1883) S. J. L. B., 225 (232); Ma Gywe *v.* Ma Thi Da, 2 U. B. R. (1892-96) 194; referred to. Ma Thet *v.* Ma San On, (1903) 2 L. B. R. 85, *pro tanto* overruled. THEIN PE *v.* U. PET. **3 L. B. R. 1906 P. 175.**

2 Where the circumstances entitle a female minor under the Buddhist Law, to sue for compensation for the breach of a promise of marriage, she can succeed independently of Contract. U. B. R. 1907 P. I. Budhist Law Marriage and P. 5 contract—*See Col. 251 P. I.*

3 *Right of a husband or wife to alienate joint property without the other's consent.*

Held, that a mortgage by a wife of her interest in a house and land which was *hnapazon lettetpwa*, without her husband's consent, was valid.

Mi Shwe U vs. *Mi KYU* followed and the rules applied to all nations by the wife.

References:—

3 L. B. R. 66.

U. B. R. 1892-96, II, 45, 204.

———1902-03, II, Ex. of decree 1.

———1904-06, Buddh. Law, Divorce, 1.

Nga Son Ta v. *Nga Son Yan*, husband and legal representative of Mi Ma Daing (deceased). U. B. R. 1907 P. 1 (Budhist Law Marriage Joint Property).

4 *Restitution of Conjugal Rights.*

Held, ill-treatment and desertion by petitioner a valid plea of justification under Buddhist Law.

References:—

I. L. R., 10 Bom., page 301.

Do. 28 Cal. Page 751.

L. B. P. J., page 654.

L. B. R., 1900-02, page 351.

Browne and Powles' Law of Divorce, page 164, A. B. C. D.

Rattigan's Law of Divorce (India), page 178.

2 U. B. R., 1897-01, page 488.

Maung Sein *v.* Kin Thet Gyi U. B. R. 1904 P. 5 (Budhist Law Marriage).

5 *Ante-nuptial contracts—Not the usual incidents of a Buddhist Marriage—To be proved by clear evidence that marriage was the consideration of the promise.*

Reference:—

Chan Toon's Leading Cases on Budhist Law, page 140.

Budhist Law (*Contd.*)

This is a suit for Rs. 528-12-0 on an ante-nuptial contract. Respondent alleges that appellant promised to pay her over Rs. 500 if she would marry him. The marriage took place, and after marriage the amount was defined to be Rs. 528-12 0. Some time after the marriage appellant deserted her and took another wife. She has obtained decree for the amount claimed.

The grounds of appeal are:

(1) That there was no marriage

(2) That there was no ante-nuptial contract.

(3) That under Buddhist Law a suit cannot be maintained by a wife against a husband to recover property so long as the marriage subsists.

Maung Ba *v.* Ma Ok. U. B. R. 1902 P. 1 (Buddhist Law—Marriage).

6 *Held*—That when a decree is passed against a wife alone, the husband and wife being Buddhists, attachment by actual seizure of joint property to the extent of the wife's interest is lawful.

Held, also—That when a decree-holder exercises his right to attach the property of the judgment-debtor, malice cannot be inferred from surrounding circumstances unless it is shown that the attachment was made in an unreasonable and improper manner.

References:—

Chan Toon's Leading Cases, page 2, 20, 53, 105.

2, U. B. R., 1892—1896, page 209.

MA THAING *v.* MAUNG THA GYWE. **U. B. R. 1902 P 5.** (*Buddist Law—Marriage and P. 1 Execution of decree*).

7 *Child of divorced couple—Rights of inheritance.*

Maintenance or renewal of filial relations sufficient to entitle children to inherit property acquired by the couple during second marriage. **14 B. L. R. 236=4 B. L. R. 272.**

See Budhist Law—Divorce No. 2.

8 *U. B. R. 1104, P. 1 (Budhist Law Marriage)*. See Budhist Law—Husband and wife No. 2.

11 *Partition—U. B. R. 1906, P. 19.* See Budhist Law—Divorce No. 3.

12 Pre-emption.

1 *Right of pre-emption—Right of widow to dispose of family property subject to children's right of pre-emption.*

A Budhist widow has a right of absolute disposal in respect of her own share, after her husband's death, and a life interest in the remainder. The decision does not overrule the law relating to the right of pre emption but is subject to the general rule, regarding the right of all co-sharers to pre-emption.

Where a mother after the father's death sold her right over joint family property to a stranger, *held*, the son has a right of pre-emption over the whole property. MO THI *v.* THA KWE. **4 L. B. R. 128.**

Hartnoll, J.

References S. J., L. B. 378; P. J., L. B. 65;

Budhist Law *(Contd.)*

2 L. B. R. 167, R.

2 Chinese customary law—Suit for pre-emption—Exemption from Indian law of succession—4 L. B. R. 1907, P. 124, Col: 77 P. 1.

3 In a case where the wife has inherited on her husband's death the share which he obtained at a partition in his lifetime with his co-heirs, and her deceased husband's co-heirs have sold their shares to a stranger, and she has a son by her deceased husband

Held, that the widow has the right of pre-emption. 29 M. 298; U. B. R. (1897-1901), 231; S J L B. 39, 41, 76; P. J. L. B. 26 U. B. R. (1897-1901), 155 and 162; 1. L B. R. 144-2 L. C. 129 and 7 A. 775, refd. U. B. R. (1892—96), 121; U. B. R. (1897—1901), 146; S. J. L. B 76; U. B. R. (1892—96), 581, refd. NGA TIM, MI MIN DOK &co. *v.* NGA SHWE ON MI PA. **U. B. R. 1907 P. 1.** *Budhist law—Inheritence Pre-emption.*

13 *Probate or letters of Administration.*
(1) Grant of—4 L. B. R. 1907, P. 287. *See Budhist Law—General.*
(2) Grant of—4 L. B. R. 1907, P. 293. *See Budhist Law—Inheritance No. 12.*

14 *Succession—Maiden lady bringing up two girls and a boy—One girl's father obtaining Letters of Administration—Other girl getting decree for whole estate as* keittima *adopted daughter of deceased—Suit on behalf of first girl—Boy put on record as party—Decree against second girl directing her to pay one-third share to first girl and another third share to boy.*

A maiden lady, deceased, had three persons living with her, (1) S, the daughter of B with whose father the deceased was living, (2) P a boy, and (3) L another girl. On her death, Y the father of S applied, as father and guardian of S for Letters of Administration to the estate of the deceased, and obtained it from the Court. A similar application was also made on behalf of L, but was refused. L, thereupon, instituted a suit *in forma pauperis* against the estate of the deceased, administered by Y, for possession of the whole of it, as *keittima* adopted daughter of the deceased. The suit, to which S and P were wrongly not made parties, and which was very badly conducted, was resisted by Y, but was finally decreed in favour of L as the adopted child of the deceased entitled to inherit. Afterwards, the sister of Y instituted, as next friend of S, the present suit on the ground that, S not being a party to the former suit, the decrees in it were not binding on her, and that she alone was entitled to the whole estate. P, who wished to put forward his claim, was permitted to be put on the record as second plaintiff in a suit in which the original plaintiff claimed the whole estate. The suit was decreed in favour of S, who was held by the District Judge to have been adopted by the deceased and not L and P.

Budhist Law *(Contd).*

Held, that S's right to share in the estate as *keittima* adopted daughter of the deceased had been proved and that L should make or pay over one-third share of the property, which she had obtained or may hereafter obtain from Y under the decree in the former suit, to properly constituted guardian of S, that L's right to share in the estate as *keittima* adopted child having been established in the former suit where S's claim was represented fully, the question of L's right to share in the estate should not have been gone into in the suit.

Regarding P, though the evidence of his having been adopted was not so strong, yet, the deceased having brought him up also, and Y, the person who should have known best the position P occupied in the house, having admitted, shortly after the death of the deceased, that P was one of three children adopted by the deceased, *held*, setting aside the decree of the District Court, that L should make or pay over to P also a one-third share of such property as she had received or should hereafter receive under such deccree. MA BU LONE *v.* MA MYA SIN. **14 B L R 9.**

2 Widow's share in the joint property of her husband—4 L. B. R. 1908 P. 256—*See Budhist Law—Inheritance No. 13.*

3 U. B. R. 1905 P. 7—*See Budhist Law—Inheritance No. 11.*

Buildings.

1 Acquirer building before acquisition—Valuation of compensation—26 B. 1. P. C. Col. 856 P. I.

2 *Compensation for buildings—Landlord and tenant—Landlord's right to eject—Separate notices to quit the land—Permanent tenure—Tenant's right to compensation.*

Held, that separate notices to quit addressed to the defendants were valid when it appeared that the holding had been divided by them and they had paid rents to the landlord according to their shares separately.

Held, also, that it could not be presumed that the tenure was not a permanent one by the fact that it was held on payment of rent at uniform rate when the *kabuliyat* did not imply that the holding was hereditary or the rent was fixed in perpetuity.

Where it is not shown that the landlord or his representative have led the tenants to believe themselves to have a permanent interest in the land and to lay out money on it, the tenants are not entitled, to claim any compensation for buildings erected by them before ejectment. ISMAIL KHAN MAHOMED *v.* KALI KRISHNA MONDOL. **6 C. W. N. 134.**

3 *Co-sharers—Building on joint land—*

Buildings (*Contd.*)

Right of—Way of necessity—Judgment—Decree Contents of.

On the suit of the plaintiff the Munsiff decreed demolition of a wall built by the defendant on land belonging jointly to the parties and on appeal the decree was confirmed. It was not suggested that the defendant had been warned not to build the wall and no specific injury to the plaintiff had been proved. It was stated in the plaint that the site of the wall had been used as passage of egress and ingress by the plaintiff. Upon second appeal to the High Court

Held, that the appeal must be remanded for retrial. In the absence of warning to the plaintiff and proof of injury done to him the plaintiff was not entitled to have the wall demolished. If the plaintiff had a way of necessity which was obstructed by the wall a portion of the wall might be removed in order to afford the plaintiff a convenient passage. 18 All., 115 not followed; 8 Cal., 708, 14 Cal 189 and 236 referred to.

(2) That in such cases the decree and the judgment should state the precise nature of the relief granted. FAZILATUNNESSA *v.* IJAZ HASSAN. **30 C. 901.**

4 Demolition of 7 C. W. N. 374—*See Bengal Act I of 1887 S. 8.*

5 Demolition of—7. C. W. N. 554. *See Bengal Act III of 1899 S. 383 No. 9.*

6 Erected by defendant—Suit for possession of land for grazing purposes. 78 P. L. R. 1903. Col. 1256 P. I.

7 Erection of—Permission not necessary. 29 C. 491—*See Bengal Act III of 1884 S. 236 No. 5.*

8 Erection of—No order within six weeks—Right to build. 5 C. W. N. 42. *See Bengal Act III of 1884 S. 238 No. 6.*

9 Erection of—Sanction—Limitation—Damages. 30 C. 317. *See Bengal Act III of 1899 S. 247 No. 6.*

10 Erection and demolition of. 7 C. W. N. 853. *See Bengal Act III of 1899 S. 459 No. 10.*

11 *Injunction—Building—Erection of—Indemnity for any loss or injury to the defendant caused by injunction—Principle of granting injunction.*

Where the plaintiff brought a suit against the defendant, who was attempting to construct a building upon a piece of land, in which, he stated, he had a permanent and independent title, to have it declared that the defendant was his tenant, holding a *sarsari jote* under the plaintiff's *patni*, and obtained an *ad interim* injunction restraining the defendant from proceeding

Buildings (*Contd.*)

with the erection:

Held, that, as the plaintiff was willing, in case he failed in the suit, to indemnify the defendant for any injury or loss that may be occasioned to him owing to the stoppage of the defendant's work of erection, the injunction should continue to the final decision of the case by the first Court, subject to the plaintiff furnishing such security as to the Court below may appear just and proper, under the provisions of section 493, C. C. P., to meet any loss or damages that may be occasioned to the defendant.

Even in cases where, upon application for injunction, the defendant has taken the risk of having title found against him and submitting to the penalty of having the building demolished, Courts of equity have been loth to decree demolition after the completion of the building, and for this reason the Courts are of opinion that matters should be allowed to remain as far as possible in *statu quo* to avoid, so far as possible, placing the person who is raising the structure in a position to say afterwards, upon the basis of his own act, that circumstances have reached at a stage in which on equitable considerations the demolition should not be insisted upon. CHANDRA NATH PAL *v.* SREE GOBIND CHOWDHURY. **6 C. W. N. 308.**

12 *Injunction—Preventive injunction—Mandatory injunction.*

The plaintiff sued for a permanent injunction to restrain the defendant from erecting a *khadki*. His application for an *interim* injunction was refused. Thereafter the defendant proceeded with the building so that when the case came on for hearing the building had been completed. The Courts dismissed the suit, holding that a preventive injunction would be of no avail to the plaintiff, as there was no longer any reason to prevent what had been done.

Held, that the view taken by the Lower Courts of the plaintiff's claim was not correct. The suit was rightly framed in the light of the circumstances which existed when it was brought. But it was defendant's subsequent conduct which rendered it necessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the Court might think fit. The plaintiff was entitled to a mandatory injunction, if he proved the right alleged in his plaint. MAGANLAL PUNJASA *v.* CHHOTALAL GHELA. **3 B. L. R. 542=26 B. 136.**

13 *Lease given for building purposes—Presumption—Grant in perpetuity—Landlord and tenant.*

Where a lease is given for building purposes the Court may well presume that it was intended to be a perpetual grant. 23 W. R. 399; 4 C. W. N. 210, s. c., 27 Cal., 570 followed; 3 C. W. N. 502, s. c., L. R. 26 I. A 58 distinguished. PROMADA NATH ROY *v.* SRIGOVIND CHOWDHRY. **9 W N**

Buildings *(Contd.)*

C. 463 = 32 C 648.

14 Sanction for construction—Implied sanction—Punjab Municipality Act XX of 1891. S. 95 of the Act applies not only to encroachments and obstructions which are added to old ones but also to those which are attached to new buildings. (52 P. R. 1900, 27 P. R. 1901, 27 P. R. 1904 referred)

An encroachment upon a Municipal property, not being a street or drain, sewer or aqueduct, would not come within the purview of S. 95 (45 P. R. 1905 referred). THE MUNICIPAL COMMITTEE OF DELHI *v.* DEVI SAHAI. **62 P R 1907.**

15 Site formerly occupied by shop—Custom—Pre-emption. 42 P. R. 1903 Col. 2044 P. I.

Burden of proof.

Account.

1 Suit for an account—Form of decree—Procedure 27, A. 374 Col. 367, P. 1.

2 Suit for accounts—Duty of the Court A. W. N. 1905, P. 1; col. 1494, P. 1.

3 Suit for possession—Defendant admitted and found to be in possession for over twelve years. A. W. N. 1905, P. 14, col. 2069 P. 1.

4 *Mortgage—Mode of taking accounts.*

The mortgagor seeking to redeem must prove how much of the debt and interest has been repaid. 12 *M. I. A. p.* 192.

The duty of a mortgagee in possession is to keep a full, true and accurate account of the actual receipts and disbursement. When an account is presented, the Judge of fact, on whom rests the responsibility of coming to a true decision, must examine it, and before arriving at a conclusion as to whether it is such an account as a prudent man ought to accept, he must consider the details and ascertain whether it has been kept on principals which indicate that it is properly correct.

Before accepting or rejecting accounts in suits between mortgagor and mortgagee, it is usually necessary to examine them critically. The omission of the mortgagor to assist, by criticising the items, may, of course, be taken into consideration. In some cases such omission may be accepted as showing that the accounts cannot be attacked, or, in other words, are known to be correct

But in other cases it may merely indicate ignorance of the proper course to take or inability on the part of the client to give suitable instructions to his pleader. No general rule can, of course, be laid down. In the Presidency Town the party is expected to show where the accounts are wrong, but the procedure applicable then may not be always equally suitable for the mofussil,

Burden of proof *(Contd).*

This is recognized in the Civil Procedure Code, which, instead of laying down rules for taking exceptions to the reports of Commissioners, simply provides in section 395 that their proceedings shall be received in evidence, leaving to the Court to assign to such evidence the weight which the circumstances and the substance of the report may seem to justify. While it is true that no general rule as to the value of accounts can be laid down, still it is clear that in each case all the circumstances must be considered such as the relative positions of the parties to each other, the trade or caste of the mortgagor, and any other matters likely to be material. It is for the party who puts forward the accounts to explain them and support them in such a way as to convince the Judge that there is such a probability of their accuracy as to make it reasonable for a purdent man to accept them. If the Judge accept them as correct, he ought to act on them. If he think that they are not correct and ought not to be acted on, then he must do his best to form an estimate of the probable produce on the evidence that is available. KUNDANMAL *v.* KASHIBAI. **4 B. L. R. 42- 26. B. 363.**

5 Onus of proving acknowledgment made at a time when the right to enforce the liability barred. 26 A. 313. Col. 1773. P. I.

6 *Acquistions out of the income of widow's estate—Alienaton—Bonafide purchaser for value—Burden of proof.*

Held, that if property acquired by a Hindu widow out of the income of her late husband's estate be treated by her as an accretion to the said estate, she cannot alienate it except for legal necessity if, on the other hand, she clearly shows her intention to keep the property so acquired separate from the *corpus* of the estate, it may be regarded as an investment of accumulated savings over which the widow has full disposing power.

Held, further, that in the absence of evidence as to the intention of the widow, it is not equitable to throw the burden of proof on a *bona fide* purchaser for value.

Held, also, that no presumption can be drawn from the mere fact that the property acquired consisted of shares of other members in the family property Agra 219, 10 C. 324, 14 C 361, 14 C 381, 25 M, 351 25 W R 335 ref. JOKHA SINGH *v.* MUSAMMAT DULARI. **11 O C 310.**

7 *Admission before Revenue Officer—Punjab Land Revenue Act (XVII of 1887), Section 44—Entry of mutation by Tehsildar not presumed to be correct till it is incorporated in the* Jamabandi*—Relevancy of such entry—Evidence Act (I of 1872), Section 35—Sale—Non-payment of consideration does not vitiate sale.*

As an entry made in Mutation Register

Burden of proof (*Contd*).

by the Tehsildar may be made the subject of appeal to the Collector, it has not the force of an entry in an Annual Record till it may have been incorporated in the *Jamabandi*, and no presumption can be made as to its correctness under section 44 of the Land Revenue Act. But as an entry in a Public Record made by a public servant in the discharge of his duty, it is relevant under section 35 of the Evidence Act.

In the absence of a contract to the contrary, if once a sale has been agreed to for a consideration, part payment of which has been deferred by arrangement, the vendor cannot withdraw it for full consideration not being paid according to the agreement of the parties.—*P. R.*, *132 of 1879, followed*. GHARIB KHAN *v.* SIKANDAR. **91 P. R., 1902.**

Adoption.

8 Adoption—See A. W. N. 1902. P. 62. Col. 2043, 69. P. R. 1907 and 67 P. R. 1902. Col. 2046, 86 P. R. 1904 Col. 2047, 30 C. 999 Col. 2050. P. I. under the heading of Adoption.

9 *Suit by plaintiff for possession as heir of his father—Defendant alleged the plaintiff to have been adopted by another—Admission by plaintiff of his having been so adopted—Nature of such admission—Estoppel.*

M and his transferees brought two suits for possession of property left by one P, the natural father of M. The defence was that the plaintiff could not inherit, inasmuch as he was adopted by K. The defendant filed several documents, in which the adoption was admitted by M himself.

Held, that the burden of proving that the adoption relied upon took place, rested on the defendant. But that burden was, *prima facie*, shifted by her proving his solemn statements under hand and seal that it did take place. The defendant not being a party to those documents, the said statements did not amount to estoppel, but the party making the statements could rebut the presumption that they were true. The express admissions of a party to a suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but he could show that those admissions were mistaken, or not true (6 M. and W., 664; 9 B. and C. 577; 12 Q. B. 926; 2 Ch. D. 72; and 1896 A. C. 587, *referred to*. RANI CHUNDRA KUNWAR *v.* NARPET SINGH. **4 A. L. J. 102 (C. P.) =11 C. W. N. 321=5 C. W. J. 115=17 M. L. J. 103=2 M. L. T. 109=9 B. L. R. 267 =29 A. 184**

10 Compromise by father on behalf of his minor son—Withdrawal of suit. 3 P. R. 1905 Col. 1479 P. I.

11 *Adoption—Factum of—Adoption long recognised.*

Where an adoption has been fully recognised in the family for a long time, the burden is upon a plaintiff who impeaches the factum of adoption to show that it did not legally take place. MANJUNATH *v.* KAVERIBAI. **4 B. L. R. 140 at 143.**

Adverse possession.

12 *Adverse possession—Limitation Act (XV of 1877), Schedule II, Article 141—Onus—Hindu widow. Possession of—Maintenance.*

The plaintiffs sued to recover possession of two houses which belonged originally to one *J*. the uncle of the first plaintiff and granduncle of plaintiffs Nos. 2 and 3. *J* died in 1857, leaving behind him a daughter-in-law *S*. the widow of his son *H*, who had predeceased him. The plaintiffs contended that the two houses on *J's* death passed into the possession of *S* for her maintenance and residence; that she died on the 25th May 1900, and that they were now entitled to possession.

The defendandts, who were the sons of two brothers of *S*, claimed that *S's* enjoyment of the houses was adverse to the plaintiffs since 1857, the death of *J*, that it had ripened into ownership, and that she sold the houses to them by a registered sale-deed; and that she also made a will in their favour in respect of her property including the houses in dispute, and that they were entitled to a lien over the property for monies expended by them in the celebration of *S's* funeral ceremonies, to pay off debts incurred by her for the repair of the property and other necessary purposes.

Held, that article 141 of the Limitation Act was applicable to the case, and the right to sue for possession accrued only on the death of *S*. The *onus* was on the defendants to prove adverse possession, and they had failed to establish it.

The Courts are loth to convert a possession which commenced lawfully into a wrongful and adverse possession. GANPATRAM HAKUMAT RAI *v.* SHIVAPRASAD AJITRAI. **4 B. L. R. 355.**

13 *Adverse possession—Mesne profits—Onus to prove right and its extent.*

It is incumbent on the plaintiff in a suit for mesne profits as in other cases to establish not only the existence of his right but also the extent of it. The first he does by proof that the defendant has either personally or by his agents or dependents wrongfully deprived him of the enjoyment of the land which may be in question, the second by proof of the duration of the wrongful possession, and it is for that period only, the period of actual or constructive possession by the defendant, that damages are claimable. ISHAN CHANDRA BURDHAN *v.* AINUDDIN MIA. **5 W. N. C. 720.**

14 Adverse possession—Limitation.—*See 24 M. 441. Col. 1931 P. I., 2 N. L. R. 32 Col. 1946 P. I.*

15 Adverse possession 73 P. L. R. 1906 Col. 2069, 26 B. 362 and 28 M. 69 Col. 2055,

Burden of proof (*Contd*).

26 B. 617 Col. 2068, 39 P. L. R. 1906 Col. 2056, A. W. N. 1905 P. 14 Col. 2069 P. I under the heading of adverse possession.

Age.

16 Statement of relatives as to age. 25 M. 183 Col. 166 P. I.

Alienation.

17 *Hindu Law—Widow—Alienation by one of two widows—Consent of other—Burden of proof.*

C and B. were two widows of a decease Hindu. They being unable to pull on together C. by a written agreement made over certain property to B. for management and maintenance. B. sold some of the properties to pay the costs of litigation. The plaintiff, adopted son of C., brought a suit to set aside the alienation.

Held, that as B had authority from her co widow to do any act necessary for the due and proper management of the property, she was impliedly authorised to alienate the property in suit to pay the costs of the litigation.

Held, further that the burden of proof lay on the plaintiff to prove that C did not consent to the sale. MAHADEVAPPA *v.* BASAGOWDA. **7 B. L. R. 258 = 29 B. 349.**

18 *Hindu Law—Alienation by manager—Joint family—Necessity—Benefit of the family.*

The mere fact that a certain person is the manager of a joint family is not enough under the Hindu law to make his acts binding upon the other members of a family It must be shown by the party relying on those acts and seeking to bind the other members by them that the acts were done by the manager either for the benefit of, or for some necessity of, the family.

Semble—Just as there is no presumption under the Hindu law that a debt contracted by the manager of a joint family is a family debt, so there is none as to any other act of his as manager. 18 Bom., 520 referred to NARAYAN YESU *v.* POLITICAL AGENT, SAWANTWADI. **7 B. L. R. 172.**

19 *Custom—Patia Raj*—Prodhan Uttaradhikari—Pachis Sawai—*Right of holder to alienate property of Raj—Debt for legal necessity—Liability of successor—Mitakshara Law.*

It is contrary to the custom of Paita Raj for the holder of the Raj to alienate the property of the Raj when he has a brother as his heir.

The words *prodhan uttaradhikari* or principal heir as used in *pachis sawai* include a brother and are not confined to a son.

When a holder of the Raj has succeeded the last holder by right of survivorship, he succeeds to the property subject to the rule of the Mitakshara law, that the successor is liable, for debts proved to have been contracted for legal necessity. 31 Cal., 224 followed.

That the creditor discharges his duty, if he shows that there was legal necessity for the loan. He is not bound to see to the application of the money. GOPAL PROSAD BHAKAT *v.* RAGHUNATH DEB. **9 W N C 330 – 32 C 158.**

20 Custom—Undue influence. 6. P. R. 9021 Col. 159 P. I.

21 Alienation by widow with consent of some of the next reversioners. 8 O. C. 21 Col. 430 P. I.

22 Succession—Onus probandi. 74 P. R. 1902 Col. 1574 P. I.

Note—For 74 P. R. 1907 read 74 P. R. 1902.

23 Alienation—19 P. L. R. 1903 Col. 2092. 103 P. R. 1902 Col. 2094, 50 P. R 1902 and 51 P. R. 1903, Col. 2097, 56 P. R. 1904 Col. 2099, 33 P. R. 1905 Col. 2100, 13 P. R. 1902 and 123 P. L. R. 1902 Col. 2101, 42 P. R. 1902 Col. 2102, 3 P. R. 1902 Col. 2114, 55 P R. 1903 Col. 2116, 48 P. R. 1903 Col. 2121 P. I. under the heading of Alienation.

Appeal.

24 Appeal—Alluvion Diluvion—Evidence, possession—Burden of proof. Col. 156 P. I.

25 *Attachment in execution—Hindu Law—Joint family property—Father's debts—Liability of son for a personal decree passed against father.*

It is not necessary in order to establish a son's liability for his father's debt, that it should be shown that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of sons to pay a personal debt of their father if the debt be proved and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge.

When a decree is passed against the father alone the son's share in the ancestral property is not exempted from sale on the ground that he was no party to the decree. All that he can claim is that not being party to the decree he is not barred from showing the nature of the decretal debt. 12 All, 209 overruled W. N. All, 1901 p 57; 12, All 99; L R, 16 I. A, 1; L. R, 13 I. A, 1; L. R, 4 I A., 247 referred to. KARAN SINGH *v.* BHUP SINGH. **W. N, A, 1904, p. 151 = 27 A. 16 (F B)**

Attestation of mortgage-deed.

26 Attestation of mortgage-deed—Evidence—Onus. 2 N. L. R. 10 Col. 609 P. I.

Bailment.

27 Entrusting for repair the driving beam of a sewing machine to Copper Smith—Decree of care—U. B. R. 1905 P. 11—Contract—*See Bailment No. 2 Col. 3.*

Burden of proof (*Contd*).

Benami Transaction.

28. *Benami transaction—Evidence.* The burden of proof is on the plaintiff, who seeks to give to a purchase a different meaning and complexion from those which it bears on its face. This burden must be strictly discharged; in other words, the plaintiff, in order to succeed, must put the Court in possession of legal and satisfactory evidence, and it will not suffice to point to matters of suspicion or even to plausible conjecture (5 B. L. R. 784, 11 M. I. A. 28 (43) refd). RAMABAI *v.* RAMCHANDRA SHIVRAM. **7 B. L. R. 293.**

29. Benami transaction—Admission. 9 C. W. N, 89 Col: 162 P. I.

30. As to whether a particular transaction is *ism farzi* lies on the person alleging it 8 O. C. 349 Col: 698 P. I.

Bengal Tenancy Act VIII of 1885.

31. S. 52.—Additional rent—Consolidated rent fixed for entire tenure. 6 C. W. N. 318. See Bengal Act VIII of 1885 No. 97.

Bequest by father.

32. Of self acquired property to son 24 M. 429. Col: 2126 P. I.

Bill of Exchange.

33. Bill of exchange or promissory note exhibiting the appearance of alteration. 14 Bur. L. R. 213. See Alteration.

34. Bond, non-receipt of consideration—15 C. P. L. R. 1902 P. 24. See Bond.

35. Plea of want of consideration—27 A. 71 Col: 224 P. I.

36. Construction of document. 27 A. 512 Col: 205 P. I.

37. Plea of fraud and undue influence. 8 O. C. 210 Col: 268 P. I.

38. Broker's liability—Onus probandi. 10 C. W. N. 14 Col. 1341 P. I. Chaukidari Chakran land.

39. Resumption and transfer—Jurisdiction of Court. 2 C. L. J. 107—32 C. 1107 Col 234 and 1826 P. I. Claims to attached property.

40. 2 N. L. R. 87, U. B. R. 1905 P. 16, U. B. R. 1905 P. 18, 30 C. 321. *See Act V of 1908 C. P. C. O. XXI R. 63.*

41. U. B. R. 1904 P. 1. *See Act V of 1908 C. P. C. O. XXI R. 58 No. 418—Consideration.*

42. Immoral consideration—Plea of—

Burden of Proof (*Contd*).

Hundi. 13 M. L. J. 7 Col. 278 P. I.

43. *Compulsorily registered mortgage-deed—Subsequent registered receipt for further advance and admitting consideration of the mortgage-deed—Onus probandi of non-receipt of the consideration.*

On 5th April, 1896, A executed a mortgage-deed of Rs. 4,250 in favour of H. On 19th October, 1896, it was compulsorily registered by the Registrar. One of its stipulations was that H could not sue for his money for six years.

A gave notice that he would waive the condition of six years and that H could sue at once. H replied that A could go to Court, if he liked, to which A retorted that he owed no money to H.

In 1898, a reconsiliation was effected and A took Rs. 250 more from H and executed a registered receipt, containing a full and categorical admission of the receipt of Rs. 4,250, previously, and Rs. 250 at the time of writing.

Held, that, under the above circumstances, the onus of proving that A did not receive any money lay very heavily upon him and as he failed to discharge the onus, H was entitled to succeed in his claim. HAFIZ HAMID YAR KHAN *v.* HAFIZ ALLA BAKHSH KHAN. **8 P. W. R. 1907.**

44 *Consideration for registered deed Act XVIII 1884. (Punjab) Ss. 40, 70—Further appeal—Revision—Jurisdiction—"Decree involves directly some claim to, or question respecting property of like value"—Evidence—Partition of holding—Alienation of accupancy rights in favour of landlord—Suit by heir.*

Held, following 24 P. R. 1903 (F. B.), that, in a suit for possession as mortgagee, the sum to be paid eventually for redemption under the lower appellate Court's decree governs the course of appeal in the Chief Court.

Held, also, that, in the case of a registered mortgage deed, the burden of proving want of consideration lies on the mortgagor or the person who claims under him.

Held, on the evidence on record, that the private partition of the holding in suit by the tenants was proved to have been made, though it was shown joint in the Revenue records.

Held, also, on the analogy of 31 P. R. 1896 (F. B.), that an ordinary heir to an occupancy tenant under S. 59 of the Punjab Tenancy Act cannot contest the mortgage of the tenancy by his predecessor to the landlord, on the score of want of necessity, when the tenant could surrender the tenancy to the landlord *gratis*.

If an occupancy tenant mortgages his holding to an outsider and then dies, without any heirs capable of succeeding under S 59 of Punjab Tenancy Act, the tenancy, becomes extinct. BHAG *v.* BUTA SINGH **19 P. L. R. 1907.**

Burden of proof (*Contd*).

Construction.

45. *Construction of statutes of taxation.*

The onus is on those who seek to put the most onerous meaning on words used in taxing statutes, to show clearly what meaning was intended. 6 A. C. 373 ref. to.—MUNICIPAL COUNCIL OF MANGALORE *v.* THE CODIALBAIL PRESS. **26 M. 547.**

46 *Jhum cultivation—Legislation to extinguish right to carry on such cultivation outside setled estate—Compensation—Onus to prove that statute applies—Statement of facts in preamble of statute—Value—Question of fact or law—Concurrent findings—Evidence Act (1 of 1872) S. 13—Transactions interalios.*

Reg. 111 of 1891 when applied to any lands would have the effect of confiscating proprietary rights and giving compensation in exchange. The onus therefore lies on Government to show, that the facts of any case are such as to bring it within its operation. The Government must prove that at the Permanent Settlement, the Officers of the Government included amongst the assets of the estate, income derived by its owners from *jhum* cultivation carried on beyond the limits of the estate.

The argument, that under the Regulations then in force no assets not arising out of the estate could be lawfully taken into account, and that a strong presumption was thus raised that the course which was in accordance with law was followed in a particular case, was not entertained in the face of the preamble to the Regulation which shows that in a number of cases the income of *jhum* cultivation carried on beyond the estate was rightly or wrongly taken into account.

It was proved that as early as 1837, the owners of the estate received *kabuliyats* from tenants carrying on *jhum* cultivation on the disputed land, that in 1842 and 1843 they succeeded in defeating an attempt on the part of persons interested in the adjoining *mouzah* to exercise rights over the land, and that on several occasions they successfully resisted proposals on the part of the Revenue authorities to settle portions of the land as *ilam* land, open for settlement.

Held, that from this and other evidence evidence of continuous possession and enjoyment it should be inferred that the land was included within the permanently settled estate of the owners, and the Regulation had no application to it.

The question here was in one sense a question of fact, but every point in the process of the reasoning involved considerations of law and thus although the findings of the Courts in India were concurrent, the Judicial Committee could review such findings in appeal. MUHAMED ALI HAIDER KHAN *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **12 C. W. N. 1095 (P. C.)**

Burden of proof (*Contd*).

Contract.

47 Contract Act S. 253. 28 C. 540. Col. 379, P. I.

Contribution.

48 *Co-sharer's suit for entire rent—Landlord and Tenant—Rent suit for—decree for share of rent not allowable—Pleadings—Parties—Conversion of nature of suit.*

The plaintiff claimed the entire rent of a holding. It was found that he was only entitled to a 4-annas share and a decree was given for such share. It was not alleged that there was any arrangement between the co-sharer-landlords and the tenants as to the payment to each co-sharer of his proportionate share of the rent, and other co-sharers were not impleaded as parties to the suit.

Held, that the suit should have been dismissed. NEPAL CHANDRA GHOSE *v.* MOHENDRA NATH ROY CHOWDHURY. **31 C. 707.**

49 Custom—Hindu Law—Adoption. 27 B. 492 Col. 2046 P. I.

50 *Local Custom—Wajib-ul-arz—Burden of proof.*

If a malguzar sets up a local custom not embodied in the current Wajib-ul-Arz the burden of proving such custom is on him. 3 C. P. L. R. 7, 123, 4 C. P. L. R. 40, 5 C. P. L. R. 76, 8 C. P. L. R. 29 referred to. BHAYA LAL *v.* CHUNNILAL MARWARI. **16 C. P. L. R. 81.**

51 *Hindu Law*—Nisprahi *and* Garbhari Gosavis—*Succession—Widow*—Chela—*Custom, general and special.*

Marriages among the *Nisprahi Gosavi* class are generally recognized.

Custom has tolerated marriages when the bride was a *Mahratta.*

The fact that the preliminary marriage ceremony was attended by many members of the class to which the parties belonged, and that no objection was then raised as to any impropriety arising from the connection between the parties, indicates that the ceremony was not regarded as one which could create any obstacle to the marriage in the eyes of the community. In the absence of instances in which such marriages have entailed condemnation by the community, a marriage so contracted cannot be held as invalid.

A custom opposed to the ordinary Hindu Law must be proved by those who assert it.

But when a custom has been proved or admitted as binding on a particular section of the community, the plaintiff must prove that individual members are liable, on personal grounds, to be excluded from the operation of the custom which regulates the section to which they still belong.

The original custom of the *Nisprahi Gosavis* was that the property of a member

Burden of proof *(Contd).*

of that section should descend in the line of spiritual to the exclusion of secular, relationship and that custom is still in force.

Garbhari Gosavis in Poona do not constitute an independent collective body, and in accordance with custom the widow of a *Garbhari Gosavi* is not entitled to succeed to the property left by him to the exclusion of his *chela*. She can claim only maintenance. GITABAI *v.* SHEOBAKAS GIR. **5 B. L. R. 818.**

52 *Malabar law—Custom—Marriage in their own community—Nambudris*—Onus.

The junior members of Nambudri Illoms are not prohibited by law or custom from contracting valid marriages in their own community.

Since everywhere Brahmins contract valid marriages with females of their own caste the *onus* of proving to the contrary that Nambudri Brahmins are prohibited from contracting such marriages lies on those who advance the prohibition. PAPPI ANTERJANAM *v.* TEYYAN NAYER. **14 M. L. J. 314.**

53 *Non-agricultural tribe—Custom—Alienation*—Brahmans *of Manhala Village*, Tehsil *Lahore—Burden of proof—Agricultural tribe.*

Held, that no presumption arose in the suit which was to set aside an alienation by a childless proprietor, the parties to which were *Brahmans* of Manhala village, *Tehsil* Lahore, that these *Brahmans* holding lands were agriculturists, pure and simple, and were governed by customary law in matters of successions; and that the party alleging that they were not governed had failed to prove it. MOTI RAM *v.* SANT RAM. **103 P. R. 1902.**

54 *Custom—Alienation by daughter*—Sayads *of Shahabad village, Karnal District.*

Held, that the onus of proving that among *Sayads* of Shahabad village, Karnal district, the daughters were competent by custom to transfer property without restriction on the part of the heirs lay on the defendants who alleged the custom, and that they had failed to discharge it. 25 P. R., 1890, 119 P. R, 1891, 74 P. R, 1902 referred to. ABDUL HASSAN *v.* HABIB ULLAH. **18 P. R. 1906.**

55. *Daughter—Collaterals of sixth degree—Hindu Chuhan Rajputs of Tahsil Narain Garh in Umbala District*—Onus Probandi—*Proof of custom against personal law—Method of calculating decrees of relationship—Right of objection up to seventh degree only*—Wajib-ul-arz *and* Rivaj-i-am.

Held, that among Hindu Chuhan Rajputs of Tehsil Narain Garh in Umbala District collaterals of sixth decree cannot exclude daughters from inheriting the ancestral landed property left by their deceased father. Civ. Appeal No. 522 of 1895 (Unreported, Punjab), 36 P. R. 1905. 101 P. R. 1895, 40 P. R. 1891. 73 P. R. 1891, 48 P. R. 1899, *D;* 179 P. R. 1889, 5 P. R. 1908, 11 P. R. 1903, F.; 79 P. R. 1891, 75 P. R. 1898, 98 P. R. 1906, *R.*

Held, also, that a person asserting a custom that collaterals so remote as of sixth degree exclude daughters is bound to establish it. 71 P. R 1904, F. and Appr., 62 P. R. 1906, Diss. 48 P. R. 1889, 61 P. R. 1898 R.

Obiter. Held:—(1) That the deceased as well as the common ancestor are both counted in calculating the degrees of relationship. 126 P R. 1890 followed and approved.

(2) That as a rule power of objection is limited to fifth or at most the seventh degree. 107 P. R. 1887 (F. B.) followed and approved,

(3) That those who set up a custom opposed to their personal law have to prove that custom. 149 P. R. 1888, 23 P. R. 1897 followed, 110 P. R. 1906 (F. B.) referred to. BHOLI *v.* MAN SINGH. **86 P. R. 1908.**

56 *Hindu Law—Marriage—Illegal marriage—Brahman marrying a Chattri (Rajput) girl—Illegitimacy of the issue.*

Whatever may have been the case in ancient times and whatever may be the law in other ports of India there can be no doubt that at the present day a marriage between a Brahmin and Chattri (Rajput) girl is not a lawful marriage in these provinces, and the issue of such a marriage is not legitimate. PADAM KUMARI *v.* SURAJ KUMARI. **3 A. L. J., 209.=A. W. N. 1906. P. 83=28. A 458.**

57 *Custom—Succession—Hindu Law—Non-agricultural* Aroras *of Kasur, Lahore District—Proof of Custom—Instances—Rebutting evidence.*

Found, that by custom among non-agricultural Aroras of Kasur, Lahore District, the daughter is excluded by the brothers.

Where witnesses to the existence of a custom have fairly ascertained instances, it is for the other side to show by cross-examination or evidence in rebuttal that those instances do not in reality support the alleged custom. ANANT RAM *v.* HUKMAN MAL. **102 P L R 1902=62 P R 1902.**

58 *Public street—Right to use—Processions.*

The right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace.

Every member of the public and every sect has a right to use the public streets in a lawful manner, and it "lies on those who would restrain him in its exercise to show some 'law' or 'custom having the force of law' depriving him of the privilege. SADA GOPA CHARIAR *v.* A. RAMA RAO. **26 M. 376.**

Custumory Law.

59. *Custom—Alienation by childless male*

Burden of proof (*Contd.*)

proprietor—Burden of proof—Non-agricultural Khatris of Hasil village, Chakwal Tahsil, *Jhelum District.*

Held, that the plaintiffs, on whom the burden of proof lay had failed to prove that the parties to the suit, Khatris of Hasil village, Chakwal *tahsil*, Jhelum district, who carried on money lending business and also held lands, were governed by the general custom of agriculturists restraining the powers of a childless male proprietor as to alienation of ancestral property—*103 P. R. 1894, 94 P. R. 1898, 50 P. R. 1893, 107 P. R. 1901 S. C. 117 P. L. R., 1901, 71 P. R., 1904, S. C. 96 P. L. R. 1904 referred to.* ATAR SINGH *v.* PREM SINGH. **12 P. R. 1906.**

Damages.

60 Marriage contract–Pan money paid in persuance thereof—Contract broken. 1 C. L. J. 261 Col. 319 P. I.

61. Suit for damages for illegal distraint of crops—32 C. 459 Col: 1811 P. I.

62. *Act I of 1872 (Evidence Act.) S. 106—Suit for damages by legal representative of deceased person killed by accident while travelling in Railway—Negligence—Burden of proof.*

Where a suit was brought by the legal representative of a deceased person, who was killed at an accident, while travelling in the train of the defendant Company, the onus of proving that there was no negligence on the part of the Railway Company, lies on such Company.

This decision is supported not only by the ruling in the case of the Great Western Railway Company of Canada v. Braid (1 Moore's Privy Council Cases New Series, p. 101), namely, that the fact of a breach on a line of Railway is *prima facie* evidence of improper construction or maintenance which it is for the Railway Company to rebut, but also by the general rule of the law of evidence that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him (Section 106 of the Indian Evidence Act). THE MADRAS RAILWAY COMPANY *v.* RATILAL KALIDAS. **4 M. L. T. 251.**

63 Daughter's exclusion from succession of deceased person. 5 P. R. 1908 Col. 443 P. I.

64 Death—Presumption of—Onus—8 B. L. R. 226 Col. 296 P. I.

65 Death—Presumption of—2 C. L. J. 236 Col. 227 P. I.

66 *Debts, legal necessity for—Nature of proof by creditor.*

Where a debt is incurred for legal necessity, a creditor discharges his duty if he shows that there was legal necessity for the loan and he is not bound to see to the application of the money. GOPAL PROSAD BHAKAT *v.* RAGHUNATH. **9 C. W. N. 330; 32 C. 158.**

Debtor and Creditor.

67 Debt discharge when instrument of debt in the hands of the debtor 29 C. 334 Col. 172 P. I.

Declaration of title.

68 *Declaratory Suit—Burden of Proof—Presumption—Under-proprietary right, how proved—Sub-settlement Act (XXVI of 1866), Rule 10.*

P. was proprietor of village G. in which D. held 110 *bighas*. P. served D. with notice of ejectment which was successfully contested on the allegation that the land was D's *Sir*. P. then sued for a declaration that D. had no proprietary or under proprietary right in the land, and established from the settlement records that D. was recorded as a tenant of the land in suit.

Held, that the presumption arose that D. was only a tenant and it was for D. to rebut this presumption. The burden of proving a negative cannot be cast upon a plaintiff *ad infinitum*.

Held, also, that under Rule 10 of Act XXVI of 1866 it was necessary for D to prove (1) that he had formerly been a proprietor (2) that the land in suit had been held by him or some person from whom he inherited at some time since 13th February 1844, and (3) that this land had been held by such person as *sir* or *nankar* when he was in proprietary possession. MAHARAJA JAGATJIT SINGH BAHADUR *v.* SURAJ BAKHSH SINGH. **8 O. C. 145.**

69 That deed of sale was executed to defraud creditors and was not binding on plaintiff. 17 M. L. J. 11 Col. 584 P. I.

Declaratory decree.

70 Suit for a declaration that property mortgaged with plaintiff was not liable to sale in execution of decree of prior mortgagee. 24 A. 170 Col. 433 P. I.

Decree and deed's suit to enforce to set aside

71. *Limitation—Suit for cancellation of instrument—Proof of knowledge of facts entitling cancellation of instrument.*

When a plaintiff sues for cancellation of an instrument and when he sets out the facts entitling him to have the instrument cancelled and when he alleges that those facts became known to him at a certain time, it is incumbent on a defendant, who pleads limitation, to dislodge the plaintiff from the position and to allege and prove a knowledge prior to the period from which time begins to run. If no evidence were given on other side, the plea of limitation would fail. (6 A. 406, 17 B. 341, 24 B. 260, 17 C. 518, 22 C. 609, 1 C. W. N. 543 and 26 M. 291 refd.) TANTS *v.* GAJADHAR. **2 N. L. R. 93.**

72 Onus *of proof—Mahomedan Law—Relinquishment of share—Voluntary settlement—Document whereby heirs give up their rights in the property in favour of one heir—Deed supported by valuable consideration—Power of revocation in a voluntary deed.*

In a suit to impeach a deed to which

Burden of proof (*Contd.*)

he has been a party, the onus lies on the plaintiff to make out a case for setting aside on equitable grounds a deed duly executed for valuable consideration. *Melbourne Banking Corporation* v. *Brougham* (1882) 7 App. Cas 307 at p. 311, followed. ASHIDBAI *v.* ABDULLA. **8 B. L. R. 153=31 B. 271.**

See also col. 549.

73. *Burden of proof—Execution of deed—Misplacement of* onus*—Acquiescence—Payment of consideration.*

The burden of proof rests on him who impugns the authenticity of a deed, the due execution of which by the owners of the property to which it relates is admitted or proved. And the *onus* should properly be placed on the defendant who disputes payment of consideration when execution and receipt of consideration are admitted by the obligor.

Where misplacement of the *onus* has been acquiesced in by the parties, the High Court would be very reluctant to interfere with the result, unless there were reasons to suppose that the error might have produced error in the decision of the case on the merits. GANGADAS JAMNADAS *v.* DAMA CHANGO. **5 B L. R. 178.**

74 *Decree on ground of fraud. 1 N. L. R. 20, col. 1874, P. I.*

Deed executed for valuable consideration.

75. *Regulation XVII of 1806—Mortgage—Foreclosure proceedings—Service of notice—Substituted service when permissible—Demand by registered notice—Burden of proof—Evidence.*

In order that the mortgagee should obtain foreclosure of the whole mortgage, every mortgagor should be served with a notice.

In a suit for foreclosure of a mortgage by way of conditional sale, it is for the plaintiff to prove a demand from each mortgagor prior to issue of notice, the failure to prove which would be fatal to his suit. The demand may be made by means of a letter sent through post registered, it would be presumed that the letter reached its destination when it is not returned to the mortgagee through the Dead Letter Office, though the presumption is neither obligatory nor conclusive. The contents of the letter being in the nature of a demand should be proved.

It is not essential that service of notice under the Regulation should be personal. The provisions of the Civil Procedure Code as to service of process, so far as they are not contrary to the Regulation, are applicable by force of section 647 of the Code to the service of notice issued under the Regulation.

The finding of the District Judge in the foreclosure proceedings that notice has been duly given to the mortgage is not even *prima facie* evidence of the provisions of the Regulation having been complied with, the service of the petition for forclosure and the notice in the form prescribed by the Regulation must be strictly proved.

Though substituted service is not confined to cases in which it is established that the mortgagor is keeping out of the way yet stringent requirements of the Regulation would not, in the absence of strict proof of evasion of service, be complied with by substituted service of notice.

Substituted service on one of the mortgagors, who was a female, not being considered sufficient, and the allegation not having been established that she made an admission of having been duly served with notice, the foreclosure proceedings were held as influctuous. (*Sheikh)* FAZAL ILAHI *v.* HAZARI SINGH **63 P. L. R., 1902=48 P. R. 1902.**

76 *Execution of promissory note not proved—Decree for the sum lent when loan admitted—Onus of payment when defendant admits execution—Cause of action—Suit for money lent.*

A certain sum of money was due to the plaintiff's father from one T. under a mortgage and some decrees for arrears of rent. The defendants settled the amount on behalf of T with the plaintiff's father, by paying him something in cash and executing a promissory note for Rs. 500, in his favour. The plaintiffs sued the defendants for the recovery of money due on the promissory note. The defendants admitted the execution of a promissory note for Rs. 500 on the same date and in terms identical with the promissory notes set up by the plaintiff but pleaded that the debt had been discharged and the promissory note had been returned to them duly endorsed with a receipt written by plaintiff's father. They, however,, denied the genuineness of the promissory note filed with the plaint.

The lower Courts found that the endorsement on the back of the promissory note set up by the defendants and the fact of the payment were not proved.

Held, that the promissory note was the sole cause of action in the suit and the plaintiff had not sued and could not sue on the ground of defendants' liability independently of the promissory note set up by the plaintiff and, having falied to prove the payment, the onus of which lay on them, the plaintiff was entitled to a decree 23 C. 851, 6 O. C. 16, 5 C. W. N. 56, 7 C. 256 and 26 A. 178. R. SYED HUSAIN *v.* BABU DURGA CHARAN, **9 O. C. 315.**

Easements.

77 *Easement—Claim for possession of property—Plaintiff denying defendant's alleged right to easement—Burden of proof.*

Where in a suit for posession of property the defendant admits plaintiff's right to the property and claims to use it by right of easement the burden of proving that the defendant had sued the property for a period of over twenty years as of right lies on him and not on the plaintiff. MIR MANSAB ALI *v.* MUHAMMAD AKBAR, **26. P. L. R. 1306.**

Burden of proof (*Contd.*)

78 *Prescriptive right—User as of right—Onus of proof.*
Any person claiming prescriptive right to a way must establish enjoyment as of right for the prescribed period. BAIJ NATH SINGH *v.* TETAI CHOUDHRY. **6 C W N 197.**
79 Mortgagor's right to impose easement on mortgaged property. 124 P. L. R. 1902 col. 618 p. I.

Ejectment.
80 *Tenancy Act*—Sir *land—Ejectment suit —Burden of proof.*
As, under the Tenancy Act, a landlord has a right to eject a tenant, whose holding consists entirely of *Sir* land, the burden of proving the existence of a special contract under which he is entitled to resist ejectment lies on the tenant. KESHEO RAO *v.* POORAN BARAI. **1 N. L. R. 32.**
81 Suit for ejectment—On whom lies—10 C. W. N. 630 (P. C.) col. 1959 p. I.
82 *Ejectment—Suit by Zamindars for ejectment—Burden of proof.*
The plaintiffs brought a suit for possession of a certain thatch, together with the land on which it stood. It was found that they were the zamindars of the site, and the defendants had no title to it either as zamindars or owners; there was no evidence that the defendants used the property in dispute with the permission of the plaintiffs; the building had been used as a mosque for forty or fifty years. On appeal the plaintiffs treated the respondants as their licensees and urged that as they were the zamindars it was not for them to show when or how the defendants came upon the land and that it was for the defendants to show that the user of the land had its origin in any higher title than that of a licensee from the plaintiffs.
Held, that the plaintiffs must, after that lapse of time, establish a right subsisting in them when the suit was brought to evict the respondents from the land of which they had been so long in undisturbed possession. GIRDHARI LAL *v.* ALLAHDIA. **A. W. N. 1904 P. 71.**
83 *Custom—Tanjore District—Free occupation of* menaikats *belonging to* mirasidars *by artizans conditionally on rendering services.*
There is a practice in the Tanjore District by which *purakudis* or artizans are allowed to occupy *manaikats* belonging to *mirasidars*, free of rent, so long as they cultivate the land of the *mirasidars* or render them services in other ways. 1 LAKSHMANA PADAYACHI. 2. SUPPA ASARI *v.* RAMANATHAN CHETTIAR. **27 M. 517.**
Enhancement of rent.
84 Road cess—Returns. Enhancement of rent. 30 C. 1033 col. 236 p. I.
85 Suit for—Enhancement—Grounds of exemption from—Onus. 4 C. L. J. 37. *See Bengal Act VIII of 1885 S. 50 col: 110.*
86. *Rent—Enhancement—Onus—Inamdar and Mirasidar.*

Burden of proof (*Contd*)

Where an Inamdar seeks to impose enhanced rent on a Mirasidar it lies upon him to prove that the enhanced rent is fair and equitable and such as according to the custom of the country is leviable on land of the description held by the Mirasidar. LAXUMAN JANEE *v.* KRISHNAJI ANTAJI. **9 B. L. R. 961.**

Escheat.

87. Executor of a necessary party—Local limits of the jurisdiction. Onus of proof—Suit for maintainable. 2 C. L. J. 484 Col: 1599 P. I.
88. Exparte decree—23 A 99 Col: 1433 P. I.
89. Evidence rule as to—Presumption—Can not shift the burden of proof—1 N. L. R. 169 Col: 234 P. I.

Fraud.

90. *Held*—That where a claimant under section 278 or Plaintiff in a suit under sec. 283 proves possession, section 110, Evidence Act applies and he is entitled to succeed unless the other party proves that he is not the owner or that he holds in trust for the judgment-debtor. **U. B. R. 1904 P. 1 C. P. C. P. 8.** *See Act V. of 1908 C. P. C. No. 2418.*
91. Fraudulent transfers—Barred debt—Consideration of transfer—Onus of proof of fraud—17 M. L. J. 11 Col: 584 P. 1.
92. Fraud—Limitation—1 N. L. R. 20 Col: 1873 P. I.
93. Fraud and undue influence. 8 O. C. 210 Col: 268 P. I.
94. Fraud—Proof of Knowledge for limitation—27 A. 540 Col: 1815 P. I.

Foreign Law.

95. *Laws in a foreign state—Burden of proof lies on him who alleges they are different from British laws—Presumption in absence of proof—Trustee and* cestui que trust—*Confidential relationship.*
It lies on him who asserts it to prove that the law of the foreign state differs from ours, and in the absence of such proof it must be held that no difference exists except possibly so far as the law here rests on the specific Acts of the Legislature.
Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. This applies to the case of trustee and *cestui que trust.*—RAGHUNATHJI MULCHAND *v.* YARJIWANDAS MADANJEE. **8 B. L. R. 525.**

Grant of revenue.

96 *Land Revenue Code (Act V of 1879.*

Burden of proof (*Contd.*)

Bom.), Section 83—Inamdar—*Enhancement of rent—Usage.*

A grant to an *Inamdar* may be either of the Royal share of revenue, or of the soil; but ordinarily it is of the former description. The burden rests on the *Inamdar* to show that he is an alienee of the soil.

When an *Inamdar* is an alienee only of the land revenue, then his relations towards those, who hold land within the area of the *Inam* grant, vary according to certain well-recognized conditions.

If the holding was created prior to the grant of the *Inam*, then the *Inamdar* as such can only claim land revenue or assessment; for he has no interest in the soil, in respect of which rent would be paid. If the holding is later in its origin than the *Inam* grant, *Inamdar*, even if only a grantee of revenue, would be entitled to place tenants in possession of sheri lands, not by virtue of any interest in the soil, but as being entitled to make the most he can out of them by way of revenue

The difference between the two classes of holdings is obvious; in the last direct contractual relations would be established between the *Inamdar* and the holder. If these contractual relations are defined by an express contract, of which there is evidence, then the rights of the parties must be determined by that contract. If no such contract can be proved, then the Court must have resource to the criteria prescribed by law for determining their rights.

The test whether the enhancement of rent is sanctioned by usage, is whether there has been any, and what, enhancement according to usage of the locality in respect of land of the same description held on the same tenure. RAJYA *v.* BALKRISHNA GANGADHAR. **7 B. L. R. 439.**

Hindu Law.

97 *Adoption—Joint—Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof.*

Held, that according to the law and custom prevailing amongst the Jain community, a widow has power to adopt a son to her decased husband without any special authority to that effect, and, if there are two widows, the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of *sapindar*, to give a son in adoption after the death of her husband.

Held, also, that, adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man 29 A. 495, F; 6 I. A. 15, 22 B. 416, 22 M. 398, 21 A. 460 referred to.

Held also that, where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *prima facie* case that the adoption challenged by him is invalid in law or never took place in fact 9 W. R. 463, A. W. N. (1902) 61, F; 1 I. A. 206, R. 11 W. R. 468, 12 W. R. (P. C.) 1, 21 W. R. 84, 24 W. R. 107, D. ASHARFI KUNWAR *v.* RUP CHAND, **A. W. N. (1908), 79=30 A. 197.**

98 Alienation by father—Ancestral debt 4 B. L. R. 587 Col. 2123 P. I.

99. Costom—Debt of father's incurred for immoral purposes—Sons liability for—16 C. P. L. R. 169. See Burden of proof—Bond No. 16.

100. *Disqualification from inheritance—Presumption—Leprosy continued—Arrangement when binding.*

A partition or family arrangement made in settlement of a doubtful, if not a disputed claim, by arbitrators appointed by the parties, effecting a division of the family properties and debts, and drawing up a list of them, which is signed by the parties and carried out and acted upon by them for sometime, is a valid and binding arrangement, which the parties to it cannot deny, ignore or resile from. *13 M. I. A., 497 (512); 14 M, I. A., 24 (36); 22 Bom. 482* (589), *L. R., 21 I. A. 35; S. C. 20 Cal. 373; L. R., 25 I. A., 161; S. C., 26 Cal. 81 (100); L. R, 2 Ch. App., 294 referred to.*

Per Mookerjee. J.—If parties have settled a dispute, such settlement will not be set aside, on the ground that it gave to one of the parties more than what he might possibly have recovered, if he had taken the judgment of the Court upon the matters than in difference between them. *1 C. L. J., 388 (405) referred to.*

Per Mookerjee J.—A family arrangement may be upheld although there were no rights actually in dispute at the time of making it, and the Courts will not be disposed to scan with much nicety the *quantum* of consideration. It is a mistake to suppose, that the doctrine of family arrangement extends no further than arrangements for the settlement of doubtful or disputed rights; the principle is applicable not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but also to cases in which arrangements are made between them for the preservation of its property. *L. R. 2 Ch. 294 referred to.*

The validity of a family arrangement does not depend upon the length of time for which it has been acted upon. A fair compromise of a doubtful right is in itself a sufficient foundation for the agreement. *1 Atk. 2, S. C. 1 W. and T. L. C.* 2nd Ed. *223 referred to.*

But if an attempt is made to set aside a family arrangement on the ground of mistake, inequality of position, undue influence, coercion, fraud or any similar ground, the length of time during which it has been allowed to stand unchallenged, may be a material element for consideration.

Burden of proof *(Contd.)*

The presumption of Hindu Law is against disqualification, and the burden of proof of disqualification lies on the person who seeks to exclude another, who would be an heir, should no cause of exclusion be established. *18 W. R. 375*; *21 W. R., 249*; *W. R., 348 referred to.*

Where it is contended, that a person is excluded from inheritance by reason of an incurable disease, the strictest proof of the disease will be required. *2 W. R., 125 referred to.*

The point of time with reference to which the existance or absence of disability has to be ascertained, is the time when the succession opens out.

The removal of the disability subsequent to the opening of the inheritance, does not entitle the affected person to claim the heritage from another whose title was better than his, while the defect existed, though inferior to his own after its removal: and a person, who has already taken by inheritance, does not lose the estate by a subsequent supervening disability. 6 W. R.. 78 ; 2 B. L. R., 115, (F. B.) ; 22 Cal., 864 referred to.

Leprosy, in order that it may disqualify must be of the virulent and aggravated type which is regarded as incurable L. R. 22 I. A., 94 ; S. C., 22 Cal., 1843 ; 5 Bom, H. C. A. C. J., 145 ; 1 Bom., 584 ; 19 Mad, 4 relied on HELAN DASI *v.* DURGA DAS MUNDAL. **4 C. L. J. 323.**

See for other facts col: 242 P. I,

101 *Joint family—Joint Hindu family—Liability of sons for father's debts—Defence that debts were incurred for immoral purposes—Burden of proof.*

According to the Hindu law of the Mitakshara school it is not necessary in order to establish a son's liability for his father's debt that it should be shown that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of sons to pay a personal debt of his father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge. Maharaj Singh *v.* Balwant Singh, I. L. R., 28 All., 508, distinguished. Kishan Lal *v.* Garuruddhwaja Prasad Singh, I. L. R., 21 A. 238, and Karan Singh *v.* Bhup Singh, I. L. R., 27 All., 16, followed. Nanomi Babutsin *v.* Modhun Mohun, I. L. R., 13 Cal., 21, referred to.

Where in such a case as above, the sons set up the defence that the debt was incurred for immoral purposes, the burden of proof is on them and not on the creditor. Debi Dat *v.* Jadu Rai, I. L. R., 24 All., 459, followed. Jamna *v.* Nain Suk, I. L. R., 9 All. 493, dissented from.

And merely general evidence of profligacy on the part of the father is not sufficient, Chintamanrav Mahendale *v.* Kashinath, I. L. R., 14 Bom., 320, referred to.

Burden of proof *(Contd.)*

BABU SINGH *v.* BIHARI LAL **A W N. 1905. P 212=30. A 156.**

102 *Hindu Law—Marriage—Illegal marriage—Brahman marrying a Chatri (Rajput) girl—Illegitimacy of the issue.*

Whatever may have been the case in ancient times and whatever may be the law in other parts of India, there can be no doubt that at the present day a marriage between a *Brahman* and *Chattri (Rajput)* girl is not a lawful marriage in these provinces, and the issue of such a marriage is not legitimate. BADAN KUMARI *v.* SURAJ KUMARI. **W. N. A., 1906. p. 83=3 A. L. J. 209.**

103 *Holding over—Transfer of Property Act (IV of 1882), section 116—Landlord and Tenant—Lease—Liability for rent—Heir of deceased co-tenant.*

The holding over by one or more co-tenants without the consent of the others cannot render the persons not so holding over liable for rent. 15 M. and W. 166 followed.

The plaintiff executed a lease in favour of three persons. Two of them remained in occupation of the leased premises even after the expiration of the lease. There was no assent whatsoever on the part of the third to such occupation. He died before suit. The plaintiff sued the heir of the deceased and the two surviving tenants for recovery of rent for use of the premises so occupied.

Held, that in order for the plaintiff to succeed in such a case the onus is upon him to show that on the expiration of the old lease a new contract was created by the plaintiff on the one hand and the defendants on the other making themselves severally and jointly liable to perform the conditions of the tenancy. The claim as against the third defendant was dismissed for plaintiff's failure to discharge the onus. BROJO LAL ROY *v.* R. BELCHAMBERS. **9 C. W. N. 340.**

Hundi.

104. *Immoral consideration. Plea of—Failure to prove—Co-habitation as consideration.* 13 M. L. J. 7, col. 278, P. I.

Husband and wife.

105 *Validity of arrangement for future separation—Public policy—Onus of proving that Mahomedan Law is different from English Law.*

The onus of proving that the Mahomedan Law is different from the English Law in the application of any principle of public policy (as in this case that an agreement for future separation between husband and wife is void) is on the party who avers it. MEHERALLY *v.* SAKERKHANOOBAI. **7 B. L. R. 602 at 607.**

106 Illegitimacy—Onus of proof. 27 M. 32 Cal. 233 P. I.

Burden of proof *(Contd)*

107 *Inams—Impartible estate—Presumption of impartibility—Burden of proof—Right of exclusive management by descendants of one of several grantees.*

Deshgat watan or property held as appertaining to the office of *desai* is not to be assumed *prima facie* to be impartibe. The burden of proving impartibility lies upon the *desai*, and on his failing to prove a special tenure or a family or district or local custom to that effect, the ordinary law of succession applies L. R., 7 I. A., 162 *followed*.

Held, that neither by the terms of the original grant or of the subsequent order of the Ruling power, nor by family custom nor by exclusive management on his part, one of the descendants of several grantees acquired a right to perpetual management of the *inam*, or in consequence to resist its partition. VINAYAK WAMAN JOSHI RAYARIKAR *v.* GOPAL HARI JOSHI RAYARIKAR. **5 B. L. R. 408=7 W. N. C. 409=30 I. A. 77=27 B. 353 P. C.**

108 *Insanity—Lunatic, contracts by—Lunacy not known to the other contracting party—Contract Act (IX of 1872,), Ss. 12, 30—Specific Relief Act (I of 1877), Ss. 38, 41—General presumption of insanity—Rebutal of—Expert opinion in questions of insanity—Value of expert opinion—Burden of proof in cases of insanity—General rules of estimating evidence as to insanity.*

If a party to a contract seeks to enforce a contract which is void under S. 12 of the Contract Act on account of the absence of capacity to contract in the other contracting party, it is not permissible to give equitable relief. However, statutory relief can be given under Ss 38 and 41 of the Specific Relief Act when rescission of a contract is asked for on this ground.

Where a person is not proved to be a lunatic on inquisition, it is necessary to rebut the general presumption of sanity. This can be done by proving that his mind was completely deranged so that he was incompetent to enter into any contract, or by proving that he was of unsound mind with regard to the particular transaction.

The opinion of an expert on facts proved or admitted is only relevant when the Court has to form an opinion on a point of science or art. Expert opinion even on admitted or proved facts will differ, and then the Court has to decide which opinion it will rely on. But when the facts are not admitted, the Court has first to come to a conclusion on the evidence as to what facts have been proved, and then apply to such facts the various expert opinions which have been offered. But if it is not a point of science or art, the Court or jury can form an opinion without expert evidence, though the line where there no longer remains a point of science or art on which the Court has to form an opinion is not always very clearly defined.

In a case where a contract is impugned by the defendant on the ground of his insanity, it is open to the plaintiff to rely on defendant's conduct in transacting business in general, and, in particular, in putting through the impugned transaction as evidence of capacity. On the other hand, it is open to the defendant to show that, though he was not generally incapable, he was incapable as regads the particular contract, either on the ground that he suffered from delusions which influenced the contracts in such a way that his delusion formed the foundation of the contract, or on the ground that owing to general enfeeblement of mind he did not understand the contract in question.

A man who is suffering from delusions may very well perform acts which are not influenced by such delusions, and when it is attempted to set aside a transaction entered into by a man suffering from delusions, the Court has to decide whether the delusions influenced the disposition or contract, and, if so, to what extent. MONOSSEH JACOB MONOSSEH *v.* SHAPURJI HORMUSJI HARYAR, **10 B. L. R. 1004.**

109. *Inheritance—Budhist Law—Inheritance—Question whether mere absence of joint living excludes a child or grandchild from inheritance—Necessity for filial neglect to exclude.*

The plaintiffs respondents, husband and wife, sued for a share of the inheritance left by the first plaintiff respondent, Mi Nyun's grandfather, Shan Byu, who died in 1261 B. E. First defendant appellant, Mi Taik, was the second wife and widow of Shan Byu and second defendant-appellant, Nga Te, was her son by Shan Byu. First plaintiff-respondent, Mi Myun's mother, Mi Saing, was the daughter of Shan Byu by his first wife, Mi Pe Zaung. Mi Pe Zaung died before 1231, when Mi Saing was an infant, and Mi Saing was placed on her death by Shan Byu in charge of her maternal grandmother, with whom she lived till her marriage. In 1231 Shan Byu married first defendant-appellant Mi Taik. When Mi Saing came to marriageable age Shan Byu and Mi Taik gave her in marriage. This was in 1235. In 1242 Mi Saing died leaving one daughter, plaintiff-respondent Mi Nyun, who must therefore have been at least 19 years of age when Shan Byu died in 1261. Neither Mi Saing nor Mi Nyun ever lived with Shan Byu. On this ground the Court of First Instance dismissed the plaintiffs respondedts' suit. The Lower Appellate Court reversed this decision on the grounds that Mi Saing separated from her parent as a child and Mi Nyun had presumably never been called on to exercise a reasonable choice. The question for decision was whether the mere absence of joint living excludes a child or grandchild from inheritance.

Held—that the Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion. There must be some

Burden of proof *(Contd.)*

filial neglect to exclude.

2, U. B. R., 1897-98; Buddhist Law--Inheritance, pp. 65, 61, 1.

2, U. B. R., 1892-96, pp. 159, 184, 110.

P. J., L. B., pp. 299, 170, referred to.

MA TAIK, MAUNG TE *v.* MA NYUN, MAUNG YE GYAN. **U. B. R. 1901. P. 139.** *(Budhist Law Inheritance) P. 7. (Burden of proof).*

110. *Insolvency—One creditor's claim challenged by another—Creditor to prove his claim.*

Where in insolvency proceedings a creditor's claim was challenged by another, it is for the creditor to prove his claim and not for the other to disprove it.—RAM KOMAL SAHU *v.* BANK OF BENGAL, AKYAB. **5 C. W. N. 91.**

111. *Insurance.*

The insurance company should prove that the assured's statements were incorrect 9 A. C. 671 foll.—ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED *v.* NARASIMHA CHARI. **11 M. L. J. 379; 25 M. 183.**

See for other facts Col. 167, 317.

112. *Insurance policy. Suit on, value of insured goods—Open and valued policies—Difference—Suit to recover value of goods lost—Fraud and misrepresentation–Burden of proof —Contract Act, S. 17.*

The plaintiff insured his goods through the defendant's vessel. They were lost on the way, as they had to be jettisoned on account of an accident which happened to the boat which carried the goods to the vessel in which they had to be shipped

In a suit to recover the value of such goods, the defendant alleged that the plaintiff was guilty of fraud and misrepresentation in obtaining the policies, that the goods was wilfully thrown into the sea, that the bags did not contain the goods which the plaintiffs declared that they contained, but they were filled up with articles of much inferior value, and that the boats were undermanned, etc.

It was held on the evidence:—(1) That the defendants had not discharged the burden of proving the fraud and misrepresentation which they alleged; that it was not proved that the valuation was so grossly exaggerated as to lead to the inference of fraud; (3) that there was no satisfactory evidence to show that the bags could have been saved or that the boat was undermanned, and that therefore the defendants were liable to pay the plaintiffs the damages claimed.

Held, further, that in a suit to recover the value of goods insured a mere exaggeration of the value of the property is not sufficient to avoid the policy; but, that, if the valuation was gross and excessive, fraud might be presumed.

A policy may be either open or valued, In the former case, the value of the subject-matter of the insurance is not stated in the policy and must be proved after a loss, In

Burden of proof *(Contd.)*

the latter, to prevent the necessity of proving the actual value in the event of a loss, a value agreed upon by the parties is mentioned in the policy and is conclusive between them in case of loss. G. H. DAVEY *v.* HAJI HASSIM IBRAHIM. **22 T. L. R. 99.**

113 *International law—Private International law—French citizens in British India —Marriage settlements—Domicile—Onus—Law governing immoveable property—Lex rei sitae—Code Civil Arts. 1401, 1496.*

One J. A. C. married a French woman in Calcutta. At the time of marriage there was no marriage settlement. Subsequently he executed a marriage settlement dealing with certain immoveable property in Calcutta to be held on certain trusts. Later on as the property increased in value it was sold, and the sale proceeds were invested in certain funds. In the suit brought by the trustees to have the direction of the Court as to how the trusts were to be determined, the questions arose, whether the settlor was a French citizen with a French domicile, and whether the French or English law should govern the matter.

Held, upon the evidence that the settlor was not a French citizen having domicile in France. The burden of proof lay on the persons who attacked the settlement to show that the nationality of the settlor was French.

That even if the settlor were of French domicile the fact of his having married a French woman without an antinuptial settlement did not imply that there was such a special contract as would take away the operation of ordinary rule that the *lex rei site* would govern immovable property. (1900) *2 Ch, 410 dissented from. L. R., (1900), A. C. 21 referred to.* A. L. BONNAUD *v.* ENILE CHARRIOL. **9 W. N. C 394=32 C. 631.**

114 *Joint property or self acquisition— Hindu Law—Joint family property.—Property acquired without aid of joint funds, when. to become joint property—Onus.*

The absence of any nucleus of joint property is a factor of considerable importance for the purpose of determining as a question of fact whether or not the property gained by each co-parcener was his self acquisition; for the mere fact that a family is joint does not raise the presumption that the property acquired by the members of that family is joint in the absence of family property. A property acquired without the aid of joint funds or joint exertions may become joint property by being thrown in to the common stock, but those who allege this must prove it. BHAGUBAI *v.* TUKARAM MANIKRAM. **7 B. L. R. 169.**

115 *Hindu Law Joint family property— Evidence—Onus probandi.*

To render property in the hands of the members of a joint Hindu family, joint property, the consideration for its purchase must have proceeded either out of ancestral funds or have been produced out of the joint pro-

Burden of proof *(Contd.)*

perty or by joint labour. But neither of these alternatives is matter of legal presumption. It can only be brought to the cognizance of a Court of Justice in the same way as any other fact, *viz*, by evidence. Consequently, whoever's interest it is to establish it, he must be able to produce the evidence. HEM NATH RAI *v.* JANKI RAI. **A. W. N. 1905 P. 2112=2 A. L. J. 658.**

116 *Custom—Muhammadan Law—Family custom—Succession—Right of representation—* Sufi Sayads *of Ludhiana city—Adverse possession—Permissive posesssion—Absentee—Possession on behalf of wife.*

The parties to the suit were *Sufi Sayads* of Ludhiana City. The plaintiff, uncle of the defendant, sued for declaration of his right to the property belonging to his father and grandfather of the defendant, on the ground that the defendant's father having predeceased his father, according to Muhammadan Law, the plaintiff excluded the defendant.

The plaintiff sued also for declaration of right to land belonging to his maternal uncle which he alleged was in the possession and management of his father by reason of the latter having married plaintiff's mother.

Held, (1) that it was proved that the family of the parties had long since lost sight of the elaborate rules of inheritance prescribed by Muhammadan Law under which a son excludes from inheritance the son of another son who has predeceased their father and (2) that in the absence of gift or acquisition of title by adverse possession the possession by plaintiff's father of the land belonging to plaintiff's maternal uncle must be held to have been on behalf of plaintiffs mother, and the plaintiff was entitled to the declarations sought for. *Sayad* ATA MUHAMMAD *v.* NUR-UL-HASSAN. **25 P. L. R. 1906.**

117. Joint Hindu Family Property—Presumption of jointness in Dayabhuga families—Onus 4 C. L. J. 56 See Col. 1932 P. I.

118 *Joint family—Father's power to will away joint family property—Partible property—Self-acquisition—Proof—Nucleus—Common stock.*

A Hindu father and his sons lived together, as a joint family. The onus of proving that the acquisition of a Hindu were his separate estate as distinct from the joint family estate is on the person who alleges it. There was a considerable nucleus of ancestral property in the father's hands after his partition with his brothers. The father did not discriminate between the sources of his income, but blended them all in one general account. The sons, when they became of age, gave their pay to the father and thus voluntarily threw into the common stock what they might otherwise have claimed as self-acquired.

Held, that the acquisition by the father subsequent to the partition with his brothers were his joint family property and that the father had no power to dispose of them by will. LAL BAHADUR *v.* KANHAIA LAL SIR ANDDREW SCOBLE. **11 C. W. N. 417; 9 B. L. R. 597; 4 A. L. J. 227; 34 I. A. 65; 5 C. L. J. 340; 29 A. 244; P. C.**

Land Acquisition Act.

119. Land Acquisition Act—Apportionment of compensation of money, principal of—Landlord and tenant. 28 C. 146. *See col. 857 P. I.*

120. Land Acquisition Act—Reference to court—Inadequacy of compensation. 6 C. W. N. 406. *See Col. 854 P. I.*

Landlord and Tenant.

121. Acknowledgment of relationship by payment of rent—Averse possession—Principal and Agent. 25 B. 410—Col. 365 and 1249 P. I.

122. Landlord and tenant—Suit between —Denial of liability to execute repairs. 3 A. L. J. 134—A. W. N. 1906, p. 56, col. 724, P. I.

122 (a). Enhancement of rent—Suit for—Raiyat fixed rate. 5 C. W. N. 880, col. 1419, P. I.

Ejectment.

123. *Ejectment—Landlord and tenant—Right to eject tenant from land—Onus—Presumption.*

When a tenant has been on long and peaceable occupation of land as part of an admitted tenure it lies upon the landlord in a suit for ejectment to prove in the first instance that the land is his *khas* property and not the tenent's. But the plaintiff is entitled to eject the tenant from the land admittedly included in the landlord's putni and not shown to have been in the possession of the tenant and included in his *Makurari* tenure when the landlord has promptly demurred to the defendant's act of appropriation, and has not given him ground to urge any presumption founded on previous possession.

In such cases the tenant must prove that the land was included in his holding. NAND LAL GOSWAMI *v.* JAJNESWAR HALDER. **6 W. N. C. p. 105.**

124. *Ejectment of tenant—Tenants setting up mirasi rights—Plaintiff claiming not merely inam, but also mirasi rights.*

Proof of title—In suits for ejectment the plaintiff must prove his title. Where a person claiming inam and mirasi rights over certain lands sues to eject therefrom the defendant, who claims to have mirasi rights over the same, the burden of proving the mirasi rights lies on the plaintiff. —MARUTI *v.* BANUBAI. **4 B. L. R. 801.**

125. *Landlord and Tenant—Zerait lands —Ejectment—Burden of proof.*

The plaintiffs sued for a declaration that certain lands were their *zeraits* and asked for a decree of ejectment of the defendants as trespassers. The defendants admitted the plaintiff's right as zamindars but pleaded that the lands were not *zeraits* and claimed to be in pessession thereof as raiyats under

Burden of proof (*Contd.*)

the plaintiffs. The lower appellate Court dismissed the suit on the ground that the plaintiffs had failed to prove that any portion of the land except 40 bighas was *zerait* and it was impossible to say upon the evidence where these 40 bighas proved to be *zerait* were situated.

Held (1) that the suit was wrongly dismissed inasmuch as the rights of the plaintiffs as zemindars being admitted, they were entitled to a decree unless the defendants could establish the tenancy on which they relied, (2) that the plaintiff should be given an opportunity to shew the situation of the 40 bighas proved to be *zerait*.

Held also that where the owner of land seeks to recover possession on the alligation that the party in possession had no right to continue in it and his title to possession is proved or admitted, he can claim a decree unless the party in possession proves the existence of a tenancy which entitles him to retain possession. The suit was remanded for a determination on the question of tenancy.—NARSING NARAIN SINGH *v.* DHARAM THAKUR, **9 C W N 144.**

126 *Landlord and tenant—Lakheraj.—Onus upon Landlord—Village pasturage, effect of.*

When a landlord sues for possession of land lying within the ambit of his estate on the ground that it is his *mal* and not *lakheraj* of the defendants, the burden of proof is upon the plaintiff landlord to show that the land is rent-paying. Hari Har *v.* Madhub Chunder (8 B. L. R. 566), followed. Where possession for a long time by the defendant is admitted to be undisturbed, the plaintiff must give affirmative proof of the land being part of his decennially settled estate. The use of the land for the purpose of grazing cattle cannot, in itself, be evidence of right in the defendants or in the villagers, but it raises a presumption in favour of the plaintiffs.—SHEIKH MILAN *v.* MOHEMED ALI. **10 C W N 434.**

127. Mitta—*Sale for arrears of revenue—Purchase by Government—Restoration to previous Zemindar's son—Grantee's rights and easements of necessity—Water-supply through Government source—Grantee not paying for it—Burden of proof.*

A *Mitta* was sold for arrears of revenue in 1836 and was purchased by Government but was "restored" again in 1859 under a permanent *sannad* to the son of the previous *Zemindar*.

Held, that in the absence of a special contract to the contrary the law will imply that this restoration or grant carried with it all the rights of water and other easements of necessity which existed at the time of restoration or grant. 2 *Mad.* 46 ; 37 *R. R.* 655 *followed.*

The grantee was entitled to the customary supply to his tanks and when the water

Burden of proof (*Contd.*)

arrived in his tanks he could do what he liked with it 24, Mad. 279, *referred to.*

This right is not at all inconsistent with the common law rights claimed by Government to the water flowing in all natural channels.

Where the source of water belonged to Government and the Government carried out improvements to the source of the supply :—

Held, that the grantee, by virtue of his engagements with the Government, was entitled to a certain supply of water without paying for it, but the burden of proving the extent to which he was entitled lay on him, and if he failed to sustain this burden, his suit for restraining the Government from levying water cess for second crop cultivation and for refund of the water cess collected must be dismissed. MARIA SUSAI MUDALIAR *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **14 M. L. J. 350.**

128 *Landlord and Tenant—Land Tenure—"Mokhassadars"—Distinction between outright grant subject to performance of services and grant of an office with remuneration from use of lands—*Prima facie *ownership—Burden of proof of right to eject or resist ejectment.*

The tenure known as "mokhassa" is one which is created by an assignment of a village or land to an individual either rent-free or at a law quit-rent on condition of service. Where the grantor of land on *mokhassa* tenure has made the grant as payment for services in lieu of money,

Semble, that he may discontinue the employment and, with it the remuneration and resume the subject-matter of the grant. But where the grant was outright, subject only to the performance of certain services, the grantor is only entitled to insist upon the performance of the services, and is not entitled to eject the grantees until such performance is refused. Where the lands granted were the lands of the zemindar and the grant was on the condition that services should be rendered, and that a certain sum should be payable to the zemindar in recognition of his ownership *prima facie* the ownership would remain with the zemindar; *Sanniyasi* v. *Salur Zemindar*, (I. L. R., 7 Mad., 268) ; and the burden of proving the plea that the plaintiff was not entitled to eject would lie on the person resisting ejectment; *Mahadevi* v. *Vikrama*, (I. L. R., 14 Mad., 365), referred to. A village was granted on a quit-rent of Rs. 144 per annum and on condition that the grantees would provide the services of certain persons to act as custodians of the zemindar's property and to give personal attendance on the zemindar. These services were rendered intermittently and not continuously, and *batta* was paid to the grantees when on duty. The quit-rent had never been varied throughout a period of 120 years, and the land de-

Burden of proof *(Contd.)*

scended hereditarily from father to son, there having been no instance of resumption during that period. Moreover, the present holder of the zemindari had taken leases from the *mokhassadars* as if they were the owners of the land, and had purchased other lands from them.

Held, that the village had been granted in perpetuity to the *mokhassadars* and that the present holder of the zemindari was not entitled to dispense with the services and resume the lands. *Forbes* v. *Meer Mahomed Tuquee*, (13 M. I. A. 438 at p. 464) and *Kooldeep Narain Singh* v. *The Government*, (14 M. I. A., 247), followed. SRI RAJAH SOBHANADRI APPA RAO BAHADUR *v.* SRI RAJAH VENKATANARDSIMHA APPA RAO BAHADUR. **26 M. 403.**

129. *Landlord and Tenant—Ejectment—Presumption as to tenancy being permanent—Long continuous possession on payment of unchanged rent—Transfers of holding and erection of buildings on it—Recognition by landlord of transfer of holding—Surrender by tenant—Construction of pottah and kabulyat.*

Suit for ejectment in which the defendant claimed a permanent tenure in the land in dispute, basing his title upon a series of transmissions of it by sale or mortgage which went as far back as 1852, each transmission purporting to be of a permanent inheritable right, and upon the continuous possession of his predecessors in title at an unchanged rent. The plaintiff, who was a lessee of the land under the Matwali of the Hooghly Imambara, alleged that the defendant was merely a tenant at-will, and that the transmissions were not recognized by his predecessors in title and were not binding on him, and relied on a *pottah* and *kabuliat* granted to the defendant by the Matwali in 1852 as being the origin of the defendant's holding, contending that on the construction of those documents, there was at the date of them an "istifa," or surrender, of the land to the landlord by the former tenant. No document of surrender was produced:

Held, (reversing the decision of the High Court), that on the true construction of the *pottah* and *kabuliat* which referred to a deed of sale to the defendant's predecessor of the same date and spoke of the *jumma* as "according to former custom and practice") no more was implied than that the seller acknowledged that he had parted with the land No inference of a surrender by the tenant could be made from them, but they attested the landlord's recognition of the transmission of the property by an instrument purporting to convey a permanent inheritable right, and taken with the other facts of the case, they established the defendant's title. In such cases, the question is whether the true inference from the facts in that the tenure is permanent or precarious, the burden of

Burden of proof *(Contd.)*

proof being on the tenant. See *Upendra Krishna Mandal* v. *Ismail Khan Mahomed*, (I. L. R., 32 Cal. 41).—NILRATAN MANDAL *v.* ISMAIL MAHOMED. **32 C. 51; P. C.**

130. *Tenancy Act—Sir land—Ejectment suit—Burden of proof.*

As, under the Tenancy Act, a landlord has a right to eject a tenant, whose holding consists entirely of *Sir* land, the burden of proving the existences of a special contract, under which he is entitled to resist ejectment, lies on the tenant. KESHEO RAO *v.* POORAN BARAI, **1 N. L. R. 32.**

131. *Rent Recovery Act (VIII of 1865, Madras), Section 14—Demand by landlord of rent in excess of what was due—Sale of tenancy.*

When a sale of the tenant's interest in certain land was held at the instance of the landlord by reason of the tenant's non compliance with the landlord's demand of rent, which was for an amount in excess of what was actully due—

Held, that the sale was illegal. PICHUVAYENGAR *v.* G. T. OLIVER. **26 M. 260.**

See also 30 C. 1. Col. 235 and 13 M. L. J. 479.

132. Non-payment of rent—Occupancy rayat—Revenue Sale—Burden of Proof 10 C. W. N. 497. See Bengal Act XI of 1859 No. 41.

133. *Payment of rent—Landlord and Tenant—Ejectment—Permanent tenure—Hereditary right—Presumption—Burden of Proof.*

In a suit for ejectment, the following facts were found, *viz*, the possession of the holding at a uniform rent for some 100 years; the property descending from father to son; various transfers, many of them recognised by the landlord; the erection of pucca buildings; improvements at much cost, and all this with the knowledge of the landlords' agents—and no attempt to eject or to enhance the rent of these years.

Held, that all these facts are sufficient to raise the presumption of permanency and hereditary character of the holding. In the absence of words importing it, the hereditary character of the tenure may be supplied by evidence of long and uninterrupted enjoyment and of the descent of the tenure from father to son.

Held, also, that when a permanent tenancy is transferred and the purchaser accepts a mutation *pattah* containing nothing, in express terms, to indicate the permanency of the holding, such *pattah* cannot have the effect of converting permanent tenancy into a tenancy-at-will.

Held, further, that in an ejectment-suit, the onus of proving the permanency of the tenure is on the defendant alleging it. ISMAIL KHAN MAHOMED *v.* AGHORE NATH MUKHERJEE. **7 C. W. N. 734.**

Burden of proof *(Contd.)*

134. Payment of rent. 26 B. 410, col. 365 and 1241 P. I.

Legitimacy.

135. Marriage—Continuance of—Presumption—Divorce—Burden of proof—7 B. L. R. 95, col. 232 P. I.

136. Presumption as to paternity of child born after death of husband—*Onus*—25 A. 403 P. C., col. 232 P. I.

137. *Illegitimacy, proved—Presumption—Divorce—Repudiation—Exact words, proof of, if necessary—*Wakf *of moveable property—Government-security—Trust-property, appropriation of, if renders secular—Deposition of witness.*

The law presumes that a child born to a wife is the husband's offspring and it is for the party who alleges illegitimacy, to rebut the presumption by proof of non-access.

In order to establish a divorce by a Mahomedan husband of his wife by evidence of repudiation, it is of vital importance to prove the exact words used by the husband in the repudiation and, in the absence of such proof, it is impossible for a Court to conclude that there was a repudiation or that, if there was any, it was of binding effect.

Under the *Hanifi Law*, the *wakf* of Government Securities, shares in Companies, Debentures and other stock is perfectly legal and valid. 9 C. L. R. 66, diss.

The property of a valid trust does not become secular by appropriation among the trustees, who are entitled to retain under their control the whole of the trust-property. SAKINA KHANUM *v.* LADDAN SAHEBA. **2 C. L. J. 218.**

See for other facts col. 109 P. I.

138 *Evidence—Burden of proof—Alienation by a Hindu widow, suit by reversioner to set aside—Legitimacy of the last male owner—Construction—meaning of ' Zouja ' and ' Bai '—Statement made by the pleader in the absence of client—Deposition on oath.*

In a suit brought by the reversioner of the last male owner to set aside an alienation made by the widow, the defence taken was that the last male owner was illegitimate. The Court found that the burden of proof of legitimacy was upon the defendant. It was *held* that the presumption under the Evidence Act was in favour of legitimacy and marriage and hence the burden of proof of the illegitimacy was upon the plaintiff. In a document, executed by the senior wife of the father of the last male owner, by virtue of which possession was given to the latter; she described herself as his "zouja" and the second wife Sujan Bai, the mother of the last male owner, a 'zouja sani.' It was *held* that the word 'zouja' means, even without the word 'mankuha,' a wife and the word 'Bai' a suffix to the name Sujan, a lady mistress, and a wife and not a prostitute. A statement made by a pleader without proper instruction, in the absence of his client, when questioned by the Court under s. 117 of the Civil Procedure Code, should not be considered to be a deposition on oath. KALIAN SINGH *v.* MAHARAJI. **A W N 1905 p. 214.**

139 Presumption as to paternity of child born after death of husband. Non-access proof—Illness of husband rendering act of begetting a child improbable. 29 C. 111 (P. C.) Col. 231 P. I.

Limitation Act.

140 Limitation Act S. 26—Right of way—User as of right—Onus of proving user. SHAIKH KHUDU BUKSH *v.* SHAIKH TAJUDDIN. **8 C W N 359.**

See Easement of water.

141 Limitation Act 127—Suit by one of three widows against her two co-widows for partition of widows estate in their late husband's property—Proof of unchastity on part of plaintiff during widowhood. No ground for refusal. 24 M. 441 P. I.

142 Limitation Act Art. 139 and 144—Landlord and tenant—Ejectment—Adverse possession—Pay by tenant of adverse possession. 26 B. 442 Col. 1950 P. I.

143 Limitation Act Art. 141—Suit by reversioner for possession of immoveable property on death of Hindu widow—Burden of proof—Time of death of widow. 14 M. L. J. 464 Col. 1955 P. I.

144 Limitation Act Art. 142—Adverse possession—Title—Suit for possession of alluvial land. 28 A 760 Col. 1958 P. I.

145 Limitation Act Art. 142—Adverse possession—Burden of proof. 8 B. L. R. 400—15 M. L. J. 272 P. C. Col. 1959 P. I.

146 Limitation Act Art. 142—Date of dispossession—Burden of proof. 59 P. L. R. 1901 Col. 1960 P. I.

147 Limitation Act Art. 142, 144—Adverse possession—Onus—Tenants in common. 5 B. L. R. 742 Col. 1966 P. I.

148 Limitation Act Art. 136, 144—Meaning of the words out of possession in Art. 136—Suit governed by Art. 144—Burden of proof on defendant in. 2 N. L. R. 32 Col. 1946 P. I.

Mahant, purchase by—

149 Mahant, purchase by—Rectification of register—Hindu Law—Property held by head of *Mutt*—Presumption. 26 M. 79. *See Cols 237, 744 P. I.*

Mahomedan Law, adoption in.

150 Mahomedan Law, adoption in. 3 P. R 1905. *See Burden of proof—Adoption No. 10.*

Malicious Prosecution

151 *Malicious prosecution—Reasonable and probable cause—Burden of proof—Conviction*

Burden of proof *(Contd)*

of plaintiff by Magistrate and acquittal on appeal.

Where the plaintiff was convicted of an offence at the instance of the defendant and acquitted on appeal, and he sued the defendant for compensation for malicious prosecution—

Held, that the *onus* cast by law on the plaintiff was specially heavy, and he must show that the original conviction proceeded on evidence known to the complainant to be false or was due to the wilful suppression by him of material information. KONA THIMMA REDDI *v.* BATHINI CHENNA REDDI. **16 M L J 18.**

152 *Malicious prosecution—Malice in law—Reasonable and probable cause—Burden of proof.*

To report to the Police in good faith even mistakenly cannot involve legal malice unless gross carelessness be an ingredient in the proceeding.

In a suit for compensation for malicious prosecution, it does not rest entirely on the accuser (defendant) to rebut the *prima facie* evidence arising from the finding of Criminal Court in favour of accused (plaintiff) by showing that he had reasonable and probable cause. The judgment of the Criminal Court is admissible in the suit as a relevant fact. 1. C. W. N., p. 537, referred to. FEROZSHAH DOSSABHOY DARRAH *v.* J. W. WOUTERSZ. **60 P R 1902=73 P L R 1902.**

153 *Malicious prosecution—Burden of proof—Reasonable and probable cause.*

In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made. Order of dismissal of the charge is not sufficient to prove its falsity. L. R. 11, Q. B. D. 440 and L. R. 11 App. Case 247, referred to. NALLIAPPA GOUNDAN *v.* KALLAPPA GOUNDAN. **24 M. 59.**

154 *Appeal to Privy Council—Civil Procedure Code (Act XIV of 1882) s. 600—Certificate that appeal to the Privy Council involves a question of law—Malicious prosecution—Questions of malice and reasonable and probable cause—Concurrent findings of Lower Courts.*

In an action for malicious prosecution in which the plaintiff claimed Rs. 3,00,000 as damages, the Court of first instance dismissed the suit, holding that the plaintiff had not proved either the existence of malice or the absence of reasonable and probable cause. The plaintiff appealed and the appellate Court dismissed the appeal on the same ground, and on appeal to the Privy Council, their lordship also held that both as regards malice and the absence or reasonable and probable cause, the plaintiff had failed to discharge the burden of proof which lay upon him. The case came before the Privy Council, on a certificate granted

Burden of proof *(Contd)*

by the High Court of Bombay that the appeal involved a substantial question of law. It appeared to their Lordships of the Privy Council that this certificate must have been granted under a misapprehension. The only question involved was a question of fact on which there were concurrent findings. According to English Law, it is for the Judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts. The judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried without a jury, there is really nothing but a question of fact, and a question of fact to be determined by one and the same person. PESTONJI M. MODY *v.* QUEEN INSURANCE CO., **25 B., 332.**

155 *Malicious Prosecution—Onus of proof—Innocence—Reasonable and probable cause—Malice—Judge of law and facts.*

In a suit for malicious prosecution, in order to enable the plaintiff to succeed he must prove, first, that he was innocent of the charge brought against him; secondly, that the defendant acted without reasonale and probable cause in instituting the prosecution; and thirdly, he must satisfy the Court that the defendant was actuated by feelings of malice in the course which he took. The question of reasonable and probable cause is, if the case is tried by a Judge with a jury, a question for the Judge and not for the jury: but in India, where there is no jury, the Judge becomes himself the Judge of the law and the facts. Pestonji Mody *v.* The Queen Insurance Company (I. L. R. 25 Bom., 332), referred to. HARISH CHUNDER NEOGY *v.* NISHI KANTA BANERJEE, **28 C., 591.**

156 *Malicious Prosecution—Malicious arrest, action for—Not maintainable when arrest order by officer invested with discretionary power, before whom the full facts were placed by the defendant.*

An action for malicious arrest is not sustainable, when the defendant has placed all the facts before the officer having the discretionary power to order such arrest and when such officer with full knowledge of all the facts exercised his discretion and ordered the arrest. In an action for false imprisonment, the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause, whereas, in an action for malicious prosecution, the plaintiff must allege and prove affirmatively its non-existence. THAKDI HAJJI *v.* BUDRUDIN SAIB, **29 M. 208.**

157 *Search—Suit for damages for malicious search proving dishonesty and "mala fides."*

The decision of a suit for damages for malicious search turns upon two questions, first, was the defendant acting in the discharge of some duty which the law recognised

Burden of proof *(Contd.)*

when he searched the plaintiff's house, second, if he was, did the defendant act dishonestly and was he prompted by a desire to injure the plaintiff. NARASIMHA SHANKAR *v.* IMAM. **5 B. L. R. 667=27 B. 590.**

Marriage.

158 Marriage—Contract—Pan money paid —Suit for money paid and damages—Public policy—Onus. 1 C. L. J. 261 Col. 319 P. I.

159 *Marriage—Lapse of time.*

It is for the person who alleges his legitimacy to bring forward satisfactory evidence in support of the alleged marriage.

Held, also, that in the particular case before their Lordships, making all due allowance for the difficulties occasioned by lapse of time and the deaths of persons who might have thrown light upon the question, their Lordships were unable to hold that the marriage was proved. AMJAD ALI KHAN *v.* NAWAB ALI KHAN. (LORD MACNAGHTEN). **5 C. L. J. 9 B. L. R. 264 P. C.**

Mesne profits.

160 *Mesne profits—Suit for—Onus of proof —Existence and extent of right.*

In a suit for mesne profits as in other cases it is incumbent on the plaintiff to establish not only the existence of his rights, but also the extent of it. ISHAN CHANDRA BUDHAN *v.* AMUDDIN MIA. **5 C. W. N. 720.**

Minority.

161 Compromise on behalf of minor of execution proceedings—Sanction of Court—Power to revoke. 3 B. L. R. 665—26 B. 109 Col. 1621 P. I.

162 Missing heir—Succession—Grand children by predeceased son—Presumption of death of missing person—Onus. 33 C. 173 P. C. Col. 227 P. I.

Mortgage.

163. Attestation, valid of—Evidence—Onus —'Omnie rite essoacta—Foreclosure suit—2 N. L. R. 10 Col. 608 P. I.

164. *Consideration—Denial of execution and passing of consideration by third party.*

If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove the recitals as to the payment of consideration for the deed which he executed are untrue. When it is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage the *onus* is upon the mortgagee to prove his case. 6 C. 268; 17 A. 428; 5 C. W. N. 403; 5 C. L. J. 653 ref. to. 3 C. W. N. cccxxiv diss. from. BISHESWAR DYAL *v.* HARBANS SAHAY. **6 C. L. J. 659.**

Burden of proof *(Contd.)*

165. *Burden of proof—Fraudulent Mortgage.*

In a suit by a mortgagee upon his mortgage against the mortgagors and the auction-purchasers who had purchased the mortgaged property in execution of a decree against the mortgagors, *held* the burden of proving that the mortgage subject of the suit was genuine and not fraudulent lay on the mortgagee. 6 Cal., 268, 24 Cal. 62 referred to. SHIB NARAIN PAHARI *v.* SHANKAR PANIGRAHI. **5 W. N. C. P. 403.**

166. *Mortgage — Redemption — Subsequent money bonds—Provision as to the payment of the bonds before redemption—Clogging the equity of redemption—Once a mortgage always a mortgage and nothing but a mortgage.*

In the year 1869, the plaintiff's deceased father mortgaged his lands with possession to the defendant's deceased father under two mortgage-deeds, and in the year 1852, the plaintiff passed two money bonds to the defendant's deceased father, which contained a clause providing that the amount due on the mortgages should not be paid in redemption of the property unless that which was due on the money bonds was also paid. The plaintiff having filed a suit to redeem the lands, the defendants objected to the redemption under the above clause.

Held, that the said clause had the effect of clogging the equity of redemption and was void. RAJMAL SHIVAJI. **27 B. 154.**

166 *(a) Mortgage—Registration—Property comprised in mortgage, non-existence of—Onus of proof.*

In a suit to enforce a mortgage bond which was registered in the Sealdah Registry, on the ground that one of the properties mortgaged was in the Sealdah district, the defendant set up the defence that inasmuch as there was no such property in existence in the Sealdah district, the registration of the mortgage was bad, and the deed as a mortgage had no efficacy in law.

Held that the onus was on the defendant to show with every clearness that no property in the Sealdah district had been comprised in the mortgage. JOGINI MOHAN CHATTERJI *v.* BHOOT NATH GHOSAL. **31 C. 146.**

167 *Mortgage by widow—Legal necessity, proof of—Lapse of time—Quantum of proof.*

Lapse of time is an element of consideration; it may absolve the mortgagee from the high standard of proof that would be required in relation to a recent transaction; but it cannot dispense with the necessity for some poof, or create a bar to redemption on payment of all that is legally due. SUBANRAO *v.* VINAYAK. **4 B. L. R. 455.**

Mortgage or Sale.

168. *Mortgage or sale—Burden of proof.*

Plaintiff-respondent sued defendant-appellant for the recovery of a piece of land

Burden of proof (*Contd.*)

which he had mortgaged to her 13 years before. Defendant admitted the mortgage, but contended that it had been converted into a sale one year afterwards. Of this she produced no evidence except a map showing her name as the owner.

Held, following the ruling in *Maung Po Te* v. *Maung Kyaw*, 1 L. B. R., 215, that the burden of proof was on defendant and that she had failed to discharge it. *Ma U Yit* v. *Po Su* (1902), 8 B. L. R. 189, distinguished. *Ko Po Win* v. *U. Pe*, Civil Regular Appeal No. 42 of 1901 (unreported) referred to. MA DAN DA *v.* KYAW ZAN. **8 L. B. R. 1905, P. 5.**

169. Mutation of names in Revenue Register IX—"Payatpaing" admissibility in evidence—30 L. B. R. 1906, p. 250, col. 247, P. I.

170. *Suit for redemption—Plea of sale—Possession of thirty years, presumption from—Evidence Act S. 110.*

Where the plaintiff sues for the redemption of a mortgage, and the defendant denies the mortgage and alleges that he is in possession of the property under a sale, and where it was found that the defendant's possession extended over thirty years, it was held

(1) that such possession was *prima facie* evidence of ownership (S. 110 of the Evidence Act);

(2) that the burden of proving the mortgage lay on the plaintiff, and that, as such burden was not discharged, the plaintiff was not entitled to a decree. KANAKKU SAVARIMUTHU *v.* AUNDIPERUMAL GOPALA KRISHNAN. **22 T. L. R. 89.**

171. *Mortgage and sale of ancestral properties—Burden of proof in either case as to validity of, against interest of other members of the family.*

In the case of alienation by mortgage, by a mitakshara father or karnavan of a Malabar Tarwad, the sons should prove the illegality or immorality of the specific debt, or the non-existence of the debt (*i. e.*, absence of consideration), and unless this is proved no relief could be given them against attachment of the family property by the creditor. But in the case of sale and assignment of mortgage security, it is the alienee that should prove the purpose for which the alienation becomes binding on the sons or that it was with the son's consent.

Held, also, that the debtors of the family had the right to pay mortgage moneys due by them to the father and obtain release. SIVAJNANAM PILLAI *v.* ARUMUKAM PILLAI SIVAJNANAM PILLAI. **23 T. L. R. 8.**

Negligence of Railway Company

172. Responsibility of a Railway Company in the care of passengers—Negligence. 28 C. 401, col. 822 P. I.

173. *Hindu Law—Widow in posesssion of deceased husband's property ousted by adopted son—Mesne profits—Maintenance—Set off—Sums expended on funeral ceremonies of late owner.*

A Hindu widow, who had been for some years in possession of the immoveable property of her deceased husband, was ousted by a claimant who proved his title as adopted son of the said deceased husband, and a decree for mesne profits was given against the widow.

Held, on appeal in execution of the decree for mesne profits; (1) that in absence of evidence of negligence, the decree-holder was entitled only to the rents actually collected; (2) that the widow was entitled to set off her claim for maintenance, which was to be fixed with due regard to the extent of the property and the social position of the widow; and (3) that the widow was entitled to set off such reasonable amounts as might have been expended by her on the funeral ceremonies of her late husband, which the adopted son would otherwise have been bound to perform. Sreemuty Nittokissoree Dossee *v.* Jogendro Nauth Mullick, (L. R., 5 I. A. 55 referred to.) DALEL KUNWAR *v.* AMBIKA PALTAP SINGH. **25 A. 266.**

174 It was not proved that Nepal came within the definition of India where a commission could be issued for the statement of a witness. SINGBIR LAMA *v.* THE EMPEROR. **7 C. W. N. 735 Cr.**

Negotiable Instrument Act.

175 Notice of dishonor—Forbearance to sue acceptor—Effect against drawer—26 M. 239—*See Col. 538 P. 1.*

176 *Negotiable instrument—Hundi—Suit by one of two joint endorsees of hundi for declaration that half the consideration was payable to himself—Allegation of grant in writing the endorsement made by the other joint endorsee.*

One Mathura, as the payee of a hundi, endorsed it over to Hira Lal and Ganga Baksh. Hira Lal and Ganga Baksh in turn endorsed the *hundi* in favour of Keshal Deo. Keshal Deo paid half the money due on the *hundi* to Ganga Baksh, but refused to pay the other half to Hira Lal without the consent of Ganga Baksh. Hira Lal accordingly sued Ganga Baksh and Keshal Deo, claiming a declaration that he was entitled to the other half of the money due on the *hundi*. Ganga Baksh set up a defence that the joint endorsement had been made fraudulently and that he alone was really entitled to the whole of the money.

Held, that under the circumstances of the case, especially as Ganga Baksh had joined in endorsing the *hundi* over to Keshal Deo, it was for Ganga Baksh to prove affirmatively the fraud set up by him and not for Hira Lal to show that no fraud had been committed. HIRA LAL *v.* GANGA BAKSH. **1904 A. W. N. 17.**

Burden of proof *(Contd.)*

Notice

177 Priority—Notice—Onus to prove. 25 M. 1 col. 490 P. I.

178 Notice to quit—Objection as to want of notice to quit—Second appeal—Ejectment suit. 26 B. 360 Col. 1255 P. I.

179 Notice of dishonor to drawer where drawee has failed to accept—Acceptance of *hundi* as conditional or absolute payment. 13 M. L. J. 252—26 M. 526 col. 543.

Note.—For 26 M. 252 read 26 M. 526.

180 *Land purchased from ostensible owners—Claim to recover—Proof of purchase with notice.*

Where plaintiffs had, by giving possession and reporting to the thugyi years previously that they had sold the land outright to the first defendant, put him in the position of ostensible owner of the property, and first defendant in turn put the second and third defendants in the position of ostensible owners.

Held, that plaintiffs in claiming to recover from persons who had brought from the ostensible owners were bound to allege that those persons brought with notice, actual or constructive, that the land was not the absolute property of the ostensible owners, and to fix them with knowledge of this. U TO AND ANOTHER *v.* R. M. S. MEYAPPA CHETTY AND FOUR OTHERS. **1 L. B. R. 1900-1902 P. 107.**

181 *Objection heard of for the first time—Authority.*

Although it is no ground for holding that an objection has no force merely because one of the kind has never been heard of before, it lies on the objector to substantiate his objection by some authority. EZRA *v.* THE SECRETARY OF STATE. **7 C. W. N. 249; 30 C. 36 at 73.**

See for other facts Col. 840 P. I.

182 *Landlord and tenant—Ejectment suit—Permanent tenancy—Recognition by landlord—Evidence—Presumption.*

The plaintiff, a mutwalli, alleged that the defendants were his tenants-at will and sought to eject them. The land had been occupied by the defendant's predecessors at an unaltered rent for 100 years, although its saleable value had increased from Rs. 300 to Rs. 3,000; they had built on it and had dealt with it, in its earlier and in its enhanced value, by sale and mortgage. In 1852 a patta and a kabuliyat of the land in question were exchanged between the then mutwalli and the purchaser of tenant's rights who was predecessor of the defendants. In the kabuliyat and relative patta mention was made of a piece of land being taken off for a road and that there was to be no claim to abatement of rent on this account. The patta provided that jumma would be paid according to former custom and practice and the mutwalli stated that the transaction would be operating as long as his authority would last.

Burden of proof *(Contd).*

Held, that the defendants had made out their case. The patta and the kabuliyat negatived the plaintiff's case for they recognized the sale of tenants' rights at unaltered rent. NILRATAN MANDAL *v.* ISMAIL KHAN MAHOMED. **8 C. W. N. 895=32 C. 51.**

183 Occupancy right—Lessor and Lessee—Adverse possession—Non-payment of rent, if creates adverse possession—25 M. 507 Col. 1948 P. I.

184 Ownership of alluvial land Accretion—River tidal or non-tidal—27 A. 665 P. C. Col. 2142 P. I.

Parda-nashin Lady.

185 Parda nashin lady or woman—Execution of bond by—Undue influence—Consideration—Burden of proof—Issue. Omission to frame—77 P. R. 1903 Col. 261 P. I.

186 *Proof—Execution of mortgage-deed by a* parda-nashin *lady.*

The Privy Council affirmed the judgment of the High Court, which had dismissed the plaintiff's suit on a mortgage-deed against illiterate *parda-nashin* lady on the ground that it was not proved that the executant understood the effects of the deed. It was found that she was not liable for any of the debts secured by the deed until she made herself liable for no apparent reason. ANNODA MOHUN ROY CHOWDHURY *v.* BHUBAN MOHINI DEBI. **V. W. N., C., 1901, p. 489=28 C. 546 (P. C.).**

187 *Parda-nashin lady. Deed executed by*—Onus.

In the case of deeds and powers executed by *parda-nashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who executed them. MUSSAMMAT SHAMBATI KOERI *v.* MUSSAMMAT JAGO BIBI. **4 B. L. R., 444=6 C. W. N., 682 (P. C.).**

188 *Impartible estate—Hindu Law—Mitakshara—Survivorship—Grant—Devolution of—Construction of—Restoration of grant with altered conditions.*

When impartible property passes by survivorship from one line to another it devolves not necessarily on the co-parcener nearest in blood but on the nearest coparcener of the senior line—4 Mad., 250, 17 Mad., 316, *followed.*

Held, upon evidence, that the *playama* was up to 1765 held by one member of the family only not being subject to the ordinary rule of Hindu Law.

Held, upon the construction of the *sannad* of grant, that there was nothing in the terms of the *sannad* to justify the idea that any thing beyond a settlement was in contemplation. The operative part of the instrument beginning with the third paragraph merely declared the permanent annual *jamma* which had been fixed on the *zamindari*.

From the grant and the altered terms on which it was made it did not appear

Burden of proof *(Contd)*

that there was any intention on the part of Government to alter the impartible character of the estate.—*11 Mad., 385; 14 Mad., 244; L. R., 5 I. A., 310, 2 Mad., 128. 11 M. L. J., 29, referred to.* KACHI YURA OODAYAR *v.* KACHI KALIYANA OODAYAR M. L. J., 1901, P. 192.=24 M. 562.

Partition.

189 Hindu law—Dayabhaga—Joint family—Presumption of joint property.

The presumption of law that, while a Hindu family remains joint, all property including acquisitions made in the name of individual members is joint property does not apply to the case of a joint family governed by the *Dayabhaga*.

In a suit by the plaintiff against his brother by right of inheritance from father it appeared that a certain property was acquired during the lifetime of their father in the name of the defendant who remained in exclusive possession of it.

Held, that the *onus* of proving that the property was the property of the father lay on the plaintiff. SARADA PROSAD RAY *v.* MAHANANDA RAY. 31 C. 448.

190 *Partition of ancestral estate—Mortgage—Allegations regarding subsequent loans on mortgage and bogus partition—Burden of proof.* U. B. R. 1901, P. 3, (Burden of proof), P. 35 (Limitation), col. 1978, P. I. patni sale.

191 *Putni sale—Suit by purchaser—Suit for possession—Land within putni area—Mal or lakheraj.*

When a purchaser at a *putni* sale proves his purchase and on his applying for possession is resisted by persons holding lands included within the ambit of the *putni* tenure, who sets up the defence that the lands held by them are *lakheraj* and not *mal*, it is for the defendants to prove that the lands have been held not under the *putni* tenure, but as *lakheraj*. 14 M. I. A. 152 *distinguished.* SASHI BHUSAN BAKSHI *v.* MAHOMED MATAIN. 4 C. L. J. 548.

192 *Sale of patni—Publication of.*

In the case of a sale of putni taluk the burden of proof is on the zemindar to establish that there was a proper publication of the notice of sale. SHEO RATAN SINGH *v.* NET LAL SAHU. 6 C. W. N. 688.

The fact that the lessee had notice that the property she was acquiring was debutter property does not preclude the lessee from being regarded as a purchaser within the meaning of article 134, schedule II of the Limitation Act, and an "assign for valuable consideration," within the meaning of S. 10 of the Limitation Act.

Under section 10 of the Limitation Act, time is no bar to an action against the trustee himself, his representatives or assigns, except an assign for valuable consideration, but as regards the latter the period of 12 years from the date of the purchase is to be the period within which suit must be brought. 2 C. L. J. 546 (552), referred to.

Burden of proof *(Contd.)*

A permanent lease including "all rights of various kinds" with the exception only of the homestead, includes the minerals.

Having regard to the proviso of section 53 of the Code of Civil Procedure, an amendment of the plaint a year or more after the institution of the suit and inconsistent with the original claim is improper and should not be allowed.

193 *Permanent settlement—Suit of possession—Reformation—Accretion—Regulation XI of 1825, Section 4, cl. (3)—Accession, meaning of—Government, rights of, if different from that of private owner—Submersion—Continuing presumption of—Case not made in the plaint, if open to plaintiff—Adverse possession—Maps Thak and Survey, effect of—Presumption—Onus of proof of lands existent at the permanent Settlement—Abandonment of submerged land, proof of.*

The state of things described in the Thak and Survey maps cannot be presumed to have existed at the time of the Permanent Settlement.

The question what lands were included in the Permanent Settlement is a question of fact and not of law, which may or may not be satisfactorily proved by subsequent Survey maps.

The *onus* of proving that any particular lands were included in the Permanent Settlement of 1793 is clearly on those who affirm that such was the case and the burden of proof is not necessarily shifted by the production of the Thak and Survey maps showing that specific lands are included in a particular estate.

The Thak and Survey maps are valuable evidence of the state of things at the time they are made, but it does not follow that they show conclusively what was the state of things at the time of the Permanent Settlement. 30 *Cal* 291 *followed.*

Where no case of acquisition of title by adverse possession was made in the plaint, nor was the question raised directly or indirectly in any of the issues, the plaintiff ought not to be allowed to succeed upon such a case which was not made in the plaint. 8 *Cal.* 975, *referred to.* 14 *Cal.* 592. *cited.*

To prove title to land by adverse possession, it is not sufficient to show that some acts of possession have been done for the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. 27 *Cal.* 943 *followed.*

The doctrine of constructive possession applies only in favour of a rightful owner and must not, as a rule, be extended in favour of wrong doer, whose possession must be confined to land of which he is actually in possession 27 *Cal.* 221, 24 *Cal.* 256, *referred to and followed 29 Cal. 518 referred to.*

Where land which has been submerged reforms and is identified as having formed

Burden of proof (*Contd*).

part even by accretion of a particular estate, the owner of that estate is entitled to it. *L. R.* 2 *I. A.* 28; 14 *B. L. R.* 268 *applied.*

Where Government acquires property under cl. (3) of section 4 of Regulation XI of 1825, either as an island surrounded by an unfordable channel or as an accession to lands held by Government, it does not become a trustee for the public; it is entitled to deal with the property in the same way as any other part of the territory of the State as its disposal. If it permanently or temporarily settles the estate to which it has thus acquired title, the holder of the settlement is entitled to the benefit of the principle of reformation and when the question arises between Government itself and a neighbouring riparian owner, Government should not be placed in a worse position than a person who has derived title from it and it is not precluded from claiming the land upon submergence and after re-appearance. 13 *M. I. A.* 467; 5 *B. L. R.* 521, 10 *B. L. R.* 406 *referred to.*

No inflexible rule can be laid down as to the manner in which an intention not to abandon submerged lands may be proved, but it would depend upon the circumstances of each particular case.

Mere submergence of lands in the possession of Government does not operate in law as an abandonment on its part and a reversion thereof to the public territory. ANANDA HARI BASAK *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **3 C. L. J. 315.**

194 *Person not born but was en ventre sa mere.*

The onus of proving that a person was not born at the time of the testator's death was *en ventre sa mere* at the time lies upon him who avers it. ADVOCATE GENERAL *v.* KARMATI. **6 B. L. R. 601 at 607; 29 B. 133.**

195 *Proof—Title of plaintiff—Privy Council—Findings of fact—Concurrent decision—Evidence Act (I of 1872), Section 90—Document thirty years old—Presumption—Discretion.*

A plaintiff can only succeed on the strength of his own title.

Their Lordships of the Privy Council did not consider it necessary to review all the evidence at length on a point on which both the lower Courts had given a concurrent decision.

Their Lordships of the Privy Council would always be extermely slow to overrule the discretion exercised by a subordinate Court under section 90 of the Evidence Act in not admitting in evidence without proof a document more than thirty years old. Musammat SHAFIQ-UN-NISSA *v.* RAJA SAHBAN ALI KHAN. **6 B. L. R. 750 (P. C.)**

Possession.

196 *Suit for possession—Defence of Limitation—Plaintiff to prove subsisting title—Burden of proof—Alluvion and diluvion—Right*

Burden of proof (*Contd.*)

to submerged land.

When in a suit for possession of an immoveable property the defendant pleads adverse possession, the Court before going into the question as to whether the defendant has or has not acquired title by adverse possession ought to be satisfied that the plaintiff had a subsisting title at the commencement of the suit.

Where a party is dispossessed by *vis major* of floods the constructive possession of the land is, if anywhere, in the true owners, and so long as the land remains submerged no title can be made against the true owner. MUNSHI MAZHAR HASAN *v.* BEHARI SINGH. **W N A, 1906, p. 234=3 A L J 567=28 A 760.**

197 Defendant in possession of land there being no wrongful dispossession of plaintiff—Plaintiff asserts permissive occupation by defendant—Defendant asserts possession of land by gift outright—Burden of proof on plaintiff. U. B. R. 1903 P. 1 (Burden of proof) P. 7 (Evidence) *See Col. 229 P. I.*

198 Allegations made by defendants—Shift of burden of proof on to defendants. U. B. R. 1901 P. 5 (Burden of proof) P. 131 (Budhist Law—Inheritance) *See Budhist Law—Inheritance.*

199 Adverse possession Onus. 30 P. R 1902 Col. 1925 P. I.

Possession and proof of title.

200 Possession—Declaration of title—Suit by person in possession for declaration of title. 25 B. 287 Col. 228 P. I.

201. *Possession — Evidence — Ownership—Value of possession.*

To recover possession a plaintiff must show a better right in himself to possession than is in the defendant. He may, within the period prescribed by the Limitation Act, show that, in a case where he is dispossessed, either by establishing title or by showing a prior legal possession entitling him to be restored to the same.

Possession is *prima facie* proof of ownership: it is so because it is the sum of acts of ownership. This applies both to prior and to present possession

Possession has a two-fold value: it is evidence of ownership, and is itself the foundation of a right to possession HARI KHANDU *v.* DHONDI NATHA. **8 B. L. R. 96.**

202. Vendee's suit for possession of immoveable property—Limitation Act (XV of 1877), Schedule II, Art 142—Adverse possession—Burden of proof—Vendor out of possession. 3 A. L. J. 334—A. W. N. 1906, P. 95—28 A. 479. *See col. 1957, P. I.*

203. *Pre-emption—Contract—Effect of fresh settlement—Custom.*

Held, that if a right of pre-emption was based on contract it would cease, unless specially renewed, at a fresh settlement, but if based on custom, the burden of proof would be on the defendants to show that a

Burden of proof (*Contd*).

custom proved to have once existed had come to an end. Mere purchase by strangers once or twice unopposed was insufficient. *W. N, All.*, 1904, p. 128, *referred to.* BIRJNANDAN LAL *v.* MUST. KUNWARI. **3 A. L. J., 561, A. W. N. 1905, P. 174.**

204. *Pre-emption--Custom--Construction of document.*

The provisions relating to pre-emption in the *wajib ul-arz* of 1833 of the village of Bankati in the district of Gorukhpur was to the following effect: "If any one amongst us wish to transfer the whole or part of his share, he must first inform all the others. If they can take for the price fixed, well and good; otherwise they may sell or mortgage to any one they like from whom they can get that proper price. The *wajib-ul arz* of 1860 of the same village stated that 1½ *bighas* of the village had been mortgaged and went on as follows: "In future, we the co-sharers have power to transfer our respective shares or lands, but on this condition that whoever sells, mortgages or grants a lease of a share, we shall ask all the co-sharers to buy it. If none of them buys, or takes a mortgage or lease, then the vendor has power to transfer it to whomsoever he likes."

Held, that the *Wajib-ul-arz* of 1860 only recorded the custom of pre-emption as was prevalent and as set forth in the *wajib-ul-arz* of 1833. The entry of the *wajib-ul-arz* of 1860 was not to be deemed a contract.

Held, also where in a *wajib-ul-arz* prepared after the rules of the Board of Revenue for the settlement of Gorukhpur and Basti Districts were passed, there was no reference to the existence of any custom, recorded in a previous *wajib ul-arz*, it was no proof that the custom subsequently became out of vogue. SEWAK SINGH *v.* GIRJA PANDEY. **2 A. L. J. 6=A. W. N. 1905 P. 16.**

205 *Holder of a resumed* muafi *land, rights of--Not a co-sharer--Acceptance by pre-emptor of money due on mortgage from vendee--Waiver of pre-emptive rights.*

Suit for pre-emption. The plaintiff's title was not disputed by the defendant. But the defendant (vendee) contended that he was also himself a co-sharer within the meaning of the *wajib-ul-arz* of the particular village. There was no evidence as to the constitution of the village to show whether the resumed *muafi* land was or was not considered by the residents or co-sharers of the village as ordinary *khalsa* land.

Held, under the circumstances, that the defendant, the holder of a resumed *muafi* land, could not be a co-sharer for purposes of pre emption.

The receipt, by a pre-emptor, from the vendor of the sale, of money due to the former as mortgagee of the vendor cannot operate as waiver of his (pre-emptor's) pre-emptive rights. AHMED ALI *v.* NAJAMA-UN-NISSA. **2 A. L. J. 145.**

206 *Pre-emption--Houses--Vicinage--Burden of proof--Kucha Masjid Khajur of Delhi*

Burden of proof (*Contd*).

City--Evidence given in another case--Admission of right under mistake--Custom.

Held, that the plaintiff whose house adjourned the house sold and opened into the same street which was a *Kucha sarbasta* had failed to prove that he had by custom a preferential right of pre-emption, as against the vendee whose house also adjoined the said house, but at the back and opened into another *Kucha sarbasta.* 17 P. R., 1903, S. C., 70 P. L. R., 1903 followed.

The burden of proof lies on the plaintiff to prove that his particular form of vicinage gives him a superior right of pre-emption.

Evidence given in another case is not admissible in the case before the Court.

The defendant is not bound by an admission made by him prior to suit under a mistake as to the plaintiff's right of pre-emption. DHUMI MAL *v.* KALU. **67 P. 1906.**

207 Primogeniture—Rule of--Custom--Orissa, land tenure in--Killa--Hereditary office estate attached to—Statements of persons who are dead—32 C. 6 Col. 157 P. I.

Principal and Agent.

208 Hindu Law--Gift—Possession--Transfer of Property Act (IV of 1882), section 123--Gift to agent. Principal and Agent--25 A. 358 Col. 730 P. I.

209. *Suit for—Accounts—C. P. C., S. 215 A.--Onus of proof.*

The Law does not impose any duty upon a plaintiff, who calls on his agent to account first to satisfy the Court that there is or ought reasonably to have been some surplus in the hands of agent. The fact of agency being established it is the duty of the Court to fix a date for the furnishing of the accounts. The plaintiff has only to show that the defendant is an accounting party and then it is for the defendant to prove the amount of his receipts. 1883 A. W. N. 218 ref. to. RAM DASS *v.* BHAGWAT DASS. **1 A. L. J. 347.**

210. Suit for an account. Principal and agent. 27 A. 374 Col: 367 P. I.

211. Suit for account--Duty of Court--A. W. N. 1905 P. I. Col: 1494 P. I.

Probate application.

212. *Probate and Administration Act (V of 1881), Section 50-Revocation of Letters of Administration. Application for--Probate--Failure of service of special citation--Inventory. Omission to file--Burden of proof--Just cause.*

A person applying for revocation of Probate or Letters of Administration under section 50 of the Probate and Administration Act, on the ground of the omission of the executor or administrator to exhibit an inventory or account, should prove to the satisfaction of the Judge that the omission was wilful or without reasonable cause.

Burden of proof *(Contd.)*

Mere omission to serve a special citation would not by itself be a sufficient ground for revoking the grant if it was shown that the person, on whom the citation ought to have been served, had knowledge of the application for probate. The onus of proving that he had such knowledge rests on the party who alleges it, and it is not necessary for the party who applies for the revocation of the grant to prove not only that no special citation was served on him but also that he had no knowledge of the proceedings.

When a judge is satisfied that the summary grant made without service of citations should be recalled, he should not pass order for its revocation at once, but ought to proceed under the law and to call upon the applicant for the grant of Probate or Letters of Administration to prove the Will in solemn form in the presence of the objector, and after hearing the evidence and his objections to decide whether the order granting the Letters of Administration should stand or whether it should be revoked. PREM CHAND DAS *v.* SURENDRA NATH SAHA. **9 C. W. N. 190.**

Pro-note.

213 Promissory note—Execution of—Decree for the sum lent when loan admitted—Onus of payment when defendant admits execution—Suit for money lent. SYED HUSAIN *v.* BABU DURGA CHARAN. **9 O. C. 315.** *See Promissory note*

214 *Novation—Promissory note for goods sold—Suit for price of goods sold.*

Plaintiffs alleged that defendants, Nos. 1 and 2, were undivided brothers, and that they had traded in opium jointly with an elder brother, V., since deceased; the latter having been managing member trading jointly with his brothers for the benefit of the family, and that defendant No. 3 was a partner in the business. Defendants had purchased opium from plaintiffs from time to time and plaintiffs said that when a purchase was made, a promissory note was always executed by whichever of the defendants happened to be present, sums being subsequently paid an account from time to time. Plaintiff sued for recovery of the opium sold and delivered. The defendants contended that the plaintiffs should have based their suit upon the promissory notes (which had not been negotiated) and not upon the sale.

Held, that the plaintiffs could sue for value of the opium sold and delivered, and all the defendants as partners in the business were liable to the claim DARGAVARAPU SARRAPU *v.* RAMPRATAPU **25 M 580.**

215 *Probate—Testator. Capacity of—Knowledge—Approval—Onus of proof.*

The fact that the testator did know and approve of the contents of the alleged Will is part of the burden of proof assumed by every one who propounds it as a Will. This burden is satisfied, *prima facie*, in the case or the Will of a competent testator. But if those who oppose it succeed by a cross-examination of the witnesses or otherwise in meeting this *prima facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the Will in question, before it can be admitted to probate. That is to say, the burden of proving knowledge and approval is always on the person propounding the Will, though formal proof may suffice when no dispute is raised.

The onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the Will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the instrument. This rule of law has application to the propounder of a Will made in the mofussil though the propounder does not actually draft the instrument himself but has it written out in his favor not by a professional lawyer but by a casual scrivener—and attested by persons brought from a distance—without any previous draft or instructions given, if the alleged testator is shown to have been as weak mental and physical capacity, and at the time of the preparation of the Will is on the brink of dissolution. BALKRISHNA RAMCHANDRA *v.* GOPIKABAI. **7 B L. R. 175.**

Railway Company.

216 Railway—Liability of—Goods carried under risk note—Release of liability for loss—14 M. L. J. 396 P. I.

217 Responsibility of a Railway Company in the care of passengers. 28 C. 401 Col. 822 P. I.

218 *Redemption—Evidence—Burden of proof—Ejectment—Decree for redemption of mortgage.*

In a suit for ejectment, the defendants pleaded adverse possession and limitation. In the Revenue Court, they had alleged that they were mortgagees of the land.

Held, that the suit was barred by limitation. It was for the plaintiff to prove, not only that they had a title to the property in question but also that the title subsisted at the date of the suit. The plaintiff failed to discharge the onus MUSAFI RAI *v.* LAGUBARTA KUNWAR. **A. W. N. 1905 P. 14.**

219 Redemption suit—Plea of sale—possession of 30 years. 22 T. L. R. 89.—See No. 170 *supra*.

220 *Redemption—Mortgage—Sale of mortgaged property for arrears of Government revenue—Execution of decree—Purchase of the same by mortgagor—Realization of suprlus sale proceeds by mortgagees—Subsequent ap*

Burden of proof *(Contd)*

plication to sell the same property under a decree on the mortgage.

A mortgagor, by allowing the revenue payable in respect of the mortgaged property to fall into arrears, caused such property to be sold at auction by the revenue authorities and it was purchased by the mortgagor *benami* in the name of a third person. The mortgagees, believing that this purchase was a genuine purchase, applied for and obtained payment out of Court of the surplus realized by the sale over and above the revenue due. Subsequently the mortgagees discovered the true nature of the purchase made by the mortgagor at the Revenue Court sale, and sought to have the same property, then in the hands of a transferee from the mortgagor's successor, sold in execution of a decree upon their mortgage.

Held, that there was no legal objection to the property being sold in execution of the mortgage decree. *Raghunath Sahai Singh* v. *Lalji Singh*, (I. L. R. 23 Cal. 397) referred to GANGA SAHAI *v.* TULSHI RAM. **25 A. 371.**

221 Proof of subsisting title to redeem—Acknowledgement--Mortgage suit. 26 M. 34 --*See Col. 1774 P. I.*

222 *Redemption—Old mortgage—Burden of proof--Secondary evidence of terms of a mortgage deed--Admission.*

In a suit for redemption of a mortgage of 1846, *held*, with reference to the provisions of S. 6 of Act I of 1869, that the burden is on the plaintiff to give at least *prima facie* proof that the mortgage is redeemable 31 A. 85 R.

Held, further, that secondary evidence of the terms of the mortgage deed, if admissible, must be of the kinds specified in S. 63 of the Evidence Act.

Held, also, that no admission by the mortgagee can operate to make a mortgage redeemable which by law was irredeemable at the time when the admission was made. KAYASTH SCHOLARSHIP TRUST, ALLAHABAD *v.* SHANKAR DIN. **11 O. C 285 (B).**

223 Redemption—Mode of taking account --Mortgage--4 B. L. R. 42--26 B. 363--*See Mortgage—Accounts.*

224 *Redemption—Mortgage or sale—Burden of proof.*

Plaintiff respondent sued defendant-appellant for the recovery of a piece of land which he had mortgaged to her 13 years before. Defendant admitted the mortgage, but contended that it had been converted into a sale one year afterwards. Of this she produced no evidence except a map showing her name as the owner.

Held, following the ruling in Maung Po Te *v.* Maung Kyaw, 1 L. B. R. 215, that the burden of proof was on defendant and that she had failed to discharge it.

Ma U Yit *v.* Pa Su, (1902) 8. B. L. R. 189, distinguished. Ka Po Win *v.* U. Pe. Civil Regular Appeal No. 42 of 1901 (unreported) also referred to. MA DAN DA *v.* KYAWZAN. **L. B R. 3 1905 P. 5.**

225 *Redemption suit—Mortgage deed containing clause for forfeiture of property—Transfer of possession—Transfer of ownership, Evidence of—Burden of proof.*

Where a transaction begins as a mortgage and subsequently there has been a transfer of possession from the mortgagor to the mortgagee, although the mortgage deed provides for forfeiture of the property on failure to repay on demand the amount secured with interest due, there still must be sufficient evidence to show that the intention was to transfer the ownership of the property if this be alleged by the mortgagee--the burden of proof of such outright transfer being on the mortgagee resisting redemption. MAUNG PO TE *v.* MAUNG PO KYAW AND OTHERS. **I L. B. R. 1900--1902 P. 215.**

Registration.

226 Registration, plea of invalidity--Will --Power to mortgage whether is direction for sale, 8 C. W. N. 362 Col. 529 P. I.

227 Religious institution--Succession to --Burden of proof—Jogi Fakirs of Bhera. Registration. B. GANGA NATH *v.* RABEL NATH. **143 P. L. R. 1906**--*See Custom (Peculiar to Punjab).*

Rent Act.

228 Rent--Enhancement--Onus--Inamdar 9 B. L. R. 861.—*See Burden of Proof--Enhancement of rent No. 3.*

229 Suit for rent—Joinder of causes of action--Suit for enhancement and orrears of rent--Raiyat at fixed rate 5 C. W. N. 880.—*See Col. 1419 P. I.*

230 Sale—Suit to set aside--Onus--Notification of sale--Parties- Joinder on defendant. 27 M. 94.—*See Col. 1378 P. I.*

Resumption and assessment of Inam.

231 *Inam land—Resumption of—Service tenure—Burden of proof.*

Service may be so connected with the tenure of land as that the power of resumption does not exist.

The combination of an interest in land and an obligation as to service may fall at least under three heads: there may be a grant of land burdened with service, there may be a grant in consideration of past and future services and there may be the grant of an office the services attached to which are remunerated by an interest in land. It may, no doubt, be made a condition of either of the first two classes of grants that the interest on the land should cease when the services are no longer required but in the absence of a provision to that effect lands held under those grants are not resumable at will.

The *onus* of proving right to resume lies on the plaintiff. THE HON'BLE LAKHAMGAUDA BASAPRABHU *v.* KESHAV ANNAJI. **6 B. L. R. 364=28 B. 305.**

Burden of proof (*Contd.*)

Revenue Act.

232 Sale--Irregularity--Collector--Ordering exemption from sale--Irregularity in issue and service of notice--Onus of proof. 10 C. W. N. 137.--*See Begat Act XI of 1859 Ss. 3, 7 Col. 32.*

Reversioner's suit.

233 Reversioner's suit—Daughter's estate Mitakshara-Mortgagee auction purchaser and reversioner--Contest between--Onus of proof RAY RADHA KISSEN *v.* NAURATAN LALL **6 C L J 490**. *See Hindu Law—Alienation.*

234 *Reversioner's suit against allienation of accupancy right—Custom—Punjab Tenancy Act (1887), S. 59.*

Where a collateral seeks to restrain an alienation of an occupancy right by an occupancy tenant, the initial *onus* lies on the plaintiff; but when he has proved his reversionary right, and his right to bring such a suit in the case of any other proprietary right, the *onus* will be shifted to the other side; and the person who asserts that no such custom obtained as to occupancy right has to prove his contention. 115 P. R., 1901. 12 P. R., 1904, 89 P. R., 1898 (F. B.) referred to. ABDULLAH *v.* ALLAH DAD, **98 P R 1907 (F B)**.

235 Sale for arrears of rent—30. C. I, Col. 235 P. I.

236 *Self-acquisition-Joint property-Nucleus of family property—Burden of proof.*

The absence of any nucleus of joint property is a factor of considerable importance for the purpose of determining as a question of fact whether or not the property gained by each co-parcener was his self-acquisition, for the mere fact that a family is joint does not raise the presumption that the property, acquired by th members of that family is joint in the absence of family property. A property acquired without the rid of joint funds or joint exertions may become joint proprety by being thrown into the common stock; but those who allege this must prove it. BHAJUBAI *v.* TUKARAM. **7 B L R 169**.

237 *Hindu Law—Joint family—Proof of self-acquisitions—Findings of fact based on presumptions only.*

It does not always follow that because the members of a family have not separated, no member among them could come into possession of self-acquired property.

Where partition took place in 1879, and in 1898 the plaintiff sued for a share in the income of a certain village which had been bought by the defendant in 1873, and the defendant was registered in the Government record as the proprietor of the income of the village, *held* that the plaintiffs were bound to prove positively that they were in receipt of their share of the income.

Findings of fact based on a long chain of presumptions were not accepted by the High Court and the cause was remanded. 11 *Bom.* 216 *referred to.* VINYAK NARSINVH *v.* DATTO GOVIND **25 B, 367**.

238. *Will. Execution of--Burden of proof --Construction of Will--Blanks in Will--Alterations in Will--Deed poll confirmed by Will. Probate of, if necessary--Mental condition of testator--Person taking benefit under Will prepared by himself--Fiduciary relationship--Succession Act (X of* 1865), *Section* 51--29 B. 530 Col: 81 P. I.

239. Presumption can not shift the burden of proof. 1 N. L. R. 169 Col: 234 P. I.

Service of Summons.

240. Service of Summons on defendant residing out of British India--Exparte Decree 23 A. 99 See Col: 1433 P. I.

Settlement proof of foreign domicile.

241. *Domicile—Domicile of origin—Abandonment—Acquiring fresh domicile—Onus of proof—Immoveable property, rights over.*

The person, who attacks a settlement on the ground of nationality, must show conclusively that the nationality of the settlor was foreign, and if he succeeds in doing so, the onus is then shifted upon the person supporting the settlement to show that the settler had acquired a fresh domicile in British India, and that his estate ought to be administered according to Indian law. All rights over immoveable property are governed by the law of the country where the property is situate, this principle being universally recognized. De Nicols *v.* Curlier (1900, A. C. 21), In re Be Nicols (1900, 2 Ch. 410) dissented from. A. L. BONNAUD *v.* EMILE CHARIOL, **32. C. 631 ; 9 C. W. N. 394**.

242 Suit for possession—Reformation--Presumption—Onus of proof of lands existent at the permanent settlement. 3 C. L. J. 316. *See Burden of Proof-Permanent No. 193.*

243 Son s liability to pay father's not immoral debts. 27 A. 16. *See Burden of proof--Attachment in execution.*

244 Specific Relief Act S. 9—Summary suit for possession by a lessee restored to possession. 24 A. 501 Col. 396 P. I.

245 Suit by person in possession for declaration of title--Burden of proof--Effect of plaintiff's possession. 25 B. 287 Col. 228 P. I.

246 Standard measurement--Resumption and transfer—Presumption of fact--Jurisdiction of Civil Court. 2 C. L. J. 107--32 C. 1107 Cols. 234 and 1826 P. I.

247 Succession certificate grant—Suit for declaration that adoption was invalid or did not take place. A. W. N. 1902 P. 62 Col. 2045 P. I.

248 Tenant in common--Partition widows right to—Effect of unchastity of widow. 24 M. 411 Col. 1931 P. I.

Burden of proof (*Contd.*)

249 *Relation between tenants in common —Collection of rent by one tenant in common—Suit by the other for his share—Onus on plaintiff*

1. There is no relation of trust or agency in one co-owner of property towards the other. When one collects the rents of the whole, he does so not in the capacity of agent but in that of owner and is answerable to his co-tenant only if he received more than his just share and to the extent of the excess alone, 1897, A. C. 18 O. 17 Q. B. D. 701 referred to. In an action by one co-tenant against another for an account of the receipts of rent over and above what the defendant was entitled to, it is for the plaintiff distinctly to allege and show that the defendant's receipts did in fact exceed its due share. 13 M & W 7; 15 W. R. 128 (Tr.) referred to. NELLAYAPPA PILLAI *v.* AMBALAVANA PANDARA SANNADHI. **27 M at 475, 477.**

250 *Thak map—Burden of proof—Suit for declaration of title—Thak map—Lakhiraj tenure.*

The suit was for a declaration of title to and recovery of possession of certain land. The defendants claimed the land as their *lakhiraj* and contended that the onus lay on the plaintiff to prove that it was *mal* and that the *thak map* was not admissible in evidence

Held that the objection of the defendant as to onus of proof was not valid.

Held also that inasmuch as, at the time the *thak map* was made, it is necessary to shew in such map such *lakhiraj* land as might be claimed, the *thak map* was admissible in evidence. In this case, the *thak map* shewing no *lakhiraj* lands, the defendant's case must fail. Jarao Kumari *v.* Lalon Moni. (I. L. R, 18 Cal. 224, P. C.) distinguished. RAJKUMAR PAL *v.* BASANTA KUMAR GUHA. **7 C W N 612.**

251 Tarwad debts—Debt incurred by Karnavan, onus of proof as to Tarwad, necessity for—Krishnan Aiyappan *v.* Padmanabhan. 21 T L. R. 239. *See Marumakkathayam Law Debt*

252 *Trade-mark descriptive of goods of another person—Injunction.*

In a suit for injunction to restrain the defendants from using the words "Camel Hair" as descriptive of, or in connection with, belting imported by them or belting, (not being of the plaintiffs' manufacture), sold or offered for sale by them, without clearly distinguishing such belting from the belting of the plaintiffs—

Held that the plaintiffs were entitled to an injunction on successfully proving (1) that the name "Camel Hair Belting" had come to mean on the Indian market the plaintiffs' Belting and nothing else, and (2) that the Defendants were selling belting made of Camel Hair, designating it as Camel "Hair Belting" so as to be likely to mislead purchasers into the belief that it was the plaintiffs' Belting, endeavouring thus to pass off their goods as the plaintiffs' 1896 App. Cases p 199, 6 R P C. 531, 11 H. L. R. 542, 1899 App. Cases p 326, 1898 App. Case p 239 referred to. JOHN SMIDT *v.* F. REDDAWAY & Co. LD. **9 C W N 281.**

253 *Transfer—Party setting up should prove it.*

A party who sets up a transfer should prove it. IMMUDOPATTAM THIRUGNANA KONDAMA NAICK *v.* PERIYA DORASAMI. **24 M 377, 28 I A 46; P C.**

254 Transfer by collector of chawkidari chakran—Proof of illegality. 32 C. 1107 Col. 234 P. I.

255 *Trust estate—Expenditure—Litigation, civil and criminal —Propriety.*

The onus is on the person who wishes to charge the trust estate to show that the expenditure was proper. RAJA PEARY MOHAN MOOKERJEE *v.* NARENDRA NATH MOOKERJEE **9 C. W. N. 421 at 435; 32 C. 582.**

256 Trustees suit who was dismissed—Devasthan committee—Powers of appointment and dismissal of Moktesars—Good and sufficient cause. 8 B. L. R. 407- 30 B. 508.

257 Trustee—Want of deligence—Liability for mismanagement of co-executor. 29 B. 170 col. 548 P. I.

258 Usufructuary mortgage—Account of profits—26 B. 363. *See Mortgage—Accounts.*

259 Wagering contract- "Badni" transaction. 25 A. 38 Col 297 P. I.

260 *Genuineness of.*

The burden of proof lies upon the person who sets up a will and not on the person who is prepared to impeach it. SUKH DEI *v* KEDAR NATH. **5 C. W. N. 895; 3 B. L. R. 704.**

261 *Will—Application for probate—Plea of unsoundness of mind on the part of the testator—Fraud—Undue influence—Burden of proof.*

If a party writes or perpares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved the contents of the will; and it is only where this is done that the *onus* is thrown upon those who oppose the will to prove fraud, or undue influence, or whatever they rely on to displace the case for proving the will. Barry *v.* Butlin, (2 Moo P. C. 40), Fulton *v.* Andrew (L. R. 7 H. L. 448), Tyrrel *v.* Painton (L. R., 1895 P. D. 151) and Farrelly *v.* Corrigan, (L. R., 1899 A. C. 563), referred to. LACHHO BIBI *v.* GOPI NARAIN, **I. L. R., 23 A. 472.**

262 Propounding of will—Knowledge and approval—7 B. L. R. 175 *See* No. 215 *supra.*

Witness.

263 *Wrongly placed—Material irregular-*

Burden of proof (*Contd.*)

ity--Probandi--Fraud. Punjab Courts Act S. 70 (a).

Held, that fraud, when pleaded, must be clearly proved and cannot be assumed.

Held, also, that a Court commits a material irregularity, within the meaning of Section 70 (*a*) of Act XVIII of 1884, if it—

(*a*) rejects *prima facie* reliable evidence, whether oral or documentary; (*b*) accepts apparently a false and absurd plea of a defendant who is bound to prove it by some satisfactory proof, or, (*c*) wrongly places *onus probandi* of an issue on a party. JIWAN MAL *v.* HARI RAM. **143 P. W. R. 1908.**

264 Zemindari—Migration of family—Family custom--Savings from ancestral property—29 C. 433 Col. 2167 P. I.

Burial.

Suit of civil nature—Jurisdiction of Civil Courts—Right of burial-Right to recite prayers before burial--30 M. 15 Col. 929 P. I.

Burial ground.

Burning and burial ground--Actionable nuisance. Madras Municipal Act (I of 1884) S. 392--Limitation--Continuing nuisance.--MUHAMMAD MOHIDIN SAITH *v.* THE MUNICIPAL COMMISSIONER FOR THE CITY OF MADRAS, **25 M. 118.** *See Madras Act I of 1884 (City of Madras Municipal Act Sections 392, 433 &c.*

Burma Acts.

(a) Lower Burma Act.
(b) Upper Burma Regulations.

1. Act 1876--Lower Burma Land and Revenue Act.

1. *S. 1--False evidence--Indian Penal Code, sections 191, 193--Statements made before Revenue Officers in certain cases--Indian Oaths Act, 1873, section 4.*

In order that a person making a statement to a Revenue Officer may be legally bound to speak the truth, it is necessary that the Revenue Officer should be acting in the discharge of some duty or in the exercise of some power imposed or conferred on him by law.

A Revenue Officer to whom an application for a grant of land is made and who enquires into matters not specified in Rule 3 or Rule 46 of the Rules under the (Lower) Burma Land and Revenue Act; or a Revenue Officer enquiring into an objection to the issue of an order of eviction under Rule 52 of these Rules, is not proceeding in the discharge of a duty imposed, or in the exercise of a power conferred, by law; and a charge of giving false evidence in respect of statements made in such enquiries will therefore not lie.

Meaning of "witness," "evidence," considered with reference to section 3 of the Indian Evidence Act and section 5 of the Indian Oaths Act.

Burma Lower Acts (*Contd*).

"Rules" and "Directions" under the (Lower) Burma Land and Revenue Act distinguished. KING EMPEROR *v* PAKIRI. **2 L. B. R. 1904 P. 272.**

2 Ss. 15, 18, 19, 20, 21 and 56, Jurisdiction of Civil Court—Dispute as to occupy or possess land not covered by a grant or lease or in respect of which no declaration has been made. 1 L. B. R. 1900-1902 P. 16. *See col: 1442 P. I.*

3 *Ss. 17, 19, 55, (1) (b), 56--Sale--Mortgage --Defective title--Jurisdiction of Civil Court, Objection to.*

Plaintiffs sued to redeem certain agricultural land alleged to have been mortgaged to defendants. Defendants pleaded that plaintiffs sold the lands to them outright. It appeared in evidence that part of the land was cleared about 13 years before the institution of the suit, and part less than 12 years before that date.

Held, that if it appears at the hearing that plaintiffs have neither a grant nor the status of a landholder their claim falls under section 19 Lower Burma Land and Revenue Act, and the jurisdiction of the Civil Court is ousted by section 56 read with S. 55, proviso 1 (*b*) of that Act. When an issue arises on such question it should be referred to the Revenue Officer under section 17 of that Act.

Held also that an objection to jurisdiction may be taken any time and cannot be met by section 578 Civil Procedure Code. *Minakshi Naidu* v. *Subramania Sastri*, (1888), I. L. R. 11 Mad., 26 followed. MAUNG SAN PAING *v.* SHWE HLAING. **I L. B. R. 1900-1902 P. 277.**

4 S. 18—*See* 1 L. B. R. 1900 1902 P. 16 No. 2 *supra.*

5 S. 19—See 1 L. B. R. 1900-1902 P. 16 No. 2, 1 L. B. R. 1900-1902 P. 277 No. 3 *supra.*

6 S. 20, 21, 22--*See* 1 L. B. R. 1900-1902 P. 16 No. 2 *supra.*

7 *Ss. 44, 45—Escape from custody--Lawful detention—Indian Penal Code, s. 225 B—Issue of process for recovery of revenue—Arrear Defaulter—Arrest.*

A person cannot be convicted, under section 225-B of the Indian Penal Code, of escape or attempt to escape, unless the custody in which he was detained was lawful.

No process for the recovery of revenue can be issued until the amount due has become an arrear, under section 44 of the Burma Land and Revenue Act, by the lapse of ten days from the service of publication of a written notice of demand. KING EMPEROR *v.* RAMARA. **4 L. B. R. 1907 P. 103.**

8 *S. 44, 45—Refusal or Neglect to—Comply with—Requisition of—Headman--Order of headman failure to pay revenue demanded--Criminal offence--Lower Burma Village Act, 1889 s. 9 (2).*

The accused were ordered by the headman of their village, on the request of the circle *thugyi*, to pay their capitation tax at a certain

Burma, Lower Acts *(Contd.)*

place. This they failed to do, and they were consequently convicted, under section 9 (2) of the Lower Burma Village Act, of having neglected to comply with the headman's requisition.

Held, that the provisions of this section do not apply to the failure of a villager to pay revenue demanded from him, the coercive procedure for enforcing payment being prescribed in the Land and Revenue Act. KING-EMPEROR *v.* LU PE. **4 L. B. R. 1907 P. 150.**

9 S. 45.—*See* 4 L. B R. 1907 P. 103 No. 7, 4 L. B. L. R. 1907 P. 150 No. 8 *supra.*

10 S. 55 (1) (*b*)—*See 1 L. B. R. 1900 1902—P. 277 No. 3.*

11 *S. 56*—*See* 1 L. B. R. 1900-1902 P. 16 No. 2, 1 L. B. R. 1900-1902 P 277 No. 3 *supra.*

2 Act III of 1898 (Lower Burma Municipalities Act).

1 *S. 46 (1) (A) (a), 68, 69—Street Tram Lines—'Buildings and lands' within the meaning of section—Tramway Company whether occupiers of land on which tram lines are laid within the meaning of Ss. 68 & 69.*

The tram lines in a certain street, meaning thereby the land of the street in or on which the Rangoon Electric Tramway Company's sleepers and rails are laid, is land within the meaning of cl. (*a*) of division A of Sub S. (1) of S. 46 of the Burma Municipal Act.

The Tramway Company are occupiers of the portion of land upon which they have laid the tram rails within the meaning of Ss. 68 & 69 of the Act L. R. 9, Q. B. 9 and L. R. A. C. 153, F. THE RANGOON ELECTRIC TRAMWAY AND SUPPLY Co.. Ld.. *v.* THE RANGOON MUNICIPAL COMMITTEE. **14 B. L. R. 23.**

2. *Ss. 130, 147, 180—Order of Municipal Committee—Uninhabitable premises—Prosecution—Challenge of legality of order—Decision as to fitness of premises for use.*

A was ordered by the Municipal Committee, under section 130 of the Burma Municipal Act, to refrain from using certian premises which were considered to be unfit for human habitation, until the Committee was satisfied of their fitness for use. He carried out some repairs, but let the premises to a tenant before doing all that the Committee considered necessary. He was prosecuted and convicted, under section 180 of the Act, of disobedience of the order, the Magistrate holding that, by virtue of section 147, the propriety or legality of the order could only be questioned in an appeal to the Commissioner. A applied to the Chief Court for revision.

Held, that the words "no such order shall be liable to be called in question otherwise than by such appeal," in section 147 of the Act do not debar an accused person from pleading as a defence to a criminal prosecution that the order is *ultra vires*.

Held further, that that part of the order which required that the Committee should be satisfied as to the fitness of the premises before their use was *ultra vires*. The question whether the house had been rendered fit for habitation was not a matter for the Committee's decision, but a question of fact to be decided by the Magistrate on the evidence. F. B. BRETTO *v.* RANGOON MUNICIPAL COMMITTEE, **4 L. B. R. 1907 P. 144.**

3. *Ss. 180 (1), 195—Order of Municipal Committee—Fine for continuing disobedience of order after conviction—Authorization of Municipal employee to make complaint—Form of complaint.*

Accused was ordered under section 130 of the Burma Municipal Act to vacate the house he occupied. The order not being complied with, he was prosecuted under section 180 (*1*), convicted, and sentenced to pay a fine. He was also ordered by the Magistrate to move out within five days, failing which he was to pay a fine of Rs. 5 for every additional day of disobedience.

Held, that the Magistrate had no authority to modify the order of the Municipal Committee by allowing the accused to disregard it for five days.

Held also, that the Magistrate had no power to inflict a fine contingent on future events. In the event of the disobedience of the order continuing after the date of the conviction, the proper course would be for the Committee to prosecute the accused again. If convicted, he could then be fined Rs. 5 for every day the disobedience had continued, down to the date of the second conviction.

A complaint of an offence under the Municipal Act must be made by the Committee or by some person authorized by the Committee. Form at foot of complaint considered. KING EMPEROR *v.* PO NAN. **4 L. B. R. 1907 P. 44.**

(3) Act IV of 1898 (Lower Burma Town and Village Lands Act).

1 *S. 4 (3), 5 (1), 41—Jurisdiction of Civil Court suit by Government for possession.*

The Secretary of State for India in Council had obtained a decree against appellant for possession of certain land known as site No. 36 A, Sand-with road, in the Cantonment of Rangoon. On appeal, the question was raised whether, in view of the provisions of the Lower Burma Town and Village Lands Act, 1898, the suit was within the jurisdiction of a Civil Court.

The land was State land at the disposal of Government as defined in s. 4, subsections (1) and (3) of the Act.

It was also either in a town or a village as defined in section 4, sub-sections (3) and (5).

Held, therefore, that both clauss of section 41 operated to bar the jurisdiction of

Burma (Lower) Acts (*Contd.*)

the Civil Courts. MOMENT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **3 L B. R. 1906 P. 165.**

2 *S. 11, 15—Claim to land in town—Bar to jurisdiction of Civil Court.*

In a suit for recovery of a house site in a town to which the Lower Burma Town and Village Lands Act, 1898, applies, the question, whether plaintiff's right to the land has ceased under section 11 of the Act by reason of his abandonment of it for more than two years continuously, is one which must under clause (2) of section 15 of the Act be referred for determination to the Revenue Officer. YON BYU *v.* SHWE TAIK AND MIN SU. **3 L. B. R., 1905 P. 50.**

3 *S. 41—Ejectment, suit for—House on village land at disposal of Government—Jurisdiction of Court—Lower Burma Town and Village Lands Act, 1898, s. 41.*

A suit for eviction from a house, for the purpose of obtaining possession of the house and site is essentially different from a suit for possession of the materials of the house. In the former case the question of title to the house cannot be separated from that of title to the site. When, therefore, the house stands on village land at the disposal of Government, the jurisdiction of the Civil Courts to try a suit for possession is barred by section 41 of the Lower Burma Town and Village Lands Act 1898. Moment *v.* The Secretary of State for India, (1905) 3 L. B. R., 165, referred to. MAUNG LAW *v.* SUPPAYA PADAYACHI. **3 L. B. R. 1906 P. 256.**

4 S. 41—3 L. B. R. 1906 P. 165 No. *supra*

(4) Act XIII of 1898 (Burma Laws Act.)

1 S. 13—Indian Succession Act X of 1865.—S. 5—Budhist Law. 4 B. L. R. 1907 P. 124 Col. 77 P. I.

2 *S. 13 (2)-Nature of obligation of—Origin of the liability—Implied agreements by carrier by water—Law administered by Calcutta High Court in Civil case to be administered by Burma Courts—Contract Act.*

The obligation imposed by Law on common carriers has nothing to do with contract in its origin, but it is a duty cast upon common carriers by reason of their exercising a public employment for reward, and a breach of such duty is a breach of the Law and for this breach an action lies, founded on the Common Law, which action wants not the aid of a contract to support it.

Held, that the Common Law liability of a carrier in the position of the defendant rests on the same foundation as the liability of a common carrier.

Held that a carrier by water impliedly engages that his vessel shall be water-tight.

Held, also that, under Sub-S. (2) of S. 13 of the Burma Laws Act, all questions arising in civil cases in the Courts of Rangoon shall

Burma (Lower) Acts (*Contd.*)

be dealt with and determined according to the Law for the time being administered by the High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction; that the Common Law of England is part of the law administered by such Court in cases which arise in Calcutta; that if such Common Law would be applied in a case of the same description as the present arising in Calcutta, it should be applied by this Court to the present case. —18 C. 620, F; East 428, cited, 1 C. P. D. 423, F; No. IX of 1872. No. XIII of 1898. MALADI SATHALINGAM *v.* RAMJAM LALLJU SAJAN. **14 B. L. R 77.**

(5) Act 1900 (Lower Burma Courts Act).

1 S. 2 (*h*), 28 (1) (C)—Valuation of suit—Amendment of Court fee—Jurisdiction—Appeal 4 L. B. R. 1907. P. 120. Col: 759 P. I.

2. S. 2 (*b*), 30—Land suit—Suit for rent of suit—Second appeal. 3 L. B. R. 1905 P. 90 Col: 147 P. 1.

3. *S. 8—Insolvency—Indian Insolvency Act, 1848—Appeal from order refusing benefit of—Application by appellant for protection from arrest—Ss. 13, 73—Lower Burma Courts Act, 1900, S. 8—Civil Procedure Code, Ss. 545, 639, 647, 4.*

Applicant had filed an appeal against the order or the learned Judge on the Original Side of the Chief Court, dismissing his petition for the benefit of the Act for the Relief of Insolvent Debtors. He applied for an order of protection from arrest during the hearing of the appeal.

Held, after examination of the law applicable, that such an order could not be granted. *In the matter of* JACOB AGABOB, *an Insolvent.* **3 L. B. R. 1906 P. 241.**

4. *S. 25—Redemption suit—Stamp duty—Value of suit—Jurisdiction.*

The amount on which stamp duty is payable does not determine the jurisdiction of a Court, but the amount or value of the subject-matter of a suit.

In a redemption suit the subject-matter of the suit is the land sought to be redeemed. Therefore the actual present value of that land at the time the suit is filed must determine any question as to the Court which is competent to try the suit. MAUNG KYAN DUN *v.* MAUNG KYAN, U. MYAT SAN. **1 L. B. R. 1900—1902 P. 96.**

5 S. 28 (1)—See 4 L. B. R. 1907 P. 120 No. 1 *supra.*

6 S. 30—Court of small causes—Suit for agricultural rent—Provincial Small Cause Courts Act IX of 1887 S. 15, 32, 3 L. B. R. 1905 P. 47.

7 S. 30.—See 3 L. B. R. 1905 P. 90 No. 2 *supra.*

8 *S. 31—Nomenclature and constitution of Courts in Lower Burma.*

When a suit is triable under section 31 (2) Lower Burma Courts Act by the Additional Judge of a Court, if the plaint be pre-

Burma (Lower) Acts (*Contd.*)

sented to the Judge of the Court he should not return it. Section 57 of the Code of Civil Procedure has no application. *Rabir Valad Ramjan* v. *Mahadu Valad Shiwaji*, (1877 I. L. R. 2 B. 360); *Palaneappa Chetty* v. *Maung Show Ge*, (1904) 2 U. B. R. Civil Procedure, 4; referred to. *Zeya* v. *Mi On Kra Zam*, (1904) 2 L. B. R. 333, followed. MAUNG GYI *v.* LU PE. **3 L. B. R. 1905 P. 120.**

9 S. 33—Judge personally interested in suit in his Court. 2 L B. R. 1904 P. 281 Col. 1061 P. I.

Upper Burma Regulation.

(1) Civil Court Regulation.

S. 10—Execution of decree—Sale certificate. U. B. R. 1905, P. 36 (Civil Procedure). *See Col. 1052 P. I.*

(2) Land and Revenue Regulations.

1 S. 53 (i)—Civil Court shall not have jurisdiction in any matter which a Revenue Officer is empowered under the Regulation to dispose of. Suit will not lie in a Civil Court to execute the orders of a Revenue Officer whether by restitution or otherwise. U. B. R. 1903 P. 1 (Land and Revenue Regulation P. 13) (Civil Procedure) Col. 921 P. I.

2 S. 53 (2) (ii)—A right of way as an easement is an interest in land within the meaning of section 53 (2) (ii), Land and Revenue Regulation, and the Civil Courts are debarred from entertaining a suit to establish such a right over State land.

References; —

U. B. R. 1897-01, II, 207.
————do.————209.
Wharton's Law Lexicon.
Peacock's Law relating to Easements in India.
Encyclopædia of the Laws of England, Volume II.
Mitra's Law of Limitation, 4th Edition, pages 414, 437.
Kerr's Blackstone's Commentaries.

MI MAGYI *v.* NGA SHWE ZIN. **U B R 1905 p. 1.** (*Land and Revenue Regulation*).

3 S. 53 (2) (ii)—*Held* that a *twinyo* or *ayo* is an interest in State land, and consequently in view of section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation, the Civil Courts have no jurisdiction to entertain a suit to recover a *twinyo or ayo.*

References :—

U. B. R., 1892-96 II, 327.
Kerr's Blackstone, Vol. II, Chaps, I, II, III, VII.
U. B. R., 1897-01, II, 443.
——————————207, 209, 211.

MI MIN DWE *v.* MA MA KIN KYIMYIN MIBAYA. **U B R 1903 p. 1.** (*Land Revenue Regulation.*)

(3) Municipal Act.

1 *S. 92.*

Held. that "rebuild" or "Re-erect', does

Burma (Lower) Acts (*Contd.*)

not include "repair" MAUNG SEIN *v.* MUNICIPAL COMMITTEE OF PAKOKKU, **U. B. R. 1904 P. 3 (Municipal).**

2 *Ss. 99, 100, 154.*

Held, that in a prosecution under Section 99, 100 and 154. Burma Municipal Act, for slaughtering an animal within the limits of a municipality in a place not licensed for that purpose it is necessary for the prosecution to prove not only that the animal was slaughtered in such a place, but that it was slaughtered for sale of its flesh. ALLY HUSSAIN *v.* KING EMPEROR. **U. B. R. 1904 P. I, (Municipal).**

3 *S. 142 (F), 180.*

Held that the word "market" has not been defined in the Burma Municipal Act, and determining whether a new market has been established in contravention of bye-laws framed under S. 142 (*f*) the test may be applied whether there has been a disturbance of market rights.

Reference:—

Indian Law Reports II, Bombay 106. KING EMPEROR *v.* NGA BA. **U. B. R. 1903 P. 1 (Municipal).**

4 S. 180—On a prosecution under section 180, Burma Municipal Act, for disobeying a notice issued under Chapter VI of that Act, the notice should be proved and put in evidence.

A Magistrate has no authority to give an order directing the accused to obey a notice issued by a Municipal Committee under Chapter VI. KING EMPEROR *v.* ABDUL GANI NAIKWAYA. **U. B. R., 1903. P. 3 (Municipal).**

(4) Municipal Regulation of 1887.

1 *Held*, that the rules contained in Municipal and Local Department Notification No. 148, dated 11th December 1900, have the force of law.

Rule 4 provides that in certain cases money shall not be received at the Municipal Office for credit to the Municipality, but that when money is presented a chalan shall be prepared and handed to the person desirous of paying money, and that he shall present the chalan and pay the money at the Treasury. When a person from whom money is due to the Municipality alleges that in contravention of this rule he paid the money at the Municipal Office, and it appears that the money was not paid to the Treasury, if is not a valid defence in a suit by the Municipal Committee to recover the money.

Reference.

Municipal and Local Department Notification No. 148, dated 11th December 1900. THE PRESIDENT KYANKSE MUNICIPALITY *v.* MA HLA WIN, MAUNG MYIT. **U. B. R. 1903 P. I.**

(Municipal Regulation of 1887).

2 *S. 12 (d).*

Held that "Rebuild" or "re-erect" does

Burma (Lower) Acts *(Contd.)*

not include "Repair" 19 M. 241 referred to. MAUNG SEIN *v.* MUNICIPAL COMMOITTEE OF PAKOKKU. **U. B. R. 1904 P. I.** (*Municipal Regulation 1887*).

(5) Registration Regulation.
S. 3.

Held, that *tari* palms and cocoanut trees are not "standing timber" as referred to section 3 of the Upper Burma Registration Regulation, but are immoveable property.

References:--
Wharton's Law Lexicon, page 737.
Stroud's Judicial Dictionary, page 805.
MAUNG PO HTIN *v.* MAUNG TE AND MAUNG THA LAW. **U. B. R. 1903 P. 1.** (*Registration Regulation*).

Ruby Regulation.

S. 6 (*1*), *8* (*1*).
Held (*1*) That in a stone tract it is an offence under s. 6 (1) Upper Burma Ruby Regulation, for a man to dig for or raise precious stones without a license in a heap of rejected earth.

(2) That it is under similar circumstances an offence to raise precious stones which are exposed to view whether on rejected earth or otherwise on the surface of the ground.

(3) That it is under certain circumstances not an offence for a woman to dig for or raise precious stones from rejected earth.

(4) That a Magistrate can confiscate only precious stones in respect of which an offence under section 6 of the Regulation has been committed.

References.
Revenue Department Notification No. 361, dated 27th October 1897.
Precious stones Manual, page 88. KING EMPEROR *v.* NGA NYUN. **U. B. R. 1903 P. I.** (*Ruby Regulations*)

(7) Village Regulation.

1. *S. 8.*
Slaughtering cattle without a license within an area within which the headman is directed by a rule under section 5 (1) of the Upper Burma Village Regulation not to allow such slaughter is not necessarily an offence under section 8 (2) of that Regulation. KING EMPEROR *v.* NGA PU, NGA YEIN. **U. B. R. 1903 P. 3.** (*Village Regulation*).

2. S. *8.*
Held—that it must be proved to support a conviction under section 8, Village Regulation, that the headman made a certain requisition to the accused and that the accused refused or neglected to comply with it. KING EMPEROR *v.* NGA MAUNG. **U. B. R. 1902 P. I.** (*Village Regulation*).

Burmese Law.
Adoption—Keitima--
Keitima form—Ceremonies—Proof--Hindu Law. 32 C. 219. *See Col. 2045 P. I.*

Burning ghat and ground.

" *Burning ground,* " *whether a* " *ghat.*"
" Ghat "--Meaning of—Maintenance by and control over it. 33 C. 1290. *See Col: 84.*

Bye-Laws.

1 Mortgage by conditional sale--Cause of action when sale becomes absolute—Custom—Wajib-ul-arz. RAN BAHADUR RAI *v.* PARMESHAR BHARTHI. **A W N 1902 p 164=24 A 493.** *See pre emption.*

2 *N.-W. P. and Oudh Municipalities Act (I of 1900), Section 128, Clause* (c)—*Bye-law. Unreasonableness of--*

A bye-law passed by a Municipality may be examined in order to discover whether it is reasonable in itself.

Held, that the following bye-law passed by the Naini Tal Municipality, as regards servant not in attendance on his master, was unreasonable.

" No coolie, whether bearing loads or not, *no servant except in attendance on his master* and no prostitute shall use the Upper North Mall at any time." EMPEROR *v.* BAL KISHAN. **W N A 1902, P. 117=24 A 439.**

3 Validity of—Rules framed by the Company under the Railway Act 23, A, 107 col: 820 P. I.

C

Calcutta.

Calcutta—Common Law of England applied in—Defamation—Action for slander—Special Damage—Damage for mental distress alone not recoverable--Cause of action—Presidency Town—English Law of Slander, rules of—Character of 1726—Limitation Act (XV of 1877), Sch. II, Art. 25.

In an action for damages against the defendant for having falsely and maliciously used slanderous words imputing unchastity to the plaintiff no special damage was alleged in the plaint, nor any actual damage proved at the trial.

Held that, as the words were not *per se* actionable, and as no damages in fact was alleged or proved, the action must be dismissed with costs. The decision of the majority of the Full Bench in *Girish Chunder Mitter* v. *Jatadhari Sadukhan* (I. L. R. 26 Cal., 653), approved and followed. *Parvathe* v. *Mannar* I. L. R. 8 mad., 175 discoussed; *Kashiram Krishna* v. *Bhadu Bapuji*, (7 Bom.

Calcutta (*Contd.*)

H. C. A. C. 17); *Jogeshwar Sharma* v. *Dinaram Sharma* (2 C. W. N., 113 Notes); and *Dawan Singh* v. *Mahib Singh* I. L. R., 10 All., 425, 456 distinguished. Damages are not recoverable for mental distress *alone* caused to the plaintiff by slanderous words conveying insult. *Wilkinson* v. *Downson* 2 Q. B. 57; *Lynch* v. *Knight* (9 H. L. C. 577, 598), referred to.

By the common Law of England introduced into Calcutta by the Charter of 1726, a person injured by slanderous words can recover damages in an action when actual damage has been caused. *The advocate-General of Bengal* v. *Ranee Surnomoyee Dasee* (9 M. I. A. 387, 426); *Ratcliffe* v. *Evans* (2 Q. B. 524), referred to. The rule of English Law of slander discussed, and held to be applicable to this case. BHOONI MONEY DOSSEE *v.* NATOBAR BISWAS. **28 C. 452.**

Calcutta Municipal Act III of 1899.
See Cols. 167 to 174 P. II.

Calcutta Municipal Consolidation Act II of 1888.

1 S. 135—Valuations-Assessment—Powers of Small Cause Court—Revision. 6 C. W. N. 480 Col. 169 P. II.

2 Ss. 236, 241—Detached building erected without sanction of Municipality—Applicability of Acts. 7 C. W. N. 374. Col. 162 P. II.

3 Ss. 247, 250—Building—Municipality—Sanction—Limitation—Damages. 30 C. 317 Col. 170 P. II.

4 S. 383—Deviation from the sanctioned plan of a building commenced under the old Act C. W. N. 554 Col. 171 P. II.

5 S. 449—30 C. 853 Col. 172 P. I.

Calcutta Small Cause Courts Rule.

Ss. 63, 70, 92, 94—Jurisdiction of Registrar to entertain application for new trial after giving exparte decree. 30 C. 588 Col. 1329 P. I.

Call on shares.

Suit for money due to registered company in respect of forfeited shares. 70 P. R. 1903 Col. 1888 P. I.

Camp.

Dismissal of suit for default in appearance —Duty of Court to give notice of date and place of hearing to parties. 37 P. R. 1904 Col. 1448 P. I.

Canals.

1 *Canals—Hajiwah Canal in Multan District—Rights of excavators and Government.*

The plaintiffs instituted this suit against Government claiming proprietary right in the Hajiwah Canal in the District of Multan which was supplied with water from Sutlej River. The canal was excavated by the plaintiff's ancestors with the sanction of Government in the year 1861 at a cost of about nine lakhs of rupees. It passed through lands owned by persons not parties to this suit whose consent plaintiffs' ancestors had obtained under agreement to supply them with water. In the Settlement Records the canal was entered as the property of the plaintiffs' father. The Government waste lands of over 60,000 acres, which were framed by plaintiffs and others, were incapable of cultivation for want of water. The Government sanctioned in proprietary right a grant of this land to plaintiffs' father. Upon the death of plaintiffs' father disputes arose among his sons, and owing to such quarrels Government took over possession and management of the canal.

The Government denied the plaintiffs' right to the canal outside the 60,000 acres grant and relied on the 8th clause of an agreement executed by the parties.

The clause was as follows :—

" The canal dug by the grantee and known as the Hajiwah shall for the present remain under the management of the said grantee : Provided always that in consideration of the premises the said grantor, his successor and assigns shall at all times hereafter, whenever he or they shall think necessary, be entitled without the consent of or permission from, the said grantee, his heirs, legal representatives and assigns, to take into his or their own hands and control the management and distribution of the water of the said canal without payment of any compensation whatsoever, and further to clear the said canal and recover the cost of clearance and management by a canal rate to be levied on the area irrigated."

Held, that the ancestors of the plaintiffs acquired a proprietary interest in so much of the Government lands taken for the purpose of the canal as was required for its construction and maintenance, and also a right to have the waters of the Sutlej River admitted into the canal so long as the canal was used for the purpose for which it was originally designed.

The principles applicable to such cases are—" If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. 1 E. and I App. 129 at p. 170 (1865).

Held, also, that the Government were entitled under the agreement to hold pos-

Canals *(Contd.)*

session and control of the land so long as they considered necessary. AHMAD YAR KHAN *v.* THE SECRETARY OF STATE FOR INDIA. **99 P L R 1901=38 P R 1902=28 C 693=5 C W N 634=28 I A 211 (P C).**

2 Canal—Nala—Stream—Riparian rights—Interference by Irrigation Department. 28 B. 105 Col. 207 P. II.

Canal dues.

Jurisdiction—Act No. XIX of 1873 (N-W. P., Land Revenue Act, Section 241, clause (i)—(Act No. VIII of 1873) Northern India Canal and Drainage Act) Section 45—Suit to recover excess canal dues paid by mistake—Claim arising out of collection of revenue or for sum realizable as revenue.

A suit to recover canal dues alleged to have been paid by mistake is a claim arising under section 241, clause (*i*) of the North-Western Provinces Land Revenue Act of 1873, and under that provision, read with section 45 of the Northern India Canal and Drainage Act, 1873, a Civil Court has no jurisdiction to entertain it. BALWANT SINGH *v.* SECRETARY OF STATE FOR INDIA. **8 C. W. N. 121=25 A. 527 (P. C).**

Canal and drainage Act VIII of 1873.

S. 45—25 A. 527 *supra.—See Northern India.*

Cancellation.

1 *Of deed—Mortgage-deed—Suit for cancellation of—Insanity of mortgagor—Finding of fact should be on allegation and evidence*

Where in suits for cancellation of two mortgage-deeds executed by the plaintiff's father, the case made by the plaintiff was that the mortgagor was insane and that the deeds were obtained by fraud.

Held, that, as the evidence which was directed to insanity in its crudest and most palpable form and to establish fraud failed, the suit must be dismissed. The first Court was not justified in commuting an insufficient case of insanity into a case of a help less or facile mortgagor, and in consequence granting a decree for cancellation, except so far as consideration had actually passed. DUGRA BAKHSH SINGH *v.* MIRZA MOHAMMED ALI BEG. **31 I. A. 235=7 O. C., 287.**

2 Of deed—Different types of insanity—Concurrent decision on fact—Unsoundness of mind. 27 A. 1 (P. C.) Col. 256 P. I.

3 Of deed—Cancellation of instrument—Pending suit—Another suit barred on the defence in the first suit. 27 B. 607 Col. 419 P. I.

4 Of deed—Declaratory decree—Further relief. A. W. N. 1904 P. 138 26 A. 606 Col. 434 P. I.

5 Of document—Suit to cancel a document—Cause of action. 25 B.78 Col. 1859 P. I.

Cancellation *(Contd.)*

See also for other cases Act I of 1877, (Specific Relief Act) S. 39, 42 and Act IX of 1908 (Limitation Act Art 91.)

6 *Of Gift—Hindu Law—*Mitakshara—*Alienation by grandfather without consideration—Right of grandsons.*

When the grandfather alienates ancestral property without any consideration it is not necessary for his grandsons to sue for the cancellation of the conveyance, and they can claim recovery of the property in their independent right as co-parceners in it. *14 Mad., 26, referred to.* KUMARASAMI GOUNDAN *v.* NANJAPPA GOUNDAN. **13 M. L. J. 21.**

7 Of lease—Rights of mortgagee in possession—Secondary evidence. 1 O. C. 18 Col. 422 P. I.

8 Of mortgage deed—Cancellation and delivery of mortgage bond—Valuation of relief by plaintiff—Jurisdiction of Court. 27 M. 480 Col. 102 P. I.

9 *Of sale deed on the ground of fraud and misrepresentation, suit by vendee for—Purchaser's knowledge of defect in vendor's title, effect of, on usual covenant of title implied.*

Plaintiff sued for cancellation of a sale deed, in his favor, on the ground of fraud and misrepresentation practised by the vendors, claiming a lien on the plaint properties, for recovery of the purchase money paid, and praying that such lien ought to take precedence over a charge under a hypothecation decree, to which he himself had been a party. The lower Court found on the evidence and probabilities that the defendants did not make any misrepresentations to the plaintiff and that the plaintiff purchased the properties with full knowledge of the nature of the defendants' title. Admittedly, the plaintiff was told that the lands were held on an *Adukavathu Otti* and he did not make further enquiries about the *Otti.*

Held, that a puchaser who has notice of a partial fact or instrument should be held to have notice of all connected facts and instruments and that, where the defect of the vendor's title was also within the knowledge of the purchaser, he could not claim the benefit of the usual implied covenants for title 14 T. L. R. 221, 19 T. L. R. 185, 26 B. 519 referred to.

Held, also that, if a prior mortgagee, who is made a party to a suit by a puisne mortgagee, omits to set up his prior lien and a decree is passed generally for sale without imposing a liability on the subsequent mortgagee, cannot afterwards bring a suit to enforce his prior lien. 24 A 429 31 C. 259, referred to. KANAKKU VELAYUDHAN PADMANABHAN *v.* MATHEVAN KALI. **21 T. L. R. 256.**

10. *Of sale deed and Pre-emption—Suit for—Inconsistent reliefs.*

The plaintiffs brought a suit against the vendor and vendee for cancellation of a deed of sale and in the alternative for pre-

Cancellation (*Contd.*)

emption of the property included in the deed. The plaintiffs alleged that they and the vendor were joint at the time of sale and that the latter could not lawfully sell his undivided one third share of the property. The allegation of jointness proved to be a false one and the claim for cancellation of the deed was dismissed. The only question to be decided was whether the plaintiffs were entitled to a decree for pre-emption in the suit.

Held, that the two reliefs prayed for in the plaint by the plaintiffs were inconsistent with each other, and that the plaintiffs were not entitled to a decree for preemption. DURGA PERSHAD *v.* MENDI-LAL. **1 O. C. 174.**

11 *Of sale of heritable non-transferable tenure—Rent Act (XXII of 1886), Ss. 41, 52—Perpetual hereditary farming lease—Under-proprietary right—Decree of Court—Tenant holding under—Revenue Act (XVII of 1876), section 40—Cancellation of sale of heritable non-transferable tenure, suit for—Rent Act XIX of 1868 s. 41.*

The question was whether the second and third defendants had, under a decree of the Financial Commissioner, obtained by the ancestor, Badulla, on April 17th, 1869, an under-proprietary right in the village or were merely *thekadars* with a hereditary but not a transferable right. The decree was for "a perpetual hereditary farming lease" of the village but on an examination of the record in the suit in which this decree was passed.

Held, that Badulla who was represented by the second and third defendants did not, by the decree, obtain an under-proprietary right, but that he became a tenant holding under a decree of Court such as is referred to in section 41 of the Rent Act of 1868 and section 52 of the Rent Act of 1886 and that his rights were not transferable, for holders of leases under degrees of Courts who can transfer their rights, are under-proprietors. NAND RAM *v.* AMANANT FATIMA BEGAM. **6 O. C. 94.**

12 Of stamp—Adhesive stamp. 6 B. L. R. 436, 28 B 432 Col. 878 P. I.

13 Of tenure—Suit for—Document—Execution of—Signature—Sufficiency of—Suit to recover possession of immoveable property—Fraud. 30 C. 433 Col 1871 P. I.

14 *Will—Suit for cancellation of—Cause of action.*

A suit for cancellation of a Will brought during the life-time of the testator is not maintainable. RAMBHAJAN KUNWAR *v.* GURCHARAN KUNWAR. **1 A. L. J. 468 = A. W. N. 1904 P. 150.**

Candidate.

For pleadership or Mukhtarship—Duty of Board of Examiners—Examination. 28 C. 479 Col. 185 P. II.

Catalogue.

Illustrations in catalogue—Portion of catalogue protected. LAWRENCE *v.* BUSHNELL. **35 C. 463.**—*See Copyright.*

Caretaker.

Guardian and Ward—Mortgage by gaurdian—Guardian making himself personally liable—Guardian entitled to retain possession until debt is discharged—Purchaser from ward not entitled to possession free of charge—Caretaker. Act of—Validity of. 15 M. L. J. 233.—*See Col. 2128 P. I.*

Carriers.

1 Acknowledgment—Non delivery of goods—Suit for damages. 26 B. 562 Col. 1789 P. I.

2 Suit against a Railway Company for non delivery of goods. 2 P. L. R. 108 P. R. 1906 (F. B.) Col. 1836 P. I.

3 Contract to carry goods—Liability for damages. 34 C. 419 Col. 826 P. I.

4 Laibility for negligence—Maritime Law. —Bill of lading—Construction. 30 M. 79 Col. 181 P. II.

5 *Liability for negligence—Carriers by sea under Common law—Foreign carrier contracting in Calcutta, law applicable to—Negligence and misfeasance.*

Carriers by sea, for hire, are common carriers by the Common Law of England; and, where the contract is made in Calcutta, whatever be the nationality of the carriers they will be governed by the *lex loci contractus.* which is the Common Law of England, *Mackillican* v. *The Compagnie Des Massageries Maritimes De France* (I. L. R. 6 Cal. 227), not followed. Under the English Common Law a common carrier may protect himself from liability for deliberate acts of misfeasance on the part of himself or his servants, but he must do so by clear, definite and unambiguous words. Landing goods in rainy weather instead of delaying delivery is negligence and not misfeasance. REFERENCE UNDER PRESIDENCY SMALL CAUSE COURTS ACT. **28 M. 400.**

6 Liability for negligence. 26 B. 562 Col. 1789 P. I.

7 Owners of sea going merchant ships. 26 B. 562 Col. 1789 P. I.

8 Railway Company's liability—Reasonableness of. 31 C. 951 Col. 825 P. I.

9 Railway Company's liability for passenger's luggage lost. 73 P. R. 1907 Col. 825 P. I.

10 Railway Company's duty as carriers—Burden of proof. 3 N. L. R. 94 Col. 823 P. I.

11. *Railway Company—Receipt of goods by one Company for carriage over its own and another Company's line—Liability in respect of overcharge made by delivering Company—Bye-laws—Power of Railway Company to alter the principle of calculation of rates.*

Two wagon loads of chillies were received by the Station Master at Bezwada on

Carriers *(Contd)*

the Nizam's Guaranteed State Railway for carriage to Agra station on the Great Indian Peninsular Railway at a rate of Rs. 270 per wagon for the whole distance. On arrival at Agra the Great Indian Peninsular Railway Company's Station Master demanded payment of higher rates, calculated per maund, and refused delivery until such rates were paid. The consignees paid under protest and sued both Railway Companies for a refund of the excess charges

Held, that the contract for carriage of the goods for the whole distance was one entire contract with the receiving Company who were liable for the overcharge, if any, wrongfully demanded from the consignees 5 M. and W., 421; 3 H. and C. 77 and 3 M. 240, foll.

Held also, that a bye-law of the Great Indian Peninsular Railway Company which reserved to the Railway the right of remeasurement, reweighment, recalculation and reclassification of rates, terminals and other charges at the place of destination and of collecting, before the goods are delivered. any amount that may have been omitted or undercharged did not authorize the Great Indian Peninsular Railway Company to alter the contract between the parties and charge at the place of destination maund rates instead of wagon rates. CHUNNI LAL *v.* THE NIZAM'S GUARANTEED STATE RAILWAY COMPANY LTD. **1907 A. W. N. 21; 4 A. L. J. 80; 29 A. 228; F. B.**

Carrier's Act. III of 1865.

Ss. 3, 8, 9. Contract to carry goods partly by steamer and partly by Railway. 11 C. W. N. 1076 Col: 826 P. I.

Caste.

1. Confinements in stock—Abandonment—Regulation XI of 1816 (Madras).

To render a person liable to confinement in the stocks, there must be a concurrence of two circumstances, *viz.*, (1) he must be a person belonging to one of the lower castes of the people, and (2) he must be a person on whom from his social standing or otherwise it may not be improper to inflict so degrading a punishment.

The test seems to be not, what is the offenders creed, but what is his caste. If he belongs to one of the lower castes, a change of creed would not of itself make any difference provided he continues to belong to his caste. Each case must be decided on its special circumstances.

Regulation XI of 1816 (Madras) being a penal one must be construed strictly and in cases of doubt in favor of the liberty of the subject. HEMMURI RATTIGADU *v.* KONDA REDDI. **M. L. J., 1901, P. 23=24 M 271.**

2. *Caste question—Relief in caste matters—Right of a member of a caste to inspect documents and books of account relating to caste property—Injunction where such inspection refused.*

Where a member of a caste, who was also a trustee of the caste property, was refused inspection of books of accounts, documents, etc., by the President of the Managing Committee of the caste.

Held that an injunction could be granted, restraining the President from refusing such inspection. 19 B. 507 referred to.

Every member of a caste, being interested in its affairs, has a right, incidental to his membership, to every information, which the books, records, and documents of the caste can give him, to enable him to discharge the duties he owes to the caste. It is a right similar to that of a partner in a firm to the partnership books and can be taken away from him only by an express caste rule, resolution or usage. But a trustee or a member of a caste has such right to inspection, only for the *bona fide* purpose and in the interests of the caste, and not for any purpose hostile or injurious to those interests.

Though a Court will not interfere with the jurisdiction and discretion of a caste as regards its internal purpose and management, with reference to which it is its own master to frame rules and regulations, yet it will interfere in favour of any individual member of the caste, as against any other member or members of it, where the Court is asked to give effect to any rule, resolution, or usage of the caste, if the right claimed in virtue of such rule, resolution, or usage, is a civil right cognizable by the Court. In giving relief in such cases, the Court, so far from interfering with the autonomy of the caste, or encroaching upon its jurisdiction as to its internal affairs, recognises them by giving effect to its rule, resolution, or usage. CHAPSEY COOVERJI *v.* JETHABHAI NURSEY. **9 B L R 569.**

3 *Hindu Law—Restitution of conjugal rights—Plaintiff's being out of caste is no defence to suit for.*

The plaintiff sued for restitution of conjugal rights in respect of his wife, a minor under the guardianship of her mother. The defendant's principal plea was that the plaintiff was out of caste. The Court of first instance disallowed this objection and passed a decree in plaintiff's favour. The appellate Court found that the plaintiff had been out casted passed a conditional decree, directing that the plaintiff should first obtain restoration to caste as a condition precedent to his obtaining a decree for restitution of his conjugal right.

Held on appeal to the High Court, that as to bar a suit brought by a Hindu for restitution of conjugal rights, the defendant must set up some offence of a matrimonial nature such as would support a decree for judicial separation the fact of plaintiff being out of caste was no defence to the suit, and

Caste (*Contd*)

no condition should have been made to the decree. 8 All., 78 and 13 All., 126 referred to. SAHADUR *v.* RAJWANTA. **A. W. N. 1904 P. 173.**

4 *Hindu Law—Execution sale—Sale of Widows' estate—Marriage between Vaidya and Kayastha—Custom—Tipperah District.*

The determination of the nature of an estate passed by a sale in execution of a decree against a Hindu widow depends upon the nature of the right, title and interest sold and upon the terms of the decree in execution of which the sale was held

By custom prevailing in the District of Tipperah the marriage of a Vaidya with a Kayesth woman is not void and the offspring resulting from such union are not illegitimate. RAM LAL SHOOKOOL *v.* AKHOY CHARAN MITTER. **7 C. W. N. 619.**

Caste disabilities, Removal Act XXI of 1850.

See supreme Government Act XXI of 1850 Col: 60, 61, P. 1.

Caste question

Zanzibar—Excommunication from caste—Jurisdiction of Civil Courts—Bombay Regulation II of 1827, S. 21, cl. I.—Civil Procedure Code (Act XIV of 1882), s. II—Zanzibar to be treated as a district in the Presidency of Bombay—Zanzibar order in Council, 1884—Defamation—Privilege.

Under the Zanzibar Order in Council, 1884, Ranzibar is to be treated as a "Zillah or district in the Presidency of Bombay," and therefore Bombay Regulation II of 1827, s. 21, cl. I, applies to Zanzibar. Under Bombay Regulation II of 1827, s. 21, cl. I, only such caste suits as claim damages for injury to caste or character of the plaintiff are maintainable in Civil Courts. But when a claim to property is involved, the regulation is no bar so far as that claim is concerned. The Courts in that case have a distinct and separate jurisdiction, resting not on the caste dispute but on the claim to property. Plaintiffs and defendants were residents of Zanzibar and belonged to the Visa Oswal section of the Bania caste. The defendants were Shetias of the caste and as such had issued an order forbiding their caste-fellows to attend a certain feast given by the members of the Lovana caste' The plaintiffs, considering the order to be illegal and arbitrary, attended the feast. The defendants thereupon summoned a caste meeting, and without calling on the plaintiffs for an explanation excommunicated them and notified the fact through the caste *Gor* or priest at Zanzibar. The plaintiffs thereupon brought this suit against the defendants, complaining of the excommunication and praying (1) for a declaration that their excommunication was illegal and that they were still members of the caste and (2) for damages for defamation.

Caste question (*Contd*)

Held, with regard to the excommunication complained of, that no relief could be granted. No claim to property was involved. It was a caste question over which the Civil Courts had no Jurisdiction under Bombay Regulation II of 1827, s. 21 cl. I.

Held as to the claim for damage or defamation, that the announcement of the caste decision was a duty incumbant on the defendants as Shettias of the caste, and was therefore privileged so far as it was communicated only to members of the caste. The evidence did not disclose any communication beyond that limit and no evidence of malice was given.

Per Chandavarkar, J.—Roughly speaking, a suit raising a caste question must fall within one of three classes. First, it may be a suit brought by a member of a caste complaining of expulsion and asking for declaration that the exculsion is illegal and that he is still a member, and as such entitled to its social privileges. In cases of this class there is no cause of action and the Civil Courts have no jurisdction although the plaintiff alleges that he has not been heard in his defence or that his excommunication has been for the breach of a rule which either never existed or which the plaintiff, in fact, never violated. The question is entirely a caste question and falls within Bombay Regulation II of 1827, S. 21, Cl. I. Secondly, when the result of excommunication is to deprive a man of his civil rights, a Civil Court has jurisdiction to enteratin a suit brought to set aside such excommunication as illegal and to inquire into the merits of the case. But even here its jurisdction is limited. All the Court can inquire into is whether the order of excommunication was passed bona fide in accordance with natural justice, *i. e.*, after a due hearing given to the party excommunicated, at a regularly convened meeting of the caste which passed the order, or by a person duly authorized by the caste to pass it, in accordance with either caste usage or rule, and for an offence against that usage or rule which the man excommunicated did as a matter of fact commit. If these conditions are fulfilled, the Court must hold that the caste acted within its powers as a domestic tribunal with whose discretion it will not interfere the court in that case having jurisdiction to inquire from the point of view of the caste, not of the Court, into the reasonableness or justifiable character of the rule for a breach of which the order of excommunication was passed. Thirdly, suits claiming relief for loss of caste and character: these are in the nature of suits for libel and fall within the law applicable to such suits.—NATHU VELAI *v.* KESHAWJI, **3 B L R 718=26 B 174.**

Cause of action.

1 Acknowledgment—Cause of action—

Cause of action (*Contd.*)

Mistake in framing plaint. 14 C. P. L. R. 1901 P. 151 Col. 32 P. I.

2 Accrual of—Reversioner's suit by—Hindu widow, allienation by—Minority—Evidence of. 32 C. 165 Col. 1956 P. I.

3 Accruing to minor—Minority—Hindu widow—Adoption during minority by widow—Suit by adopted son. 9 C. W. N. 795 Col. 1742 P. I.

4 *Accrual of—Right of suit—Execution of decree—Suit for recovery of money paid to decree-holder in pursuance to an agreement in satisfaction of decree.*

The defendant obtained a decree against plaintiff for Rs 69 11. An agreement was entered into between the parties to the effect that Rs 55 was to be paid in full satisfaction of the decretal debt, and that the defendant should certify in Court. Accordingly Rs 55 was paid to the defendant who, however, without certifying satisfaction of the decree as agreed upon, applied for execution. A notice of the application was served upon the plaintiff under section 248 of the Civil Procedure Code.

Held that a suit by the plaintiff for recovery of Rs 55 paid to the defendant according to the agreement was not maintainable. TIRUMALAPALLI SRIRAMULU *v.* RAYALLI DALAYYA. **16 M. L. J. 54.**

5 Administrator's suit against deceased executors estate—Government securities—Suit for return of. 7 C. W. N. 476 Col. 1917 P. 1.

6 Administrator General, if public officer—Suit against—Notice if necessary—Cause of action—Meaning of. 8 C. W. N. 913 Col. 1197 P. I.

7 Alligation in plaint.—Objection as to want of notice to quit—Second appeal—Issues Court to frame. 26 B. 360 Col. 1255 P. I.

8 Alligation in plaint—Suit based on contract—Place where payment to be made—Return of plaint to be presented to proper Court. 79 P. R. 1902 Col. 1058 P. I.

9 Appeal—Liability of purchaser of some of the mortgaged properties. Cause of action. 6 C. W. N. 583 Col. 638 P. I.

10 *Appropriation of debt due to minor by third party—Cause of action—Joint tort-feasors—Guardian and Ward.*

The defendants Nos. 1 to 8 owed a certain sum of money to the plaintiffs who were minors. The defendant No. 9, who was a cousin of the plaintiffs, got the defendants Nos 1 to 8 to wipe out the credit from the plaintiff's account and to appropriate it to a personal debt due to them by the defendant No. 9 and his brother defendant No. 10. This was done without reference to the mother of the plaintiffs who was their guardian. The plaintiffs sued the defendants No. 1 to 10 for recovery of their money. The Court dismissed the suit against defendants Nos. 1 to 8 and decreed it against the defendants Nos. 9 and 10. The plaintiff appealed from the dismissal of their claim against the defendants Nos. 1 to 8 and the defendant No. 9 appealed for the claim to be dismissed against him.

Held, granting the appeal of the plaintiffs and rejecting that of the defendant No. 9, that all the defendants were liable. SEWA RAM *v.* KISHEN RAM. **147 P. L. R. 1906.**

11 *Attorney and agent—Legal Practitioner—Remuneration—Promissory note—Agreement by attorney to take a gross sum in lieu of costs—Client—Attorney's daybook.*

An attorney is not entitled to any reward for services rendered to his client beyond his just and fair professional remuneration during the subsistance of the relationship of attorney and client, unless the client had competent and independent advise to measure the amount of service rendered by the attorney. *Tyrrell* v. *Bank of London*, (10 H. L. C. 26, 44); *O'Brien* v. *Lewis*, (32 L J. Ch. 569); *Holman* v. *Loynes*, (4 De G. M. & G 270); *Rhodes* v. *Bate*, (L. R. 1 Ch. A. C. 252, 257); *Morgan* v. *Minett*, (L. R. 6 Ch. D. 638); *Liles* v. *Terry*, (2 Q. B. 679), followed in principle. *In re Whitcombe* (8 Beav. 140), *Lawless* v. *Mansfield*, (1 Dru & War. 557, 605), referred to. And *Holditch* v. *Carter*, (L. R 3 P and D. 115), distinguished. An attorney cannot split up his functions by acting partly as attorney and partly as agent of the same client. BROJENDRA NATH MULLICK *v.* LUCKHIMONI DASSEE. **I. L. R., 29 C. 595.**

12 *Before suit—Co-sharers—Denial by one co-sharer of another's title—Denial for the first time in the written statement.*

An assertion or denial of a right in a written statement does not give rise to a cause of action. A cause of action must be antecedent to any allegation made in the pleadings. MADAN MOHUN SHAHA *v.* RAJAB ALI ALSO **8 C. W. N. at 415; 9 C. W. N. 928; 23 C. 223.**

13 Breach of contract—Suit for damages for breach of contract of sale—Jurisdiction of Court—Cause of action—7 C. W. N. 912 Col. 1063 P. I.

14 Cancellation of deed for fraud and misrepresentation—Suit for—Cause of action in plaint alteration of—Whether permissible 21 T. L. R. 255—*See Cancellation of deed.*

15 Compromise—Cause of action—Jurisdiction—Suit for a declaration that a compromise and a decree founded thereon are null and void as against the plaintiff—25 A 48 Col. 1054 P. I.

16 Concurrent suit for cancellation of gift—Suit for possession—26 A. 236 Col. 400 P. I.

17 Counsel and client—Recovery of fee paid by client for professional services to advocate—25 A. 509 Col. 1330 P. I.

18 Continuing damages—Restraint of trade—Damages previous and after the institution of suit—Decree directing accounts

Cause of action (*Contd.*)

—Company—Liability to account—29 B. 107 Col. 294 P. I.

19 *Continuing breach—Usufructuary mortgage—Covenant to repair—Breach.*

Breach of a covenant in a usufructuary mortgage by which the mortgagor undertook to keep the premises in repair is a continuing one and a suit on such covenant is not barred by limitation. KRISHNAJI *v.* VASUDEV. **3 B. L. R. 156.**

20 *Creditor suing another for bad decree—Execution of decree—Rights of attaching creditors—Right to assail decree of rival decree-holder.*

A decree-holder attaching property of the judgment debtor under a simple money-decree sued for a declaration that a rival decree-holder, who had also attached the same property was not entitled to attach it, on the ground that the decree in his favour should not have been passed.

Held, that he had no cause of action when fraud by the defendant in obtaining his decree was neither alleged nor proved and the Court which passed the decree complained of was competent to do so.—25 *Cal.*, 179 *and* 25 *Bom.*, 337, *referred to.* LACHMI DIAL *v.* HAR DANNI LAL.—**W. N. A., 1903, p. 61=25 A. 347.**

21 *On date of suit—Acquisition of title by defendants pending suit—Pre-emption—Wajib-ul-arz—Right of pre-emption lost during pendency of suit.*

On the 14th October 1901, a suit for pre-emption was brought in respect of a mortgage dated the 17th September 1897. Another suit for pre-emption upon a sale dated 31st March 1901 between the same vendors and vendees was brought and finally decided on the 9th August 1901. The order in that case was that the plaintiffs should be allowed to enter into possession of the property on payment by them of Rs. 499 within two months, otherwise the suit should stand dismissed. The money was not paid and the suit of the plaintiffs was dismissed. Five days after that dismissal, the present suit was brought. In consequence of the dismissal, the vendees in the suit in which such dismissal took place became shareholders in the mahal.

Held that the vendees having thus become shareholders the plaintiffs had as against them no preferential right to preempt. RAM HIT SINGH *v.* NARAIN RAI. **A. W. N. 1904, p. 68=26 A. 389.**

22 *Declaration-Suit for—Under-proprietary right—Cause of action—Prescription.*

In 1873 the plaintiff's father was served with a notice of ejectment by the defendant which he resisted, alleging that he was an under-proprietor and the notice was cancelled. The plaintiff continued to hold the land on the same terms until the last settlement. He then applied to be entered as an under proprietor but the Settlement Officer recorded him as an occupancy tenant. In 1900, the defendant brought a suit for enhancement and got the plaintiff's rent enhanced. In consequence of this proceeding the plaintiff brough the suit for a declaration that he was an under-proprietor.

Held, that the plaintiff's cause of action to sue for a determination of his right arose when the Rent Court enhanced his rent, that his suit was not time-barred and that he had acquired title as an under-proprietor by prescription. HAR DAYAL *v.* UDIT NARAIN SINGH. **8 O. C. 30.**

23 *Declaratory decree—Cause of action—Suit for a declaration that the defendant had no right to mortgage joint property—Court-fee.*

The plaintiff alleged that he was a half sharer with the defendants Nos. 1 and 2 in certain houses, that by an arrangement with them he held these houses while they held other portions of the joint property exclusively and that they had mortgaged the joint property which was in his sole possession. He sued for a declaration that the defendants had no right to mortgage it. The Court held that the suit as brought was not maintainable.

Held, that the decision of the Lower Court was wrong.

Held, also, that Court fee for the suit was payable on half the mortgage money secured by the mortgage deed. GHULAM KADAR *v.* WAJIHUDDIN. **50 P. L. R. 1904.**

24 Decree—Fraudulent decree or execution —Cause of action. 25 A. 48 Col. 1054 P. I.

25 Decree for costs assigned—Assignee not party to suit—Recovery of costs from assignee —Cause of action A. W. N. 1902 P. 47 24 A. 288 Col. 1364 P. I.

NOTE—24 A. 288 read for 24 A. 228.

26 *Defamation—Privileged communication —Truth of the imputation—Action of libel—Cause of action—Publication—Question of fact.*

Where a suit is brought by a plaintiff complaining of a defamatory communication made to the caste, the first question to be determined is whether apart from the truth or falsity of the statement, the communication was or was not privileged, i. e., one made in the performance of a duty owed to the caste. If it is made in the performance of such a duty for the protection and in the interests of the caste the question whether the imputation is true or not is immaterial.

In an action for libel, the cause of action is not the writing but the publication, and the question is not whether the writing but whether the publication is on a privileged occasion. If the facts are not in dispute, the question whether the occasion is privileged is one of law for the Judge to decide, but where they are in dispute, they must be left to the jury and when the jury have found the facts, it is for the Judge to say whether they constitute a privileged occasion. And in dealing with the question of privileged occasion the Judge has to consider whether the defendant who published the defamatory matter had any interest or duty in connection with the subject. ADITRAM MAHASHANKAR *v.* HARGOVAN KALIDAS. **6 B. L. R. 684.**

Cause of action (*Contd.*)

27 Different breaches of contract 28 P. R. 1907 Col. 1403 P. I.

28 Different allegel and different prove—Suit for maintenance of possession—Suit virtually one to get a rectification of an erroneous decree or a cancellation of an erroneous order in execution. BASAWAN KURMI *v.* NAKCHHEDI PANDE. **A. W. N. 1904,** P. **207=27 A. 174.**

See pleadings.

29 Different cause of action—No resjudicata—Plaintiff not bound to unite in a suit—8 O. C. 65, Col: 1040, P. I.

30 Different transfers of widow—Reversioners declaratory suit 9 O. C. 326, Col: 1415 P. 1.

31 Dispossession caused by a reversal of a decree, whether would give a fresh—for a suit for possession so as to give a fresh starting point for limitation. NARANAYANAN CHETTY *v.* KANNAMAI ACHI. **28 M. 338.**

See for other facts Col. 935, 1766 and 874 P. I.

32 *Negligence—Negligent act of Revenue officer—Cause of action.*

Plaintiff, a Government rayat, suffered damage by reason of the negligence of the Tahsildar in causing the Government channel, from which the plaintiff's land derived its supply of water to be closed. It was part of the Tehsildar's duty to see that the channel was closed at a certain date, but he made the mistake of closing it fifteen days too soon.

Held, that in the absence of allegation of malice on the part of the Tehsildar, or, the infringement of any right of property the plaintiff had no cause of action against the Tehsildar. 7 *Mad., H. C. R, 60 and 16 Mad., 333, referred to.* CHINNAPPA MUDALIAR *v.* SIKHA NAIKAN. **24 M. 86.**

33 *Cause of action—Pro note payable in Madras—Duly stamped—Pro-note stamped immediately after signature.*

Where the pro-note was payable in Madras or Secunderabad and payments of interest were made in Madras, it cannot be said that no part of cause of action arose in Madras. The obligation to pay in either place gave a cause of action in both places.

Stamp on the pro-note in suit was affixed and cancelled after the signature on the pro-note was made but the acts were practically simultaneous.

Held, that the pro-note was duly stamped and was admissible in evidence—S. 16, Act I of 1879 In determining whether a document is sufficiently stamped with reference to its admissibility in evidence the document must be looked at as it stands without having recourse to collateral circumstances to be proved by extraneous circumstances.- 16 *Cal.* 432 2 *Q. B.* 715. SURIJ MULL *v.* HUDSON. **24 M. 259.**

34 Execution of decree—Khas and Symbolicial possession—Decree absolute for foreclosure—16 C. P. L. R. 1903 P. 197 Col. 668 P. I.

Cause of action (*Contd.*)

35 *False evidence—Defamation—Conspiracy—Cause of Action—Costs.*

No action for damages will lie against persons who had given false evidence for doing so. 11 B. L. R., 321; 17 Bom., 123, 573 and 14 Bom., 97.

And no action will lie for conspiracy unless the overt act is itself actionable.

If one of the defendants has infringed the personal rights of the plaintiff, the others who combined towards such infringement would also be held liable.

The words 'costs in the cause' do not mean that those costs will follow the event, but that the costs remain to be dealt with by the Court at the hearing.

It is open to the plaintiff to have the question as to whether the plaint disclosed a cause of action and the question of jurisdiction set down for trial on a preliminary issue. There is no obligation on the defendant to raise the preliminary issues at all. TEMPLETON *v.* LAURIE. **25 B., 230.**

36 Fee for medical attendance—First suit for a part of—Fee for medical attendance on a pro-note decreed—Second suit for balance, barred. 29 A. 256 Col. 1406 P. I.

37 Foreigner—Defendants against—Jurisdiction against resident of foreign state—Cause of action. 25 B. 523 Col. 1055 P. I.

38 *Ghatwali Tenure (in Bankura)—Heritability—Resumption.*

Where a ghatwali tenure is proved to have passed from father to son for many generations.

Held that the presumption would be that it was held under a grant of inheritance although the grant may not contain words of inheritance. A ghatwali tenure in the district of Bankura was held subject to the payment of quit rent and the performance of ghatwali services. At the time of the permanent settlement, the lands comprised in the tenure were included within the *mal* lands of the zemindari and revenue was assessed upon the footing that the quit rent was fixed in perpetuity.

Held that, that the tenure was a permanent and heritable one and was held subject to the performance of the services. Such tenure could not be determined or resumed either by the zemindar or by the government on the ground that the services were no longer required. Where a *ghatwal* having become incapable of personally performing the services, his son was appointed deputy to discharge the duties, but was dismissed for incapacity.

Held that the son was not thereby debarred from succeeding his father after his death. JOGENDRA NATH SINGH *v.* KALI CHARAN ROY. **9 C. W. N. 663.**

39. Guarantee, revocation of, surety—Liability of surety to a firm which has undergone change in its constitution—28 C 597 Col: 379 P. I.

Cause of action (*Contd.*)

40. *Defamation—Cause of action—Special damage—Unchastity. Imputation of.*

A used words which imputed unchastity to the wife of X.

Held, (i) that the words constituted defamation not only of the wife of *X*, but also of *X* himself, and *X* was, therefore, entitled to maintain an action on his own account; (ii) that the words were actionable without proof of special damage. SUKAM TELI *v.* BIPAL TELI **4 C. L. J. 388=34 C. 48.**

41 *Defamation—Libel—Slander—Cause of action—Special damage—Publication.*

A wrote letters to the husband of X. In which he alleged that X was a witch, and had by her sorcery caused the death of some relations of A. A also made oral statements of a similar description to their castemen. P and her husband sued to recover damages for defamation.

Held, (i), that the husband of X had no casue of action as the imputation made was not defamatory of him. *2 Cal. L. J.*, 396 *applied*

(ii). That X had a good cause of action as the imputation made tended to bring her into hatred, conempt or ridicule. 4 *Mason* 115 *followed.*

(iii). That there was publication of the defamation. A communication to a husband or a wife of a charge against the wife or husband, constitutes a sufficient publication. (1895) 55 *Am. St. Rep.* 224 : (1843) 20 *N. J. Law*, 208 *followed*; (1853) 13 *C. B.* 1836 : (1885) 1 *T. L. R.* 572 *applied* ; (1892) 33 *Am. St Rep.* 936; (1889) 12 *Am. St. Rep.* 76; (1888) 20 *Q. B. D.* 635 *distinguished.*

(iv). That so far as the libel was concerned, no proof of special damage was necessary. The distinction between the actionable quality of oral and written words examined. (1878) 33 *Am., Rep.*, 403 ; (1834) 27 *Am., Dec.*, 271 *followed.*

(v). That so far as the slander was concerned, no proof of special damage was necessary 26 *Cal.*, 653 *distinguished* (1898) 3 *C. L. J. 140* ; (1906) 4 *C. L. J.*, 388 *followed.*

The earlier English authorities on the subject reviewed. SHOOBHAGEE KOERI *v.* BOKHORI RAM. **4 C. L. J. 390.**

42 Jurisdiction—Suit for a declaration that a compromise and a decree founded thereon are null and void as against the plaintiff. A. W. N. 1902 P. 179—25 A. 48 col. 1054 P. I.

43 Jurisdiction—Splitting of claims—Claim on distinct causes of action. 28 B. 447 col. 1403 P. I.

44 *Jurisdiction — Arbitration — Cause of Action—Foreign Judgment—Award, suit on—Arbitration Act (52 and 53 Vict., C. 49), s. 12.*

An award was made against the defendant in England for payment of a certain sum of money to the plaintiffs an order under S. 12 of the Arbitration Act (52 and 53 Vict. C. 49) was made thereon. The defendant, who at the time of the commencement of the suit was not dwelling, or carrying on business, or personally working for gain, within the limits of the Ordinary Original Jurisdiction of this Court, in consideration of the plaintiff's agent (in Calcutta) undertaking not to institute any suit for a certain time, made a promise to pay in part £500 within a certain period and the balance of the amount of the award in time. The plaintiffs instituted, with leave under cl. 12 of the Letters Patent, this suit for the amount of the award :

Held that under the above circumstances, the consideration for the promise on the part of the plaintiff's agent was illusory, amounting only to a promise on the defendant's part to do what he was already legally bound to do, and the transaction formed no part of the cause of action, and this Court had no jurisdiction to try the suit. "Cause of action" defined Read *v.* Brown, (L. R. 22 Q. B. D. 128) referred to.

Semble : An order under S. 12 of the Arbitration Act (52 and 53 Vict., C. 49) enforcing an award made in England is not such a judgment that a suit in a Court in this country can be instituted on it as on a foreign judgment. But on the facts as stated above, the Court was at liberty to make the decree it did, on the footing that the suit was one based on the award and not on the order made under S. 12 of the Arbitration Act. DEEP NARAIN SINGH *v.* DIETERT, **31 C. 274=8 C. W. N. 207.**

44 (a) Jurisdiction—Misjoinder of cause of action—Suit by widow for a share of husband's immoveable and moveables. 31 C. 262, Col. 1424 P. I.

45. *Jurisdiction—Easement - Suit, Right of —Parties—Civil Procedure Code (Act XIV of 1882), s. 30—Public road—Right of owner of soil—Right of way—Tort—Damages—Injunction—Minor—Cause of action.*

Where a road has been dedicated for the use of the public, the owner of the soil, over which the road runs, is entitled to exercise all rights of ownership so as not to interfere with the right of way, which exists in the public. *Vestry of St. Mary, Newington* v *Jacobs*, (L. R. 7 Q B. 47) referred to. When the owner of such soil is responsible for keeping the road in order and in good repair, he is entitled to institute a suit for damages and injunction against the destroyer of any work of improvement done to the road, without proving special damage. A minor is not responsible for a tort committed by the manager of his estate, provided the tortious act was not in connection with the management of the estate. MAHARAJ BAHADUR SINGH *v.* PARESH NATH SINGH. **31 C. 839.**

45 (a) Jurisdiction—Malacious prosecution—Abatement of suit—8 C. W. N. 745—31 C. 993. *See Malicious Prosecution.*

46. Jurisdiction—Separate suit not barred—Formal Possession—Dispossession—Cause

Cause of action (*Contd*).

of action—Right of suit. 8 C. W. N. 49 Col: 1087 P. I.

47. *Letters Patent, Clause 12—Cause of action—Payment of debt—Place of.*

The plaintiff, a commission agent carrying on business in Bombay, sued the defendant, who carried on a similar business at Phulgaon, for recovery of money on settlement of accounts, after obtaining leave under clause 12 of the Letters Patent. Certain instructions were given by the plaintiff to the defendant at Phulgaon to enter into certain transaction on his behalf which were complied with by the defendant. The defendant submitted accounts and sent money to the plaintiff at Bombay. It was contended for the defendant that no part of cause of action arose in Bombay and leave should be rescinded.

Held, that these facts were material parts of the cause of action and leave was properly granted.

The expression "cause of action" means the bundle of facts, which it is necessary for the plaintiffs to prove before he can succeed in his suit. Not irrelevant immaterial facts, but material facts without which the plaintiff must fail. If any of these material facts have taken place within the jurisdiction of Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court, and leave is given, then it is open to the defendant to contend at the hearing that the Court has no jurisdiction.

Where no specific contract exists as to the place where the payment of the debt is to be made, it is the duty of the debtor to make the payment where the creditor is. MOTILAL PRATABCHAND *v.* SURAJMAL JOHARMAL. **6 B. L. R. 1038.**

48. *Letters Patent, Section 12—Suit on the Original Side of the High Court—Leave of Court—Cause of action—Land situated beyond the jurisdiction of the Court—Jurisdiction of High Court—Injunction—Court of Equity in England—Practice.*

The plaintiffs after obtaining leave under clause 12 of the Letters Patent brought a suit on the Original Side of the High Court of Bombay in which the plaintiffs after setting forth their title to, and possession of, a certain Talao situate beyond the local limits of the Court's original jurisdiction alleged that the defendants, who resided within the jurisdiction of the Court, were molesting them in their possession and enjoyment of the said Taloa and prayed that it might be declared that the plaintiffs were entitled to the exclusive possession and enjoyment of the said Talao and to control the water-connections therefrom and that the defendants had no right in or to the said Talao or to take water therefrom through the said connections. The plaintiffs also sought for an injunction to give effect to that declaration. The defendants obtained a summons to have the leave granted rescinded but on the summons being dismissed the defendants appealed.

Held, that the order dismissing the summons was appealable, 13 *B L R followed.*

Held, also that as the prayers were directly concerned with the land and the leading purpose of the suit was to establish a title to possession of land and to secure that possession from molestation, and the claim was based not on any contract, trust or fraud, or any circumstance giving rise to privity between the parties, but was brought to vindicate rights resulting from ownership and possession alleged to be with the plaintiffs the suit was one for land and the Court had no jurisdiction in the suit.

A suit for land is not necessarily a suit which asks for delivery of the land to the plaintiff.

Under section 12 of the Letters Patent leave is only required where the cause of action shall have arisen in part within the local limits of the Ordinary Original Jurisdiction of the High Court, in no other case is there any power or need to give leave.

A Court of Equity in England only assumes jurisdiction in relation to land abroad, when as between the litigants or their predecessors some privity or relation was established on the ground of contract, trust or fraud, but in no case has the Court of Equity entertained a suit, even if the defendant was within the limits of its jurisdiction, where the purpose was to obtain a declaration of title to foreign land.

Though it is a general principle that the title to land should ordinarily be determined by the Court within the limits of whose jurisdiction it lies, it no doubt is open to the Legislature to disregard that principle.

But the Courts certainly would not lean towards a construction involving that result, where the words of the Legislature are fairly capable of a meaning in conformity with the general principle.

The expression "suit for land" was not intended to be read with a technical limitation which never had associated with it. VAGHOGIKUVERJI *v.* CAMAJI BOMANJI. **6 B. L. R. 958.**

49. *Jurisdiction—Place of suing for breach of contract—Damages for Contract Act S. 4, 5 —C. P. C. S. 20.*

Plaintiff, who resided at Kurnool, filed a suit in the District Court of Kurnool against the defendants, who resided in Madras, for damages. Plaintiff had been consigning goods for sale to the defendants as commission agents and he now complained that they had sold his goods at rates unnecessarily low. The contract of agency had been concluded by postal communications between plaintiff and defendants:

Held, that the suit was one arising out of contract within the meaning of S. 17 of the Code of Civil Procedure, that, within the meaning of explanation III to that section, the cause of action arose at the

Cause of action *(Contd)*

place where the contract was made, *i. e.*, at Madras and that clause (iii) of the explanation was inapplicable to the suit inasmuch as the amount claimed was one payable not in performance of the contract, but as damages for its breach. Under the Indian Contract Act, where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted, though the contract is voidable at the instance of the acceptor by communication of his revocation before the acceptance has come to the knowledge of the proposer.—KAMISETTI *v* KATHA VENKATASWAMY. **I. L. R. 27 M. 355.**

50 *Jurisdiction—Suit for rent or in default for possession of land—Settlement decree entitling landlord to demand any reasonable rent at his option—Landlord and tenant, relation of—Rent Act—Res judicata—Cause of Action—Civil Procedure Code (Act XIV of 1882), ss. 13, 43—Limitation.*

In 1866 the defendant obtained from the Settlement Court a decree against the plaintiff in respect of certain plots of land. That decree, according to a subsequent decision of the Judicial Commissioner's Court, conferred on the defendant under-proprietary rights only in the trees standing on the plots, and not in the land, possession of which could not be maintained by the defendant without paying rent, should rent be demanded. In 1895 the plaintiff brought a civil suit to have rent assessed on the land. The suit was dismissed on the ground that the Civil Court had no jurisdiction. In 1898 the plaintiff gave the defendant a notice requring him to pay Rs. 191-4-0 per year as ground rent. To this the defendant paid no heed. Upon this the plaintiff sued in the Revenue Court for ejectment but the suit was dismissed. In 1900 he brought a civil suit and prayed that the defendant be ordered to pay a reasonable amount of rent which came to Rs. 191-4-0 or in the alternative actual and proprietary possession of the land be decreed.

Held, that the relation of landlord and tenant did not exist between the parties as defined by the Oudh Rent Act and that the Civil Court were not debarred from taking cognizance of the suit.

Held, that, the question as to whether the defendant was a tenant was not *res-judicata.*

Held, also, that section 43, Civil Procedure Code, did not affect the case because a part of the cause of action was the notice which the plaintiff served on the defendant after disposal of the former civil suit.

Held, further, that the defendent's possession could not become adverse till refusal of payment of rent on his part and as that rent was not demanded till 1898, the suit was not barred by limitation. MOHAMMED ALI RAZA KHAN *v.* MUSAMMAT MENDA. **6 O C 341.**

Cause of action *(Contd.)*

51 *Malicious Prosecution—Damages—Plaintiff not prosecuted by defendant though names by the defendants as having some connection with an assault made upon him—Prosecution initiated by Magistrate* suo motu.

One Dhudhnath Kandu lodged a complaint before a Magistrate that he had been assaulted and severally beaten by four persons whom he named. He subsequently added the name of a fifth person as one of his assailants. When required to make a statement upon oath in support of his complaint, he stated *inter alia*, that in the course of the assault one Mathura Prasad came from behind and called out "beat." Thereupon the Magistrate issued a warrant against Mathura Prasad also as well as against the persons named in the complaint. Mathura Prasad was acquitted, and thereafter brought a suit for damages for malicious prosecution against the complaint.

Held that the plaintiff had never been prosecuted by the complaint but that his prosecution was due to the action of the Court *suo motu*, and that the plaintiff had no cause of action against the defendant. DUDHNATH KANDU *v.* MATHURA PRASAD. **24 A 317.**

52 *Malicious prosecution—Complainant responsible for prosecution and its continuance—Material part of cause of action—Jurisdiction of High Court—Letters Patent, clause 12—Extradition Act (XXI of 1879), Section 14.*

The expression "cause of action" means that bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case.

In pursuance of a prosecution for defamation proceedings were taken in Bombay under the Extradition Act for the extradition of the plaintiff from British India so that he be put on his trial in Kathiawar. On that trial it was held that there was no foundation for the charge of defamation brought by the defendant against the plaintiff and that the plaintiff be acquitted and that he should not be extradited from British territory. The plaintiff thereupon sued the defendant for damages for malicious prosecution in the High Court of Bombay after obtaining leave under clause 12 of the Letters Patent. On application to cancel the leave

Held, that the suit could be brought in the High Court as at least a material part of the cause of action had arisen within the jurisdiction of the Court.

A person is responsible not merely for starting a prosecution but also for continuing a prosecution, and he is so responsible whether the prosecution was ordered by the Court or whether it was an independent prosecution started by the party himself. MUSA YAKUB MODY *v.* MANILAL AJITRAI. **7 B. L. R., 20 = 29 B 368.**

53 *Mahabrahmani Collections—Right to—Suit for share in offerings not one in which right to property is involved—Contract—Cause of action.*

A suit by one party against the other

Cause of action *(Contd.)*

claiming a share in a voluntary offering made by a third person is not a suit in which a right to property is involved, and in the absence of a contract between the parties the plaintiff is not entitled to recover any share of that offering. In the case of *Mahabrahmins* claiming a right to make collections in certain localities or from certain classes, no claim based on an alleged right to property can be set up, and it would only be from a breach of some contract that a cause of action could arise. BHAGWAN DIN *v.* MANI RAM. **5 O. C. 225**

54 Meaning of--Multifariousness--Appeal. 6 C. W. N. 585 Col. 1381 P. I.

55 *Meaning of--Letters Patent, Article 12—Promise made out of jurisdiction of High Court to be fulfilled within the jurisdiction—Promise of payment. Breach of--Suit on Original Side filed without obtaining leave--Jurisdiction of High Court to hear suit.*

Held, that the words " cause of action " in article 12 of the Letters Patent, mean all those things which are necessary to give a right of action and that in a suit for breach of contract, the High Court has no jurisdiction, where leave has not been given, unless it is proved that the contract as well as the breach of it occurred within the local limits of the Court. SESHAGIRI ROW *v.* NAWAB ASKUR JUNG. **27 M. 494.**

56 Meaning of—Splitting of—Resjudicata—Mortgage—Suit upon specific mortgage—Fresh suit on another mortgage on failure to prove the one in suit in the first case. 13 M. L. J. 448 Col. 1027 P. I.

57 *Meaning of.*

Cause of action is the entire set of facts which give rise to an enforceable claim. It comprises every fact, which a plaintiff must, if traversed, prove in order to obtain judgment. It has no relation whatsoever to the defence, which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. 42 L. J. C. P. 98, 58 L. J. Q. B. 120, refd to 16 C. 98--15 I. A. 156 (P. C.) F. DULICHAND CHAUDHRI *v.* LALLAH KURMI. **1 N. L. R. 4.**

58 Meaning of —First suit for possession dismissed as not cognizable by--Civil Court --Application for withdrawal rejected and appeal dismissed--Subsequent suit for declaration. 8 O. C. 389 Col. 1031 P. I.

59 Meaning of--Cause of action--Misjoinder of--Suit to contest alienations by widow--Hindu Law, 1 P. R. 1905 Col. 1383 P. I.

60 Meaning of—Interlocutory order—Injunction—Receiver. 7 B. L. R. 925 Col. 1422 P. I.

61 *Meaning of—Letters Patent, Clause 12—Cause of action—Payment of debt. Place of—*

The plaintiff, a commission agent carrying on business in Bombay, sued the defendant, who carried on a similar business at Phulgaon, for recovery of money on settlement of accounts, after obtaining leave under clause 12 of the Letters Patent. Certain instructions were given by the plaintiff to the defendant at Phulgaon to enter into certain transactions on his behalf which were complied with by the defendant. The defendant submitted accounts and sent money to the plaintiff at Bombay. It was contended for the defendant that no part of cause of action arose in Bombay and leave should be rescined.

Held, that these facts were material parts of the cause of action and leave was properly granted.

The expression " cause of action " means the bundle of facts, which it is necessary for the plaintiff to prove before he can succeed in his suit. Not irrelevant immaterial facts, but material facts without which the plaintiff must fail. If any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court, and leave is given, when it is open to the defendant to contend at the hearing that the Court has no jurisdiction.

Where no specific contract exists as to the place where the payment of the debt is to be made, it is the duty of the debtor to make the payment where the creditor is. MOTILAL PRATABCHAND *v.* SURAJMAL JOHARMAL. **6 B. L. R., 1038=30 B. 167.**

62. Meaning of — Multifariousness — Causes of action. 25 M. 736 Col: 1882 P. I.

63. *Meaning of. Civil Procedure Code (Act XIV of 1882), Section 17—Carrying on business--Agent--Manager of joint family.*

A manager of a joint family property is not an agent for the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such person is not that of principal or agent, or of partners, it is much more like that of trustee and *Cestui que trust.* ANNAMALAI CHETTY *v.* MURUGASA CHETTY. **W. N. C., 754=5 B, L. R. 734 =26 M. 544 (P. C.).**

64. Meaning of—Suit against co-sharers in possession to share in the property—Necessary parties — Cause of action—No misjoinder. 6 O C. 379 Col. 1380 P. I.

65 Meaning of--" Unable to entertain " and " unable to decide," distinction between--" Some other cause of the like nature," what is--Non suit--Misjoinder of parties and cause of action. 35 C. 728 Col. 1765 P. I.

66 Meaning of—Misjoinder of causes of action---Suit dismissed---Second appeal--Practice. 5 B. L. R. 185 Col. 1426 P. I.

67 *Misjoinder--Causes of action.*

Held, that there is no misjoinder of causes of action when a plaintiff is doubtful whether the law or some special custom will be held binding by the Court and when in such a case he relies on both He will obtain the relief appropriate to his case.--MUSAMMAT MOHUMED-IN-NISSA *v.* MU-

Cause of action (*Contd.*)

SAMMAT NASIBAN. **1 O. C. 80.**

68 Misjoinder—Cause of action. 3 O. C. 176 Col. 1374 P. I.

69 Joinder of parties—Irregularity not cured. 26 B. 259 Col. 1234 P. I.

70 *Voluntary conveyance—Suit to set aside—Circumstances surrounding the transaction and conduct of parties*—Bona fide *transaction—Fraud—Acquiescence—Civil Procedure Code (Act XIV of 1882), Section 45—Misjoinder of causes of action.*

The plaintiff, having obtained a money decree against defendant No. 2, sought to attach certain moneys in the hands of the Accountant General as his judgment-debtors. Defendant No. 1, wife of defendant No. 2, gave notice to the Accountant General that the money belonged to her under a deed of assignment executed by defendant No. 2 in her favour several years before the decree. Defendant No. 1's claim was inquired into by the Court executing the plaintiff's decree, and the plaintiff was referred to a regular suit. The plaintiff brought the present suit in which firstly on his own behalf he asked the Court to set aside the deed of assignment in favour of defendant No. 1 as void against him, and secondly, he on his own behalf and on behalf of other creditors, who were not made parties to the suit, but whom a notice was given under section 30 of the Civil Procedure Code, asked the Court to declare that the deed of assignment was voidable at the option of the defendant No. 2's creditors, including the plaintiff. The plaintiff's case was that the deed was invalid, because, firstly, it was executed at a time when defendant No. 2 was in embarrassed circumstances for the purpose of defeating and delaying creditors, and secondly, because it represented a sham and colorable transaction which passed no right to defendant No. 1, but the second ground was abandoned.

Held, that there was no misjoinder of causes of action or parties in the frame of the suit.

Held, also, that for the purposes of determining the question, whether the deed was a sham transaction, the Court must take into consideration all the circumstances which surrounded the transaction and the conduct contemporaneous and subsequent of the parties.

It was found that, as there was no indebtedness at the time of the execution of the deed, all existing debts having been paid off before its execution and the consideration for the conveyance being natural love and affection, which the law regards as good, the deed was so far a *bona fide* transaction.

No *mala fides* can be presumed merely from the possibitily that the settlement might prejudice the claims of subsequent creditors.—I. L. R., XXIII Bom., 146, *at p.* 157 *referred to.*

It was contended for the plaintiff that *mala fides* must be presumed from (1) no notice of assignment having been given to the Accountant-General ; (2) interest being realizad by the defendant No. 2 subsequently to the assignment ; (3) defendant No. 2's dealing with moneys in satisfaction of his own decrees.

Held, that *mala fides* could not be presumed from the above facts. Notice of assignment to the Accountant-General was not necessary; it must be presumed that, when the defendant No. 2 began to receive the moneys immediately after the execution of the deed, he received them for defendant No. 1, and made them over to her, and from her acquiescence in her husband's dealing with the moneys, *benami* nature of the transaction could not be presumed.

It is not the practice of the Courts in India to press a presumption by acquiescence against a *parda nashin* female in a rival claim from the near non-contestation for a limited time of an adverse title.

Where the circumstances attending the transactions are by themselves suggestive of *bona fides*, the evidence of intention afforded by subsequent conduct of the parties must be clear and cogent. It must not be of an equivocal character, but absolutely inconsistent with the *bona fides* of the transaction and leading to one and but one presumption only presumption of fraud. EBRAHIM RAHIM BHOY *v.* FULBAI. **4, B. L. R. 180=26 B. 577.**

71 *Joint debtors—Consent decree against one—Right to continue suit against the other—Practice.*

Where a plaintiff sues against two joint debtors and takes a decree by consent against one of them, there is nothing to prevent the further prosecution of the suit to establish the joint liability of the other. (1891) 2 Cr 295 diss. from. DICK *v.* DHUNJEE. **3 B L. R. 234; 25 B. 378.**

72 *Joint Property—Illegal ouster of joint owner—Suit for recovery of joint possession.*

Held, that if a plaintiff has been in joint possession of property and has been illegally ousted from joint possession of any portion of that property by a co-owner, he is entitled to be restored to such joint possession. *Rahman Chaudhri* v. *Salamat Chaudhri*, (A. W. N. 1901, p. 48). distinguished. BHAIRON RAI *v.* SARAN RAI. **I. L. R. 26 A., 588; A. W. N. 1904, P. 106.**

73 Joinder of causes of action—Suit for enhancement and arrear of rent, burden of proof—Raiyat at fixed rate. 5 C. W. N. 880 Col. 1419 P. I.

74 Subsequent lease in possession—First lease's suit to eject him—Compensation for improvement. 29 C. 871 Col. 569 P. I.

75 *Restitution of conjugal rights—Hindu Law.*

Held, that a suit for restitution of conjugal rights lie in the case of Hindus, though a suit will not lie by a husband to recover possession of the person of his wife. The husband is entitled to get decree if the wife has attained an age at which she is consider-

Cause of action (*Contd*).

ed fit to discharge her conjugal duties, though in the eye of the law she may still be a minor; conditions may be imposed in certain cases; *held*, also, that the Limitation Act is not intended to define or create causes of actions, but simply to prescribe the period within which existing rights may be enforced in the Courts of Law.

Held, also, that from the mere finding that the marriage was celebrated no presumption arises that all the rites and ceremonies necessary to constitute a legal and valid marriage were performed.

When some of the defendant's witnesses were not in attendance owing to a belief caused by the improper procedure adopted by the Munsiff of examining one or two witnesses each day and adjournment was refused the High Court set aside the decree and remanded the suits for retail. SURJAMONI DASSEE *v.* KALI KANTA DAS. **28 C 37.**

76 *Hindu law—Father's debts—Specific performance of a contract against minor.*

The duty to discharge the father's debts justifies the acquisition of the money required for that purpose, even though it be by sale of the ancestral land; but the existence of a reasonable belief by the purchaser in the existence of those debts is a necessary condition.

No Court would, even if it could, make a decree for the specific performance of a contract affecting an infant unless the contract was shown to be for the infant's benefit. JAMSETJI N. TATA *v.* KASHINATH JIVAN MANGELLIA. **3 B. L. R. 398=26 B. 326.**

77 *Libel—Newspaper article—Alligations of fact and* bona fide *comment—Proof of truth essential, when criminal offence imputed—Misjoinder of parties—Cause of action—Amendment.* BARROW *v.* HEMCHUNDER LAHIRI. **35 C. 495.** *See Amendment of Plaint.*

78 Mesne profits—"Cause of a like nature"—*Resjudicata*—Past and future—Previous suit for. 32 C. 118 Col. 1882 P. I.

79 Multifariousness—Appeal. 6 C. W. N. 585 Col. 1381 P. I.

80 Multifariousness—Administration suit—Suit to set aside decree obtained by fraud—Jurisdiction of High Court Original side—7 C. W. N. 353 Col. 1757 P. I.

81 Multifariousness—Misjoinder of parties—Causes of action. 29 C. 257 Col. 1382 P. I.

82 Misjoinder of causes of action—Omission to claim all reliefs. 24 A. 553 Col. 1414 P. I.

83 Misjoinder of parties and causes of action—Joinder of claim for moveable and immoveable property. 24 A. 358 Col. 1388 P. I.

84 Suit based on several mortgages hypothicating different properties. 25 A. 229 Col. 1425 P. I.

85 Novation—Hundies in satisfaction of account—Right to sue on accounts. 7 P. R. 1903 Col. 313 P. I.

Cause of action (*Contd.*)

86 Original—Maintainability of suit on—Pro-note. 26 A. 178 Col. 188 P. I.

87 *Promissory note not duly stamped—Suit on original contract.*

When a cause of action for money is complete in itself whether for goods sold or for money lent or for any other claim and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may sue on the original consideration, provided he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person.

But when the original cause of action is the bill or note itself and does not exist independently of it, there is no cause of action for money lent otherwise than upon the note itself, and a suit is not maintainable otherwise than on the bill or note. 7 *Cal.*, 256 *followed.*, 10 *Mad.*, 94 *distinguished.* YARLAGADDA VEERARAGHAVYYA *v.* GORANTLA RAMAYYA. **15 M. L. J. 484=29 M 111.**

88 Promissory note accepted by vendor for their value—Suit for the price of goods and not on pro-note. 25 M. 580.—*See Burden of proof—Pro-note.*

89 Plaint-Sufficient disclosure of cause of action "contract in writing registered"—Signed by one party thereto. 25 M. 50 Col. 1893 P. I.

90 *Plaint—Cause of action—Suit against Secretary of State.*

In a suit, brought against the Secretary of State for restoration of certain property belonging to the plaintiff, it was alleged that the plaintiff's brother was charged with an offence under section 363, I. P. C, and that he had absconded; that thereupon the property in dispute was attached as the property of his brother and was not released on the objections of the plaintiff by Deputy Magistrate and the Deputy Commissioner. No action by the Secretary of State or by any person, for whose actions he could be deemed responsible had been referred to or suggested.

Held, that the suit was not maintainable as the plaint disclosed no cause of action against the Secretary of State. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RAM AUTAR. **4 O. C. 29.**

91 Place of suing—Suit for declaration that a compromise and a decree founded thereon are null and void as against the plaintiff 25 A. 48 Col. 1054 P. I.

92. Plaint—Cause of action, Statement of—Privileged communication—Publication. 6 B. L. R. 131 Col. 47, P. I.

NOTE—6 B. L. R. 131 read for 6 B. L., B. L. R. 133.

93. *Pre-emption*—Wajib-ul-arz, *interpretation of—Mortgage by conditional sale—Cause of action.*

This was a suit for pre-emption in respect of a certain property which was the subject of a mortgage by way of conditional sale regarding which a suit for foreclosure had

Cause of action (*Contd.*)

been decreed in favour of the mortgagee.

Held, on a construction of the *wajib-ul-arz*, that the terms of the *wajib-ul-arz* are wide enough to cover the case of such a transfer. The cause of action arose both at the time when the deed of conditional sale was executed and also when the mortgage was foreclosed.

Held, also, that when the terms of a *wajib-ul-arz* fixed the price which the pre-emptor has to pay at a rate very favourable to the pre-emptor, the prices so fixed ran with the land and were enforcible even against *bona fide* purchasers. *Karim Bux* v. *Phul Bibi* (I. L. R., 8 All. 102) followed. BAHADUR SINHA *v.* RAM SINHA. **A. W. N. 1904 p. 149=27 A. 12.**

94. *Pre-emption—Rival pre-emptors, suit between—Conditional decree for pre-emption to claimant with inferior rights—Pre-emption of part of property sold—Wife, position of, in the order of relationships—Oudh Laws Act (XVIII of 1876), s. 9—Suit for immoveable property situate in different districts—Cause of action—Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 19.*

Z and his wife executed two deeds of sale on different dates in respect of certain villages in Kheri and Hardoi districts for certain sums of money in favour of R.

K. H., who was the cousin of Z, brought two suits for pre-emption, one on each deed in the Court of the Subordinate Judge of Hardoi claiming as a co-sharer in each village to oust the purchaser who was a stranger. Subsequently two similar suits were filed in the same Court by K. F., another wife of Z., claiming pre-emption on the same deeds as a co sharer. The two plaintiffs were each made a defendant in the other's cases. The Subordinate Judge found that neither plaintiff was a co-sharer in the village situate in Hardoi district, but on the strength of s. 19, C. P. C., tried the suit. He decreed the whole claim of K. H. on the ground that the lands in the Hardoi district were included in the same deeds of sale, with lump-sums as consideration, as the lands in the Kheri district over which the plaintiff had pre-emptive rights. He passed a similar decree in favour of K. F. to be operative in the event of K. H. making default in payment within the stipulated time. On appeal, the District Judge dismissed the suit on the ground that the Subordinate Judge of Hardoi had no jurisdiction to entertain the suits. Hence K. H. and K. F. filed separate appeals in the Court of the Judicial Commissioner.

Held, that the Subordinate Judge had jurisdiction to try the suit notwithstanding the finding that the plaintiffs had no pre-emptive rights in land situate in the Hardoi district and that it did not depend upon the finding of the Court as to the existence or otherwise of any of the causes of action stated in the plaint but it depended on the allegations made in the plaint as to the causes of action and subject-matter of the suit. There must be *prima facie* a cause of action common to the portions of the property, the subject of the suit in both districts (or all the districts); the mere assertion of a claim respecting property in the district selected as the *venue* would not suffice, under the claim arose out of the same cause of action (or a cognate one which could legally be joined with it) as the claim to the property in the other district (or districts).

Held, that, where the plaintiff has a pre-emptive right as to a part only of the property conveyed by a deed, he can only obtain a decree for pre-emption of that part; but where the consideration for the whole is a lump-sum, he is entitled to such decree on payment of a proportionate part of the consideration.

Held, therefore, that K. H. and K. F (the plaintiffs) had a right (apart from the other's claim) to have a decree for pre-emption in each of their suits as to that portion of the property which is situate in the Kheri district.

Held, *further*, that K. F., as wife of one vendor and co-wife of the other, did not come within the "order of relationship" referred to in section 9, clause I, Act XVIII of 1876, which relates to consanguinity from a common stock.

Held, *also*, that in suits between rival pre-emptors, the claimant with inferior right should be granted a decree conditional on the claimant with superior right failing to avail himself of his decree.

Held, therefore, that K. F. was entitled to an alternative decree in the event of K. H.'s failing to pre-empt within the stipulated time.—KARAM HUSAIN *v.* RAGHUBAR DAYAL. **4 O. C. 397.**

95. *Pre-emption—Cause of action—Transfer by decree in a suit for pre-emption.*

A right of pre-emption does not arise upon the transfer of property by virtue of a decree in a suit for pre-emption. ABDUL RAZZAQ *v.* MUMTAZ HUSAIN. **A. W. N. 1903 P. 63.**

96. *Pre-emption—Sale by Court—Cause of action—Certificate of sale not prepared owing to objection of purchaser—Right of pre-emption not affected—Registration Act (III of 1877 as amended by Act VII of 1888), Section 17, Clause (0).*

In execution of a mortgage-decree creating a lien against land and accessory rights, the land was sold and purchased by the decree-holder on the 20th July 1897. After confirmation of sale, a draft sale certificate was prepared, but the decree-holder objected that the accessory rights had not been included, and prayed that the error might be rectified. Subsequently accessory rights were sold, and purchased by the decree-holder on the 20th August 1898. The sale was confirmed on the 5th October 1898, and a certificate of sale dated 9th November 1898, was prepared, which recited the latter sale, and its confirma-

Cause of action (*Contd.*)

tion by the Court, and covered the entire property. In a suit for pre-emption, filed on the 19th July 1898, in respect of land sold on the 20th July 1897, it was contended for the decree-holder, vendee, that no certificate of sale having been granted till the date of suit, the suit was premature.

Held, that the suit was not premature, as the sale was confirmed, and it was at the purchaser's own request that the certificate was not drawn up and given to him, although a draft had been prepared. The provisions of Section 416 must be held to have been sufficiently complied with. AJUDHIA PERSHAD *v.* CHANDAN. **36 P L R 1903=9 P R 1903**. *See for other facts Col. 481 P. I.*

97 Promissary note—Execution of—Suit for money lent—Onus of payment when defendant admits execution. SYED HUSAIN *v.* B. DURGA CHARAN. **9 O C 315**. *See Burden of proof. Pro-note and Promissory Note.*

98 Promissory note not duly stamped—Suit on oral agreement contained in promissory note. 66 P. R. 1906 Col. 882 P. I.

99 Promissory note—Suit on—Note admissible in evidence—Plaintiff not allowed to set up a case outside the note. 26 A. 178 Col. 188 P. I.

100 Promissory note—Suit on "Drawer." Legal representatives of. 60 P. R. 1903 Col. 540 P. I.

101 Place of suing—Hundis—Cause of action. 42 P. L. R. 1903 Col. 1063 P. I.

102 Place of suing—Injunction—Suit for—Temporary influence—Appeal—Transfer of suit—Re-transfer. 28 M. 19 Col. 1063 P. I.

103 *Railway—Consignor agent of consignee—Modification of terms of contract by consignor—Cause of action against Railway.*

The plaintiffs' agent consigned certain goods to the plaintiffs who refused to take delivery owing to a *bona fide* mistake as to the identity of the goods, the agent having sent them loose in a waggon while the invoices described them as sent in bags. It was not alleged that the agent had no authority to transfer the goods from bags into a waggon or that the Railway dealt with the plaintiffs' agent with notice of the agency. On the plaintiffs' suit for damages

Held that on the pleadings the plaintiffs' claim was not maintainable for the plaintiffs' agent was the person who caused the mistake and the raliway could not be held responsible for what the agent did in the course of authority.

Held, also, that assuming that it was a term of the contract that the goods should be carried in bags and delivered to the plaintiffs the agent himself by his action modified that term and as between him and the railway he could not hold the latter liable for a breach of it. The plaintiffs could not sue the railway whatever cause of action they might have against their agent. G. I.

Cause of action (*Contd.*)

P. RAILWAY CO. LD. *v.* SAHEB RAM. **5 B. L. R. 953**.

104 *Recovery of minor wards—Tort—Death of defendant pending suit—Survival of cause of action against defendants heirs.*

A Civil Court has jurisdiction to entertain a suit by a father to recover possession of his minor children illegally detained by a stranger. Such a suit is not barred by the provisions of the Guardian and Wards Act (VIII. of 1890). A Mahomedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant Mukimbhai. Pending the suit, Mukimbhai died, and the suit was continued against his widow Sharifa as his heir and legal representative on the ground that the minors were in her possession.

Held, that the cause of action did not survive as against the widow of the deceased defendant, and that therefore the suit could not proceed. The cause of action which gave rise to the suit was extinguished when the defendant Mukimbhai died. SHARIFA *v.* MUNEKHAN. **25 B. 574.**

105 *Recurring Mortgagee, suit brought by, for possession of the mortgaged property—Instalment default in payment of—Cause of action, recurring.*

A mortgage-deed, which was executed on the 25th November, 1884, provided that the money would be paid in yearly instalments and that if, in any year, an instalment remained unpaid until the end of the month *Jeth*, the mortgagee would be entitled to the possession of the mortgaged property. Default was made in the payment of an instalment on the 23rd June, 1891, which corresponds to the last day in the month of *Jeth* in that year and no instalment was ever paid afterwards. The present suit for recovery of possession of the mortgaged property was brought in November, 1903.

Held that this was not a case where recurring causes on action could be considered to have arisen every year in the month of *Jeth*; that there arose only one cause of action under the terms of the mortgage-deed, it being in the month of June, 1891, when the first default was made; and that the suit, having been brought after 12 years from that date, was time-barred. SHEO DARSHAN SINGH *v.* DEPUTY COMMISSIONER, RAI BARELI MANAGER, COURT OF WARDS, TILAI ESTATE. **8 O. C. 286.**

106 Rent suit for—Due on a putni tenure—Order on appeal returning on plaint for presentation to proper court—Appeal to High Court. 30 C. 453 Col. 141 P. II.

107 Relinquishment of—Contribution to mortgage debt—Liability of land in possession of third person. 24 M. 96 Col. 640 P. I.

108 Relinquishment of—Matter which might and ought to have been made a ground of defence—Mortgage suits—Power to go behind judgment and decree. 24 A. 429 Col. 1020 P. I.

Cause of action *(Contd.)*

109 Relinquishment of portion of claim. 24 M. 491 Col. 1407 P. I.

110 Relinquishment—Subsequent suit for money paid on a consideration that failed 24 M. 27 Col. 1408 P. I.

111 Relinquishment—Lease for agricultural purposes. Right of tenant to shells found in land—Previous suit for injunction—Second suit for compensation. 25 M. 669 Col 1405 P. I.

112 Relinquishment—Splitting of claims. 25 B. 161 Col. 1410 P. I.

113 Relinquishment—Splitting of claims—Misjoinder—Causes of action. 24 A. 553.

114 Relinquishment—Suit for sale of mortgaged property. A. W. N. 1902 P. 114, 24 A. 456 Col. 1437 P. I.

115. Relinquishment— Multifariousness—Cause of action. Splitting of. 25 M. 736. Col. 1382. P. I.

116, *Secretary of State, liability of—Government servant, suit by—Power of the Government to dismiss its servants—Cause of action—Plaint.*

The Crown has power to dismiss its servants at will, and no authority representing the Crown is able in the employment of persons in the service of the Crown to contract with them so as to deprive the Crown of the enjoyment of that power. Such power can only be excluded and restricted by an Act of the Legislature. 1 *Q, B.* 116 *relied on*. (1896) *App. Cas.* 575, *distinguished.*

Held, that the plaint did not disclose a cause of action enforceable at law, because it did not allege that any statutory enactment existed, which had the effect of exempting the plaintiff from the liability, which the law imposed on those who were engaged in the service of the Crown. A. E. VOSS *v.* SECRETARY OF STATE FOR INDIA. **33 C. 669.**

117. *Set aside a wakfnama—Execution of Decree—Civil Procedure Code, s. 266—Dismissal of execution case—Fresh attachment—State proclamation.*

It cannot be laid down as a general proposition of law that, because an execution case has been dismissed by reason of no steps having been taken by the decree holder to bring, within a certain time limited, the property to sale, the attachment already put upon it necessarily falls through. The question is one of intention.

Held, having regard to the scope of the order dismissing the previous application, that no fresh attachment is necessary before issuing a sale proclamation. GOBINDA CHANDRA PAL *v.* DWARKA NATH PAL. **33 C 666.**

118 *Set aside a Revenue sale.—Revenue Recovery Act (II of 1864) Sections 38 and 59—Title of purchaser—"Aggrieved."*

The provisions of Section 38 of the Act II of 1864 which were first enacted as an amendment by Act III of 1884, show that until confirmation by the Collector the sale proceedings are incomplete and are liable to be set aside or confirmed by the Collector either on the application of the parties or of his own motion. It is the confirmation of the sale which gives to the purchaser the right to possession, and to have the lands registered in his name. Until the sale proceedings have been confirmed it cannot properly be said that the rights of the persons, whose interests will be affected by the sale, are injured so as to give them a right of suit as persons aggrieved within the meaning of Section 59 of the Act. 12 *Mad.*, 168 *distinguished.* SABAPATHY CHETTY *v.* RENGAPPA NAICKEN. **M. L. J. 1903 P. 225.**

119 *Slander—Defamation—Slander—Right of suit.*

For the mental distress caused by insult damages are not recoverable. 26 *Cal.*, 653; *S. C.*, 3 *W. N.*, *Cal.*, 551, *followed. L. R.* 2; *Q. B.*, 57; 9 *H. L. C.*, 594, *referred to.*

Subject to certain limitations the English law has been made applicable to Natives within the limits of Calcutta since the year 1726 by the Charter of 13 Geo. I. An action for slander is maintainable in Calcutta by virtue of the common law of England. 9 *M. J. A.*, 387, *referred to.*

Words imputing unchastity to woman are not *per se* actionable, and in the absence of special damage no suit would lie against the slanderer. S. M. BHOONI MONEY DASSEE *v.* NOTOBAR BISWAS. **5 W. N., C. 659 = 28 C. 452.**

120 Slander of title—Cause of action—Malice not expressly pleaded—Amendment of plaint. 4 C. L. J. 268—10 C. W. N. 1906 P. 107 Col. 794 P. I.

121 Splitting of. 27 B. 379 Col. 1402 P. I.

122 Splitting of claims—Claim on distinct causes of action. 28 B. 447 Col. 1403 P. I.

122 (a) Splitting of claim—Cause of action. 87 P. R. 1903 Col. 1407 P. I.

123 Splitting of—Co-sharer purchasers suits for contribution Previous suit against other co-sharer. 13 M. L. J. 83.

124 Splitting of—First suit for possession on lease inadmissible in evidence for want of registration. 13 M. L. J. 475 Col. 1409 P. I.

125 Splitting of—Probate and Administration. 8 C. W. N. 54 Col. 1410 P. I.

126 Splitting of—To sue—Meaning of—Policy of insurance—Mortgage of. 7 B. L. R. 138 Col. 1413 P. I.

127 *Splitting of—Civil Procedure Code—XIV of 1882, s. 43—Suit for a share in inheritance against administrator—Cause of Action—Administrator's refusal to pay interest to plaintiff—no denial of plaintiff's title—Succession certificate (Act VII of 1889), s 9.*

On August 8th, 1893 A., a lunatic, died leaving the Plaintiff and the defendants as his heirs. B, one of the defendants, obtained a succession certificate under Act VII of 1889 and recovered a certain sum as interest on the Promissory Notes which formed the greater part of the estate of the deceased.

Cause of action (*Contd.*)

In September, 1894, the plaintiff brought a suit against B. for recovery of his share in the amount received by B. as interest on the Notes on the allegation that the plaintiff was one of the heirs of the deceased and that B. had declined on demand made, to pay to the plaintiff his share claimed. B. did not deny the plaintiff's title to a share in the estate. The suit was ultimately dismissed on the singular ground, that, as one C had filed a suit against the parties to the present suit, an element of uncertainty had been created in the right of plaintiff. The suit of C. was dismissed. In August, 1896, the plaintiff brought another suit for recovery of his share in the entire property of A. on the allegations that he was one of the heirs of A, that he, in September, 1895, applied to the Court that security should be taken from B. under s. 9. Act VII of 1889, and that the latter in the course of those proceedings alleged that he had become the owner of the plaintiff's share thereby setting up, for the first time, a title adverse to the plaintiff. The defendant's plea was that the suit was barred by s. 43, Act XIV of 1882.

Held, that the refusal of B. to pay interest in 1894 was not and did not involve a denial of the plaintiff's title and it was only a denial of the plaintiff's title that could force the plaintiff into Court with a claim for possession of his share by administration and partition.

Held, that the cause of action in the present suit was not complete when the former suit was brought and the present suit was, therefore, not barred by sec. 43 Act XIV of 1882.

The cause of action, which arises against an administrator who, being bound to administer the estate and to render accounts thereof as administered by him, fails to do so, differs from the cause of action which arises against a trespasser or a person who wrongfully withholds possession of property to which the plaintiff is entitled. ZAKI ALI KHAN *v*. JAFAR ALI KHAN. **2 O. C. 17.**

128 Suit for possession- Subsequent suit for collection of deed on which defendant based his claim 26 A. 236, Col. 400 P. I.

129 Subject matter not identical—Res-judicata how determined A. W. N. 1903, P. 97, Col. 1029, P. I.

130 Splitting of claim—Resjudicata—Mortgage.—Suit upon specific mortgage. 13 M. L. J. 448, 26 M. 760 Col. 1027, P. I.

131 Splitting of claims 27 M. 116, Col. 1412, P. I

132 Suit to set aside compromise decree and for injunction. A. W. N. 1902 P. 179—25 A 48 Col. 1054 P I.

133 Suit for money paid by plaintiff for defendants. 31 P. R. 1904 Col. 327 P. I.

133 Suit on award. 31 C. 274.—*See No. 44 supra.*

134 Possession—Separate suit not barred—Cause of action—Right of suit. 8 C. W. N. 49 Col. 107 P. I.

135 *Vendor and purchaser—Cause of action—Purchaser covenanting to pay off mortgage—Default in payment on date of sale—Promissory note for interest executed by vendor—Claim for breach of covenant against vendee not maintainable.*

Where the vendee agreed with the vendor to pay the mortgagor of the property sold to him the amount due on the mortgage but failed to pay the interest that had accrued after the date of the sale to the date of payment and the vendor executed a pro-note to the mortgagee for such interest and sued the vendee for damages for breach of the vendee's covenant to pay the mortgage amount on the date of sale.

Held, that since the vendor had not made any payment to the mortgagee but simply executed a pro-note there arose no cause of action for the suit as he had suffered no damage at the date of the suit. PUNDI DORAISAMI TEVER *v.* LAKSHMANAN CHETTY. **14 M. L. J. 1904 P. 285.**

136. Widows suit against reversioner for declaration that widow was competent to transfer property for necessity. 76 P. L. R. 1904 Col. 440 P. I.

137. Wife's defamation—Husband has no cause of action for defamation. 4 O. L. J. 390 and 34 C. 48. *See* No. 40, 41 *supra.*

Cause paper.

Legal Practitioner—Attorney and Client—Attorney, application for charge of—Discharge by attorney himself—Lien on cause papers—Duties of attorney on record—Costs—Refusal by attorney to act until costs incurred are paid—Costs of the application.

Having once undertaken the conduct of a case, an attorney is bound, whether the client is rich or poor, to prosecute the case with due diligence; and he cannot say that, unless a large sum is paid to him, he will not continue to conduct the case. Where a client himself discharges his attorney on record, the latter is entitled to hold the cause-papers till his costs are paid, or an undertaking given for their payment. But where the attorney discharges himself, expressly or by implication, he has no such right; he must give up the papers to the new attorney to whom the client proposes to go, only retaining his usual lien on such papers. Heslop *v.* Metcalfe, (3 Myl. and Or. 183); Robins *v.* Goldingham (L. R. 13 Eq. 440); Wilson *v.* Emmet (19 Beav. 233) relied upon. ATUL CHUNDER MOOKERJEE *v.* SOSHI BHUSAN MULLICK. **6 C. W. N. 215=29 C. 63.**

Caveat.

1 Application for probate of the will of a Hindu widow—Husband's reversioner's objection that widow had no power to dispose of husband's property by will invalid.—1 C. L. J. 258, Col. 526, P. I.

2 *Will—Probate and Administration Act (V of 1881), s. 69—Caveat - Judgment-creditor—Fraudulent creditor.*

Caveat *(Contd).*

The words "interest in the estate of the deceased" in s. 69 of the Probate and Administration Act mean "interest in the estate left by the deceased." A judgment creditor who, but for the will, would in execution of his decree have a right to seize the property or that share of it which should descend to his debtor, and who alleges that the will has been set up for the purpose of defrauding the creditors, is a person claiming an interest in the estate of the deceased, and as such has a *locus standi* in opposing the grant of probate of the will. *Umanath Mukopadhya* v. *Nilmoney Singh* (I. L. R., 6 Cal., 429, and *Nilmoney Singh Deo* v. *Umanath Mookerjee* (I. L. R. 10 Cal., 19), referred to. KISHEN DAI *v.* SATVENDRA NATH DUTT. **I. L. R, 28 C, 441.**

3 Compromise by agent without knowledge of principal—Repudiation by principal —Probate—Grant on consent of parties. 31 C. 357 Col. 1593 P. I.

4 Revocation of probate—Just cause—Omission to file accounts. 26 B. 792 Col. 519 P. I.

5 *Letters of Administration—Scope of enquiry prior to grant—Practice.*

On the hearing of a petition for issue of Letters of Administration to the estate of a deceased person, it is not the province of the Court to go into questions of title to the property to which the Letters of Administration refer. OCHAVARAM NANABHAI *v.* DOLATRAM JAMIETRAM, **6 B. L. R. 966=28 B. 644.**

6 *Will—Probate-Caveat—Undue Influence —Validity of Will—Objection to a particular clause of Will.*

In a suit for probate, the caveators assailed the whole of the will on the ground of undue influence, but the Probate Court granted probate disallowing that objection;

Held, that in a subsequent suit it was not competent for the caveators to show that any particular clause in the Will had been inserted through undue influence. NUZHATUDDOWLA ABBAS HOSSEIN *v.* MIRZA KURRATULAIN. **I. L. R. 31 C. 186.**

Caveat-emptor.

1 Caveat-emptor—Execution of decree—Sale—Warranty of title. A. W. N. 1905 P. 99 Col. 1556 P. I.

2 Caveat emptor—Joint family—Mortgage executed by father. DEBI SINGH *v.* JAI RAM. **25 A. 214.** *See Hindu Law Debt.*

3 Sales in India—Covenant as to title—Warranty—Fraud—Misrepresentation. 8 O. C. 345 Col. 591 P. I.

4 Evidentiary admissions and admissions by the pleadings distinguished. U. B. R. 1907 P. I. (Evidence) Col. 184 P. I.

Census registers.

1 Census registers—Public documents 6 B. L. R. 535 Col. 190 P. I.

Central Provinces Acts.—Act XVIII of 1881 (C. P. Land Revenue Act).

1. *Ss. 16 and 136 G—Partition rules (rule 30)—Investigation in partition cases—Report to a Revenue Officer not specially empowered to investigate and report in partition cases—Question of title or proprietary right.*

Section 16 of the Land-revenue Act is controlled by Rule 30 of the partition rules and no partition case can be made over for investigation and report to any Revenue Officer who has not been specially empowered in that behalf.

Semble—Any question of title or proprietary right such as is referred to in section 136 G must be *inquired into and determined* by an officer who has been empowered to effect a partition. LOOK NATH DUBE *v.* BISSESAR DUBE. **15 C P L R 1902 P. 153.**

2 *S. 50—Thikadar—Superior proprietor—Revenue.*

A thikadar holding from an inferior proprietor is not *as such* liable to the superior proprietor for the revenue referred to in section 50 of the Central Provinces Land Revenue Act 1881. DHIWAROO PATIL *v.* DOJIBA BHAO. **14 C P L R 1901 P. 81.**

3. *S. 50—Malik-makbuza — Malguzar—Whether two estates can be held by same person — Merger — Whether transfer of one affects the other.*

The object of the definition of "*Malik-malkbuza*" in the Central Provinces Land Revenue Act of 1881 is merely to distinguish it from all the other kinds of revenue-paying proprietors who may be found in the village: But this does not imply that the same person may not simultaneously possess two distinct estates under different forms of ownership, even in the same *mahal* in cases where the doctrine of merger does not apply.

The estates of *Malik-makbuza* and *Malguzar* in the same *mahal* are distinct from, and independent of, one another. And the possession of both by the same person does not produce a merger of these estates.

It is competent for a person in the Central Provinces to be at once a *Malguzar* and a *Malik-Makbuza* in the same *mahal*; and transfers of either one of these estates has no effect upon the ownership of, and legal rights and liabilities appertaining to, the other estate. MT. MUNKOO *v.* MT. KUKSOO. **4 N L R 2.**

4 *S. 50—Malguzar—Malik-Makbuza—Mahal—Tenant—Sub-tenant—Merger.*

Notwithstanding any entry to that effect by the Settlement authorities a *Malguzar* cannot be a *Malik-Makbuza* of a plot of land situated within the mahal, and any person holding the plot from him is a tenant, not a sub-tenant. SHRI KRISHNA RAO *v.* BAJURA. **15 C P L R 171.**

5 *Ss. 65, 118—Transfer of Property Act, Ss. 88 and 100—Tenancy Act, S. 43—Holdings as security for the payment of revenue or rent —Suit for arrears of rent—Incumbrances—Landlord—Limitation Act, Art. 132 and section 6.*

C. P. Act (XVIII of 1881) *(Contd.)*

A suit to enforce the charge referred to in section 65 of the Land Revenue Act is governed by the special rule of limitation contained in section 118 of the Act. 11 C. P. L. R. 95. 14 C. P. L. R. 17, 10 C. P. L. R. 48, 19 C. 1 referred to. KHEMCHAND *v.* DHANRAJ KIRAR. **16 C. P. L. R. 1903, P. 52.**

6 *S. 65 A—Declaration under the Land-revenue Act—Thikadar—Ejectment—Proprietor—Suit to eject Thikadar—Thika-jama—Cause of action.*

A declaration of protection under section 65 A of the Land-revenue Act relates back to the date on which but for such declaration the Thikadar would have been liable to be ejected. If the proprietor has brought a suit to eject the Thikadar his right to recover thika-jama for the period during which the ejectment proceedings are pending only accrues on the date on which the thikadar is declared to be protected. 9 C. 255, 12 C. 258, 1 R. R. 223, 12 M. I. A. 244 referred to. TULSIRAM BAPU *v.* Mt. JANKI WIDOW OF RAMDIN. **16 C. P. L. R. 1903, P. 33.**

7 *S. 67A, 67 1-Abandonment-Joint holders-Survey-number—Surrender—Tenancy Act, S. 35—Tenant—Rent—Raiyat—Relinquishment—Merger.*

The abandonment by one of two joint holders of a survey-number does not necessarily enure in favour of the other joint holder. NANHA BAIRAGI *v.* MANSINGH GOND. **16 C. P. L. R. 1903 P. 28.**

8 *Ss. 69, 83, 132—Entry of a Settlement Officer's record—Record of a Settlement Officer Sir-land—Suit for the reversal of an entry of the Settlement Officer.*

Subject to the result of a suit instituted under section 83 of the Land Revenue Act an order or entry of a Settlement Officer recording, or omitting or refusing to record any land as sir land under sub-section (1) of section 69 is final. CODOO RAO PATEL *v.* BAXI, SON OF ADKU. **15 C. P. L. R. 1902 P. 12.**

9 S. 83—15 C. P. L. R. 1902, P. 12 No. 8 *supra*

10. *S. 108—Mortgage of a village—Sir fields—Sale of a village for arrears of revenue—Purchaser—Occupancy tenant of a sir land—Suit for ejectment—Ex-proprietary interest—Void transfer.*

In 1895 A mortgaged his proprietary share of a village together with certain *sir* fields to the defendant. In the following year A's share was sold for arrears of revenue due in respect thereof and was purchased by the plaintiffs, A becoming occupancy tenant of his *sir* land.

In 1900 the defendant foreclosed his mortgage and got possession of the land r

In a suit for ejectment brought by the plaintiffs it was held that, though the ex proprietary interest acquired by A in place of his proprietary interest became subject to the mortgage, it was not open to the defendant to resist the claim upon the strength of a transfer which was void as against the plaintiffs. 11 C. P. L. R. 133, 14 A. 538, 13 C. P. L. R. 143 referred to. HARIKRISHNA BRAHMAN *v.* JAIDEB AND OTHERS. **17 C. P. L. R. 1904 P. 33.**

C. P. Act (X VIII of 1881) *(Contd).*

11 S. 118—16 C. P. L. R. 1903 P. 52 No. 5 *supra.*

12 S. 132—15 C. P. L. R. 1902 P. 12 No. 8 *supra.*

13 *S. 136 G—Partition of landed property—Objection to partition—Claim for improvements—Title—Question of—Question of title.*

An objection to a partition which takes the form of a claim for improvements is an objection raising a question of title within the meaning of section 136 G of the Land-revenue Act.

The meaning of the expression 'question of title' discussed. 23 A. 291, 2 A 619, 18 A. 210, 10 C. P. L. R. 37 and 40 referred to. SETH BIRDHI CHAND *v.* MT. KAIM BI AND OTHERS. **17 C. P. L. R. 1904 P. 5.**

14 *S. 136 G—Appeal—Return of a memorandum of appeal—Question of title within the meaning of section 136 G of the Land-revenue Act.*

No appeal lies against an order returning a memorandum of appeal to be presented to the the proper Court.

An objection to a partition of *sir* land on the ground that such land has been already partitioned and is held in severalty is an objection raising a question of title within the meaning of section 136 G of the Land-Revenue Act. 17 C. P. L. R. 5, 9 A. 388 referred to. GOVINDRAO *v.* NARAYANRAO. **17 C. P. L. R. 1904 P. 129.**

15 *S. 136 G. Valuation—Jurisdiction—Suit for partition.*

The value for the purposes of jurisdiction of a suit for partition is not the value of the entire property but the value of the share in respect of which partition is sought.

The scope of section 136 G of the Land Revenue Act explained. 8 C. 757, 17 C. 680-12 A. 506, 8 B. 31, 22 B. 315 referred to. JAFAR HUSSEN *v.* ABDUL KADAR. **15 C. P. L. R. 1902 P. 81.**

16 S. 136 G—15 C. P. L. R. 1902 P. 153 No. 1 *supra.*

17 *S. 152 (b) (3)—Co-sharers—Mahal—Civil Courts—Jurisdiction—Apportionment of revenue Assessment.*

As between the co sharers of a mahal a Civil Court has jurisdiction to apportion the Revenue assessed on such mahal. JANKI PRASAD *v.* BALMUKAND. **14 C. P. L. R. 1901 P. 107.**

2 Act IX of 1883 (C. P. Tenancy Act).

1 *Agricultural tenancy, devolution of—Applicability of Hindu Law.*

Agricultural tenancies in Central Provinces are created by contract and statute, and their devolution is governed by the same statute. The Tenancy Act does not recognise such things as succession by right of survivorship, the vesting of a son's interest by birth, and so on. In the case of Hindus, the Courts, in dealing with agricultural holdings, will follow the Hindu Law of inheritance so far as it may be consistent with the principles of the Tenancy Act and no further and the peculiar feature in the former, under which a son gets by birth a vested interest in the property of his father which controls the father's power over such property, has no place in the latter. GHANYA *v.* UKUND RAO. **4 N.L.R. 9.**

2 *S. 41 (7)—Absolute occupancy tenant, transfer of holding by—Conditions under which transfer can be avoided—Statutes interfering with private rights, construction of.*

Where an absolute occupancy tenant had made a transfer of his holding, the transfer can be avoided, under S. 41 (7, of the Central Provinces Tenancy Act. 1898 only by the whole proprietary body acting together, 13 C. P. L. R. 113 S. A. No. 20 of 1906 of the J. C. S. Court. Central Provinces F; 12 C. W. N. 249, 14 C. 201, 2 N. L. 45 (47) R. or by an agent who is authorised to act on their behalf and whose authority should not have been revoked in regard to the particular transfer in dispute. A transferee cannot be disturbed, under S. 41 (7), if even one of many persons composing the body of landlords refuses to join in avoiding the transfer, S. A. No. 20 of 1906 F; 16 C P. L. R. 135 (139), 14 C. P. L. R. 129, R; 20 W. R. 126 7 C. 414, 2 C. W. N. 229 R. and distd. and a suit to avoid the transfer was, under the circumstances, dismissed.

Statutes interfering with private rights of alienation should be strictly construed. 7 A. 702 (707)R. RAMJI PATEL KUNBI *v.* SYED NUR **4 N. L. R. 45.**

3 S. 43—Absolute occupancy tenant—Suit to recover arrears of rent charged upon land. 3 N. L. R. 8 Col. 1886 P. I.

4 *S. 43—Jurisdiction—Central Provinces Tenancy Act of 1898, Sections 45 cl. (3), 47—Occupancy holding, transfer of part of—Limited interest—Adverse possession.*

When statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters, which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Court. 2 C. L. J. 359 F.

When a transfer of occupancy holding was effected without the consent of the landlord at a time when the rent law in force was Act IX of 1883 as amended by Act XVII of 1889, the Civil Courts have jurisdiction to entertain a suit for ejectment. But it is otherwise after the passing of the Central Provinces Tenancy Act of 1898. 3 C P L. R 70, 4 C P L R 49, 59 172 R.

The change made in the law in this respect in 1898 is not of procedure only; it affects substantive rights

Section 43 of the Tenancy Act of 1883 refers to transfers of entire holdings and not of a portion only. So long as the original tenancy subsists the landlord has no right to re-enter and oust the persons, who are in the land by license from the tenant. 3 C. P. L R. 70 R.

The possession of a limited interest in moveable property may be just as much adverse for purpose of passing a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property: but such adverse possession of a limited interest though a good plea to a suit for ejectment is good only to the extent of that interest; the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest has been asserted 2 C L J 125 F. ICHHARAM SINGH *v.* NIL MONY BAHIDA. **7 C. L. J. 499=35 C 470.**

5 *S. 92—Decision of Tahsildar that a person is tenant*—Res judicata—*Jurisdiction of Civil Court.*

The second clause of Section 92 of the Tenancy Act is enabling or explanatory, and is not exhaustive. A Tahsildar's decision, that a person is a tenant, is not *res judicata* so as to bar the trial of the issue, whether he is tenant or not, in a Civil Court. The fact that a Tahsildar has, under s. 92, re-instated a person as a tenant does not bar a Civil Court from deciding whether the landlord has the right to evict that person as a tenant, and still does it bar a Civil Court from deciding whether the person is a tenant or not when the landlord brings a suit to eject him as a trespasser. In other words the fact that a Tahsildar has put a person into possession under S. 92, does not make that person a tenant if he is not a tenant. M. T. DURBASSA *v.* KHALAKSING **4 N L R 63.**

(3) Act XVII of 1885 (Court of Wards Act).

Ss. 7 (1) a, 23, 26 (2)—C. P. Court of Wards Acts 1885 and 1899—Authority of Court of Wards over the person and property of minors.

Where a Court of Wards has assumed superintendence of the person or property, or both, of an infant, on the ground of his minority, its authority over the ward and his property on such ground, whether conferred by Act XVII of 1885 or Act XXII of 1899, ceases and determines on the date on which

C P Act (XVII of 1885) (*Contd.*)

the ward attains majority, though the formal relinquishment of such ward and his estate may be delayed beyond that time.

The date on which a ward becomes *sui juris* is the actual day on which he admittedly attains the age of 21 years, or, in the event of any dispute as to the actual day, such date as may be fixed by the Chief Commissioner.

From and after such date the ward is under no disability to contract merely by reason of the superintendence of the Court of Wards (on the ground of his minority) not having been formally relinquished. SHEOLAL AND OTHERS *v.* NANDLAL AND OTHERS. **17 C. P. L. R. 1904 P. 172.**

(4) Act XI of 1898 (C. P. Tenancy Act).

1 *S. 2 (10)—Jurisdiction, question of, when entertainable in appeal—Civil Court's jurisdiction when ousted—Central Provinces Land Revenue Act (XVIII of 1881) Ss. 4 (8a), 152—Gochur and common lands—Gaontia, a proprietor—Ejectment, suit for—Court to inquire rights at the time of the filing of plaint—Entry in settlement record, presumption, evidence—Holding of a survey number.*

If the question of jurisdiction depends for its determination upon facts not found by the Lower Courts, an appellant cannot ask the High Court to find them; the appellant must substantiate his contention if he can on the facts already found. If he is unable to point to any facts in respect of his plea, that plea must fail.

The ordinary Civil Courts cannot be ousted of their jurisdiction in the absence of an express provision of law to that effect. 10 C. P. L. R. 17 R.

Gochur lands cannot be classed in the same category as common lands.

A *gaontia* of a Government village in the Sambalpur District is a proprietor and is entitled to bring an action in ejectment.

The Civil Courts must adjudicate on the rights of the parties as they existed when the plaint was filed and not on any title subsequently derived. 21 M. 288 R.

The entry in the settlement record is not conclusive; it is only a matter of presumption.

The holding of a survey number in section 2 (10), explanation II of the Central Provinces Tenancy Act has reference to the holding when the proceedings in a Civil Court are initiated, and it cannot avail a person that in a subsequent settlement he was recorded as a tenant. PURKHIT PANDA *v.* ANANDA GAONTIA. **8 C. L. J. 116.**

2 *Ss. 2 and 41—Holding nature of—Partition of holding, effect of—"devolves," effect of—*

A holding, under S. 2 (3), Tenancy Act 1898, is, by its very definition, a parcel of land held under one lease or set of conditions

C P Act (XI of 1898) (*Contd.*)

and is indivisible and cannot be affected by action to which the tenants alone are parties. 1 W. R. 10 and 8 C. 118 relied on. Even if it were ancestral property in the hands of a father, and his son should acquire rights in it by birth, the son could not enforce a partition so as to bind the landlords to recognise each share as a separate holding.

By virtue of S. 41 (1) Tenancy Act, the right of an absolute occupancy tenant "devolves" as if it were land and the use of the word "devolves" appears by necessary implication to exclude, for example, the taking by survivorship which obtains among Hindus in respect of joint ancestral property. 4 C. P. L. R. 137 and 13 C. P. L. R. 137, followed; 11 C. P. L. R. 144 referred to. PANCHAM SINGH *v.* NANKOO SINGH. **3 N. L. R. 182.**

3. *S. 18 (b) Remission or suspension of rents—Payment of thika-jama—Whether relieved or not—Intention of parties.*

In the absence of a general or special order by a Revenue Officer under sub section (6) of section 18 of the Tenancy Act a thikadar is not relieved from payment of thika-jama merely by reason of the facts that by an order passed under sub section (1) certain rents have been remitted or suspended. The liability or non-liability for the payment of thika-jama under such circumstances depends entirely upon the intention of the parties at the time of making the contract. 44 L. J. C. P. 27, 32 L. J. Q. B. 164, 40 L. J. C. P. 36, 23 L. J. Q. B. 321 referred to. RAJA KISHORE *v.* SETH JETHMAL MAHESRI. **14 C. P. L. R. 138.**

4. S. 35—Abandonment—Joint holders—Survey—*Number* — Surrender—Tenant—Raiyat. 16 C. P. L. R. 1903 P. 28, *See Act XVIII of 1881 (C. P. Land Revenue) No. 7.*

5. *Ss. 38, 41 (3) (b)—Meaning of the word 'permit' in S. 41 (3) (b)—Absolute occupancy tenant selling holding—Notice to landlord—Effect of landlord's inaction for one month after notice—History of the tenant's right to transfer—Validity of reference to Select Committee's reports.*

The legislature, by enacting and re-enacting S. 38 of the Tenency Act, 1883, intended to cut down, not the landlords, but the absolute occupancy tenant's rights. The word 'permit' in S. 41 (3) (b) should be interpreted as merely equivalent to "suffer." Where an absolute occupancy tenant intends to transfer any right in his holding by sale and gives to his landlord a written notice of his intention, the landlord does not, by reason of his inaction for one month after receiving the notice, forfeit the right to recover an amount equal to the rent of the holding for one year. The right to receive any payment at all is recognised by reason of the landlord's paramount title in the land, and such recognition cannot be intended to lapse, if the landlord allows so brief a period as one month to pass without taking any action. The Select Committee's reports on an Indian Bill may be referred to to ascer-

C P Act (XI of 1898) (*Contd.*)

tain the *object* of the corresponding Act. 22 C. 788 (799). 17 A. 498, 24 B. 484, 25 B. 269 R. SETH GANGABISHAN *v.* BALMUKAND, **3 N. L. R. 40.**

6 *S. 41 Onus probandi--Party--Will--Instrument--Testator--Absolute occupancy tenant-Bequest--Ancestral property--Hindu law Validity of the Will--Power of transfer by will.*

The *onus probandi* lies in every case upon the party propounding a Will, and it is incombent on him to satisfy the Court that the instrument so propounded is the last will of a free and capable testator.

An absolute occupancy tenant is not empowered to bequeath any right in his holding. 13 C P L R 159, 11 C. P. L. R. 167, 34 C. J. P. M. and A. 25. MT. ANANDI BAI *v.* HARLAL BRAHMAN. **15 C. P. L. R. 1902 P. 1.**

6 (a)—*Valid notice.*

The notice referred to in section 41 of the Tenancy Act is not a bad notice merely because it requires the landlord to purchase the holding within eight days. 15 B. 407 7 A. 899, 64 L J, Q. B. 200, 44 P. R. 442. 11 C. P. L. R. 1 referred to. BHARAT SINGH *v.* DHAN SINGH. **14 C. P. L. R. 1901 P. 162.**

7 *S. 41 (2)—Absolute occupancy holding --Voidable transfer.*

A transfer effected before the expiry of the period referred to in section 41 sub-section (2) of the Tenancy Act is voidable at the instance of the landlord. 1 C. P. L. R. 53, 1 C. P. L. R. 132. MT. TULSA *v.* MT. DASODA. **15 C P L R 173.**

8 *S. 41 (3) (b)--Suit for rent by the Malguzar--Purchaser from tenant not liable in a suit for a simple money decree.*

In a suit by a Malguzar, under S. 41 (3) (*b*) of the Act, for the recovery of one year's rent, in which an absolute occupancy tenant and his purchaser were made defendants, and where no attempt was made to make the rent a charge on the holding, *held* that, as the suit was for money only, no decree could be passed as against the purchaser.

Held also that, even where there is a contract between the vendor and the purchaser, to the effect that the purchaser must pay the year's rent, the Malguzar, "being a stranger to the consideration, cannot enforce performance of the contract, by an action thereon in his own name, although he is the person intended to be benefited thereby, unless he is in the position of *cestui que trust.* 11 C. P. L. R. 108, 14 C. P. L. R. 22 R. BUDHA *v.* ATMA RAM. **3 N L R 111.**

9 S. 41—*See 3 N. L. R. 182 No. 2 supra.*

10 S. 41 *(3) (b)—See 3 N. L. R. 40 No. 5 supra.*

11 S. 43—Holding as security for the payment of revenue or rent—Suit for arrears of rent. 16 C. P. L. R. 1903 P. 52. *See Central Provinces Act XVIII of 1881 Ss. 65, 118 No. 5.*

12 *S. 45—Scope of the section—Applicability to leases not affecting proprietary rights.*

S. 45 of the Tenancy Act applies only to leases or other transfers of proprietary

C P Act (XI of 1898) (*Contd.*)

rights, in *sir* fields. It does not apply to agricultural leases, which do not affect the proprietary rights. 1 N. L. R. 32 R. BHAGIRATHI BAI *v.* ANYAJI KUNBI. **3 N L R 159.**

13 Ss. 45, 46, 47 and 95—Jurisdiction--Occupancy holding, transfer of part of--Limited interest--Adverse possession. 35 C. 470. *See Central Provinces Act IX of 1883 S. 43 No. 4.*

14 *S. 46--Succession to occupancy holding.*

The law governing succession to the occupancy holding of a Hindu is the Hindu Law, subject to the exceptions created by Statute Law S. 46 of the Act lays down such an exception, and its provisions are absolute and are not merely enforceable at the option of the landlord. RAJAI *v.* FUNDI. **3 N. L. R. 112.**

15 *S. 46 (3)—Suit for—Sub-lease, grant of, by tenant.*

Under the Central Provinces Tenancy Act, none but an occupancy tenant can be ejected from his holding for granting a sub-lease. SADASIB JHEMKIR *v.* JALA GAONTIA. **8 C. L J. 156.**

16 *S. 46 (5) Occupancy tenant—Transfer of an occupancy holding—Deed of transfer--Non-registration of a deed of transfer--Jurisdiction of Civil Courts--Ejection of a transferee—Trespasser.*

Where an occupancy tenant purports to transfer his holding by virtue of a document which required to be registered but which could not be registered owing to the prohibition contained in section 46 (5) of the Tenancy Act the jurisdiction of the Civil Courts to eject the transferee as a trespasser is not barred. 16 C. P. L. R. 135, 14 C. P. L. R. 14. CHAMRU SAO BANIA *v.* TULSIDIN SINGH. **17 C. P. L. R. 1904 p. 49.**

17 S. 46, 47--*See* 35 C. 470 No. 30 *supra.*

18 *Ss. 59 and 60—Tenant of a* malik makbuza*--Nature of tenancy--Sale of the estate—Termination of the tenancy.*

Although the tenant of a *malik makbuza* is styled a sub-tenant in s. 59 of the Tenancy Act, he is a sub-tenant with a difference. He is a sub-tenant in that he does not possess the privileges of an ordinary tenant, but his landlord is not lessee, but the owner of the land. A *malik makbuza* as free liberty to transfer his right, and the sale of his rights is in no way analogous to an alienation by a tenant and does not necessarily determine the sub-tenancy. The purchaser can eject the tenant of *malik makbuza*, only in circumstances in which the original *malik makbuza* could have ejected him. 6 C. P. L. R. 92, 11 C. P. L. R. 5, 12 C. P. L.R. 158 referred to. SHAMLAL *v.* KANHAI LAL. **3 N. L. R. 162.**

18 (a.) *S. 71—Transfer of holding by ordinary tenant—Possession—Civil suit by landlord for possession of ordinary holding barred —Landlord's remedy under Sec. 71--Tenancy Act.*

A, a co-sharer in a village, obtained a

C P Act (XI of 1898) *(Contd).*

money-decree against B, an ordinary tenant. Before this decree was passed, B executed a deed of sale conveying his holding to C. A attached the land in execution of his decree. C objected to the attachment on the strength of his sale deed but the objection was dismissed. The land was eventually sold at public auction and was purchased by D. In a suit by C for declaration of his title and for possession, against A, it was

Held that the new Tenancy Act has deprived the landlord of his remedy to have the transfer declared void in a civil suit. His remedy now lies, under section 71 of the new Tenancy Act, in applying to the Revenue Officer for possession. 13 C. P. L. R. 143, 14 C. 644, 20 W. R. 126 referred to. DAYARAM PATEL LODHI *v.* SHALIGRAM LODHI. **16 C. P. L. R. 1903 P. 135.**

19 *S. 80—Special contract to pay interest.*

There is nothing in section 80 of the Tenancy Act which prevents a landlord from recovering interest on arrears of rent at any rate which may have been agreed upon by the tenant. KUNJBIHARILAL *v.* GABRU KURMI. **16 C. P. L. R. 1903 P. 43.**

20 *S. 85—Ejectment of tenant—Decree for arrears of rent—Satisfaction of decree.*

The ejectment of a tenant under section 85 of the tenancy Act does not operate as a satisfaction of the decree for arrears. 6 C. P. L. R. 121 referred to. GANPAT RAO GOPAL GHATATE *v.* NARAYAN. **16 C. P. L. R, 1903, P. 88.**

21 *S. 92—Jurisdiction of Revenue-officers.*

The summary jurisdiction conferred on a Revenue-officer by S. 92 of the Tenancy Act is restricted to cases in which a tenant has been ejected by his landlord 22 I. A. 107, 56 L. J. Q. B. 225, 55 L. J. Q. B. 417, 51 L. J. Q. B. 145 referred to. KHADOO TELI *v.* KALOO GOND AND OTHERS. **16 C. P. L. R. 1903 P. 70.**

22. S. *94 (1)—Limitation—Special period of limitation—Suit by a tenant against a defendant who ousted him—Settlement from the landlord.*

The special period of limitation prescribed by section 94 sub-section (1) of the Tenancy Act applies to a suit instituted by a tenant against a defendant who has ousted him and who after such ouster has taken a settlement from the landlord. 15 C. 317. 15 C. 450, 16 C. 741, 17 C. 926, 24 C. 40. 11 C. W. N. 175, 11 C. W. N. 595, 4 C. W. N. 326, 4 C. W. N. 665, 4 C. W. N. 801, 4 C. W. N. 803 referredto. DEBIDIN KALAR *v.* HARI AND SHEO PRASAD. **15 C. P. L R. 1902 P. 123.**

23 *S. 94 (1)—Suit by a tenant—Tenant other than an absolute occupancy tenan—Possession of land—Ejectment by a person other than a landlord.*

A suit by a tenant other than an absolute occupancy tenant to recover possession of land from which he has been ejected by a person other than his landlord, the landlord having had no hand in the ouster, is not governed by section 94 (1) of the C. P. Tenancy Act, 1898. 29 C. 610, 24 C. 40, 1 C. W. N. 573, 20 C. 609 at P. 628, 21 C. 732 at P. 758, 23 C. 55 at P. 59, 21 C. 732, 22 C. 783, 14 C. 176 at P. 183, 16 C. P. L. R. 70 referred to. SONSA CHAMAR *v.* PURAN SINGH RAJPUT. **16 C. P. L. R. 145.**

24. *Suit for recovery of arrears of rent —Personal remedy and real remedy—Their nature—Charge—Transfer of Property Act, S. 100—Limitation Act, Arts. 100 and 132.*

A landlord has two distinct forms of relief arising out of the relations existing between him and the tenant whose rent is in arrears, namely, a *personal* remedy, against the tenant, based on contract, and a *real* remedy against the holding. A suit for the personal remedy involves a claim for rent as such, and can only be maintained against those, who are personally bound by the contract of tenancy, namely, the tenant or some representative personally liable to pay the arrears. A suit for the real remedy follows the land, and lies against whomsoever, for the time being, having any interest in such land, irrespective of any representation of the defaulting tenant. The real remedy is a transformation of the claim for arrears of rent into one for money charged on land, which is sanctioned by the Central Provinces Tenancy Act, and is enforceable by a suit for sale under S. 100 of the Transfer of Property Act.

Therefore, a suit against the tenant for arrears of rent may, if properly framed, be one to obtain a personal decree as well as a decree for sale of the holding, subject to the law of Limitation. (*a*) The personal remedy is gonerned by Art. 110 of theLimitation Act, and the real remedy by Article 132 (*b*).

A suit against persons, to whom the tenancy is transferred by a private sale binding on the landlord, being a suit to enorce the real remedy, is governed by Art. 132 of the Limitation Act. SINGAI MURLIDHAR *v.* LALA PREMNARAIN, **3 N. L. R. 164.**

(5) Act XXIV of 1899 (Court of Wards Act.)

1. *S. 31—Central Provinces Court of Wards Act, 1899—Contract Act, section 68—Liability for necessaries supplied to a ward.*

Section 31 of the Central Provinces Court of Wards Act, 1899, does not control section 68 of the Contract Act so as to exempt the estate of a Government ward from liability for necessaries supplied to the ward. 20 C. 61 referred to. RAJA RAGHOJI RAO SAHIB BHONSLAY *v.* TEKARAM. HALWAI AND ANOTHER. **17 C P. L. R. 1904 P. 57**

2 S. 31, 34—17. C. P. L. R. 172. *See Act XVIII of 1885 supra*

Ceremonies.

1 *In adoption—Hindu Law—Adoption—Competency of a Sudra leper to adopt.*

Held, that in Bengal a Sudra leper may

Ceremonies (*Contd.*)

adopt a child. SUKUMARI BEWA *v.* ANANTA MALIA. **28 C. 168.**

2 *In adoption—Custom—Adoption—*Chudasama Gameti Garasias—Onus—*Age of ceremonial competence.*

Held, that the plaintiffs, on whom the *onus* lay, failed to prove a custom forbidding adoption among *Chudasama Gameti Garasias* who were governed by Hindu Law.

There is no fixed age at which a Hindu attains ceremonial competence and on the attaining of which adoption is forbidden. VERABHAI AJUBHAI *v.* BAI HIRABA. **7 W. N. C. 716=57 B. L. R. 534=27 B. 492 P C.**

3 Griha Pravesam and Retusanti ceremonies—Right of mother to recover expenses incurred for—13 M. L. J. 25—26 M. 497 Col. 321 P. I.

4 *Custom—Hindu Law—Ceremonies—Marriage of widow by* chadar-andazi—Khatris—*Act XV of 1856.*

Section 1 of Act XV of 1856 declares void any custom or any interpretation of Hindu Law forbidding the re marriage of widows, so that it is clear that where a Hindu widow desires to re-marry, no custom and no interpretation of Hindu Law can avail to prevent her from contracting a legal marriage.

The Act is simply an enabling one, passed in deference to a body of solid Hindu opinion, and must be administered with every care.

The question whether re-marriage is recognized by custom is relevant, as showing the intention of the parties. If the custom can be established, it will be conclusive to establish the legitimacy of the children resulting from the union of a widow.

The fact that there was a custom obtaining of going through a certain ceremony, recognised by all the brotherhood as *not constituting marriage and not intended to constitute marriage,* would be relevant as showing that the parties did not intend to constitute their union into anything more than a kind of concubinage.

No particular form of ceremony is necessary, even among *Khatris,* to constitute a marriage. It is not the ceremonies but the consent of the parties which constitute the marriage.

But if a marriage were set up between parties of a high Hindu caste, and certain rites and ceremonies were held essential to such a marriage, and these had been for no sufficient reason omitted, and something else substituted—that fact would be evidence—possibly evidence of great weight—as to the *factum* of a marriage having taken place or not, and as to the relationship which the parties desired to create.

Where in the case of a widow marrying in opposition to the views of her own relatives and section of the *Khatri* caste, the parties go through such ceremonies as they can reasonably arrange for and clearly and unequivocally express their intention to enter into the marriage relation with each other, and to live together as husband and wife, and do, in fact, thereafter, live as husband and wife, the union is a valid marriage.

In the case of the re-marriage of a Hindu minor widow, also amongst high caste Hindus, Courts should be careful to see, whatever the particular ceremonies considered necessary or desirable, that the proper consent of responsible persons was fully given.

Held, that in the present case the ceremonies gone through, in which *Chadarandazi* formed a part and the publicity given, and the measures taken, were sufficient to constitute a valid marriage, if performed with the consent of parties competent to consent, and actually consenting, to establish the relationship of marriage. As the girl was a minor and no parent as guradian was present, to give consent, the consent and the intention on the part of contracting party competent to give and to hold it, which was necessary to the 'nexus' of a valid marriage, was absent and consequently there was no valid marriage. LAL CHAND *v. Mussammat* THAKUR DEVI. **118 P. L. R. 1903=49 P. R. 1903.**

Certificate.

1 Of administration—Order extending certificate—Order granting a certificate—Appeal. 25 M. 634 Col. 803 P. I.

2 Appeal to Privy Council—Form of certificate of leave to appeal. 5 C. W. N. 689—23 A. 415 Col. 1291 P. I.

3 *Appeal to Privy Council—Value of suit for purpose of appeal to Her Majesty in Council—Certificate for leave to appeal—Question of misjoinder of parties and causes of action not sufficient ground for granting.*

Plaintiff brought a suit against P. and 20 others, which was dismissed on the ground of multifariousness in misjoinder of parties and causes of action. This decision was upheld by the Judicial Commissioner. The same plaintiff had brought altogether 19 suits of a cognate character. Out of these 14 came in appeal before the Judicial Commissioner and were decided in plaintiff's favour. The 15th was the suit first mentioned. The plaintiff put in an application for leave to appeal to Her Majesty in Council. It was an admitted fact that the value of the suit was below Rs. 10,000. It was contended that leave ought to be granted because of the above facts and because it was otherwise a fit case for appeal.

Held, that the question of law determined was one of misjoinder of defendants and causes of action in the suit and propriety of the order passed by the Court of first instance consequent on such misjoinder and the said question of law was not of such importance or difficulty as would justify the giving of a certificate of leave to appeal. *Baijnath* v. *Graham,* 11 Cal., 740 distinguish-

Certificate (*Contd.*)

ed) ABU JAFAR *v.* PARBHU NATH. **1. O C S 18.**

4. To collect debts—Adoption—Burden of proof—Suit for declaration that adoption was invalid or did not take place—Effect of grant of certificate of collection of debts recognising adoption. A. W. N. 1902 P. 62 Col: 2045 P. I.

5. *To collect debts—Landlord and Tenant—Rent paid by tenant to landlord's widow after his death—Discharge—Claim by executor of the Will of the landlord—Interest.*

The defendant rented a house from the landlord at Rs. 150 a month. The landlord raised the rent to Rs. 2,000 per annum. The rent was paid up to the date of the landlord's death to him. After his death he made one payment towards rent of Rs. 1,000 to his widow and obtained her verbal consent to a reduction to Rs. 145 per month. About one year after the payment of Rs. 1,000 to the widow a notice was given by the executors named in the Will left by the landlord to pay the rent to them. The defendant paid nothing to the widow or the excutors after the notice was received by him and expressed his willingness to pay the rent to whomsoever it might be due. On the executors suing for the arrears of rent due at the rate of Rs. 150 per month with interest the Court gave a decree at Rs. 145 per mensem deducting Rs. 1,000 paid to the widow.

It was contended for the executors on appeal that the claim should have been decreed in full.

Held, that the judgment disallowing interest was right but the plaintiffs were entitled to decree at the rate of Rs. 150 per month without the deduction of Rs. 1,000 allowed by the lower Court. The defendant must be presumed to have been aware that he was under no obligation to pay the widow, or any one else who did not produce a certificate or probate or letters of administration, or some authority to collect the debts due to the deceased landlord. As he was under no obligation to pay the widow and demanded no authority, the mere neglect on the part of the plaintiffs to give notice of their claim did not debar them from making it subsequently. C. GOLAK NATH *v.* G. GRADDOCK. **72 P. R. 1903=164 P. L. R. 1903.**

6 Of Insurance of sale—Certificate of membership—Policy of life insurance. 25 B. 376 Col. 891 P. I.

7 Satisfaction of decree—Execution of decree—Agreement—Separate suit—Uncertified adjustment—Suit for staying execution and declaration of—Satisfaction—Injunction. 8 C. W. N. 395 Col 454 P. I.

8 Of Public Demand—Resjudicata—Rent fixed by Settlement Officer—Certificate of rent due by tenant—Suit to set aside certificate. 28 C. 676 Col. 1830 P. I.

9 Of Public Demand—Sale under certificate—What passes. 6 C. W. N. 302 Col. 73 P. II.

10 Of Registration—Execution of deed—

Certificate (*Contd.*)

Admission of signature before Registering Officer.—Certificate of Registration—Power of Court to go behind. 6 C. W. N. 329 Col. 486 P. I.

11 *Of sale—Amendment of—Civil Procedure Code 1882, Sections 244* (c) *and 588—Appeal against order refusing amendment of certificate of sale.*

An order refusing amendment of the sale certificate of property purchased by the decree holder is not appealable. 26 Cal., 529, 18 All., 36, 17 All., 478, referred to. SADDO KUNWAR *v.* BANSIDHAR. **W. N. A. 1901, p. 156=23 A. 476.**

12 Of sale—Arrears of revenue—Onus of proof—Notice—Irregularity and illegality in form and service. 30 C. 1 Col. 235 P. I.

13 Of sale—Absence of reservation—Deeds of mortgage and sale. Absence of wards of exception or reservation. 30 C. 556 (P. C.) Col. 990 P. I.

14 Of sale—The certificate of sale is not the title. It is merely the title deed. 27 B. 379 Col. 1402 P. I.

15 *Of sale—Debt due by a company described as debt due by manager—Sale of debt—Effect of.*

Where in a certificate of sale a debt due by a company was described as debt due by the manager of the company.

Held, that the debt due by the company was not sold. BALAKRISHNA *v.* ORIENTAL LIFE ASSURANCE COMPANY. **4 B L R 340.** *See for other facts Col. 161 P. I.*

16. Of Sale—Suit to partially set aside sale not maintainable. 9 C. W. N. 805 Col. 73 P. II.

17. *Of sale—Public Demands Recovery Act (I of 1897, Bengal), Sections 19 and 33—Sale, Setting aside of—Review—Revision.*

Sub-section 4 of section 19 of the Public Demands Recovery Act (I of 1895), Bengal), in saying that any order made by the certificate officer under the section shall be final, only means and intends that it shall not be open to appeal, such as is provided by section 32; the intention is not to make the order absolutely final so as to make it not open to review or revision. MATANGINI DEBI *v.* GIRISH CHANDER CHONGDAR, **7 W. N. C. 433 =30 C. 619.**

18. Of Sale—Proclamation of sale—What passes at Court sale. 27 B. 334 Col. 1171 P. I.

19. Of Sale—Pre-emption—Sale of Court—Cause of action—Certificate of sale not prepared owing to objection of purchaser—Right of pre-emption not effected. 9 P. R. 1903—36 P. L. R. 1903. *See cause of action No. 96.*

20. Of Succession—Suit upon a usufructuary mortgage by the heirs of the deceased mortgagee whether maintainable without a succession certificate, in a case where the mortgagee becomes entitle to a personal decree against the mortgagor on the hap-

Certificate (*Contd.*)

poning of certain events. 5 C. W. N. 607 —28 C. 246 Col. 800 P. I.

Note—28 C. 256 read 28 C. 246.

21 Of succession—"Debt"—Suit by son of deceased mortgagee for amount due on usufructuary mortgage—Failure to produce certificate of heirship—Right to recover. 24 M. 22 Col. 797 P. I.

Certified copy.

1 Certified copy from the Registration office if admissible—Secondary evidence—Public document. 17 C. P. L. R. 1904 P. 161 Col. 188 P. I.

2 Evidence—Admission of party—Certified copy of Statement in a previous suit—Admissible. 31 P. R. 1903 Col. 188 P. I.

3 *Public Document—Khasras, certified copies of—Admissibility in evidence—Evidence Act (I of 1872), ss. 74 and 77—Patwari—Public Officer—Revenue Act (XVII of 1876), ss. 206 and 212—Act XIII of 1882, s. 8.*

The plaintiff-respondent sued for possession of certain lands alleging that he was the proprietor thereof and that defendants-appellants had gradually dispossessed him. The defence was that the plaintiff-respondent had no title and had not been in possession within 12 years next before the institution of the suit and that the defendants-appellants had been in adverse possession for that period and prior thereto. Copies of *Khasras* for the years 1286, 1288, 1291 and 1292, *Fasli*, were produced in evidence. DALJIT SINGH *v.* THE HONORABLE MAHARAJA PARTAB NARAIN SINGH. **3 O. C. 204.**—*See for other facts Col. 191 P I.*

Certified purchaser.

1 Execution of decree—Benamidar—Suit by certified purchaser for profits against person in possession. 27 A. 443 Col. 1175 P. I.

2 Certified purchaser—Benami purchase 5 C W N 341 Col. 1173 P. I.

3 Suit against certified purchaser—Benamidar. 26 A. 82 Col. 1173 P. I.

4 Certified purchaser—Interpretation. 31 B. 61 Col. 1173 P. I.

5 Suit against—Benami purchase. 13 M. L. J. 354 Col. 1176 P. I.

Certifying Counsel.

1 *Certifying Counsel.*

In certifying counsel the Court should have regard to the following considerations: —(1) Whether notice has been given by either side of the intention to employ counsel. (2) Whether the matter to be dealt involves the consideration of complicated facts or merely of simple facts. (3) Whether there arises any substantial question of law which has to be argued and discussed. ZULEKABAI *v.* AYESHABAI. **7 B. L. R. 753.**

Cess.

1 Assessment of—Mela, profits of, if assessable, with road cess—"Annual value"—"Rent"—Tenure holders, stall holder and vendors at mela, if tenants or mere licen-

Certifying Counsel (*Contd*).

sees—"Immoveable property"—Mela—Levy cess over and above income tax, if legal. 35 C. 82 Col. 79 P. II.

2 Abwab rent—Landlord-Tenant—Collection charged 8 C. W. N. 529—31 C. 834 Col. 126 P. II.

NOTE 10 C. W. N., 529 read 8 C. W. N., 529.

3 *N. W. P. Land Revenue Act (III of 1901 N.-W. P.) Section 56 and 86—Cess—Rent-Payments recorded in the* wajib-ul-arz *as* 'Muhtarifa.

Where a class of residents in the *abadi* other than agricultural tenants were made liable under the *wajib ul-arz* to pay annually to the zamindars certain dues described therein as *muhtarifa.*

Held, that the payments to be thus made were by way of rent and not by way of cesses which required the general or special sanction of the Local Government for their validation. MUHAMMAD ABDUL HAI *v.* NATHU, **W. N. A. 1904, p. 201=27 A. 183.**

4. *Kabuliat—Construction of—Liability for Dak cess.*

The clause in the *Kabuliat* relating to the payment of dak cess was as follows —'In whatever places and stations in the moffussil there are and may hereafter be dak chowki houses and practice of running dak by the order of the Magistrate, I will have the power to appoint amlas of those dak-chowkis of different stations, to pay their salary and expenses and to superintend them, and you will have no connection therewith. If I fail to pay the same and you pay it, I will repay the whole amount with interest.

Held, that the meaning of that clause was that the putnidar was to pay the charges due for dak runners and so forth and, if he failed to do so the Zamindar was entitled to recover by suit the amount, which he would have to pay in place of the putnidar.

Although the system is changed the liability for paying such charges is not transferred.

3 W. R. S. C., C. Ref. 17. Concurred. JILLAR RAHMAN *v.* BIJOY CHAND MAHTAP. **23 C. 293.**

5. If a charge on estate—Liability of owner after sale. 30 C. 778 Col. 81 P. II.

6. Decree as to—Competent Court—Road cess, 28 C. 109 Col. 1003 P. I.

7. Illegal recovery of-Principal and agent —Agent collecting illegal cesses—Suit by principal for recovery of the same, 7 C. W. N. 535—30 C. 1011 Col. 363 P. I.

8. Illegal recovery of—Value of property—Abwab—7 C. W. N. 439 Col. 1549 P. I.

9. Land revenue—Right to recover voluntary payments—Superior holder 26 B. 504 Col. 327 P. I.

10. Liability to pay—Right to recover —Right to additional rent—Recurring right 6 C. W. N. 366 Col. 126 P. II.

Certifying Counsel *(Contd)*

11. Liability to pay—Illegal cess not objected to in former suit for rent—28 C. 17 Col. 1025 P. I.

12 *Suit against President of the District Board—Madras Local Boards Act 1884, Section 57.*

A sum of money was collected from an *inamdar* by a Collector as land cess under sections 57 Act V of 1884 (Madras Local Boards Act) and paid in by him to the credit of the District Fund. The *inamdar* filed a suit against the President, District Board, to recover the sum on the ground that it had been illegally collected. He did not claim any damages,

Held, that the suit in the form in which it was brought would not lie for all the wrong that the plaintiff alleged was caused to him was caused by the Acts of the Collector and the President was not responsible for any part of the wrong alleged to have been done. HARISCHANDRA DEVU *v.* PRESIDENT, DISTRICT BOARD OF GANJAM. **24 M 114**.

13 *Act III of 1878 (Local Rates Act)—Act IX of 1889 (Kanungo and Patwari's Act)—Right of assignee of land revenue to collect cesses*

Held, that no suit would lie by an assignee of the Government land revenue against the *zamindars* for recovery of cesses under Acts III of 1878 and IX of 1889. The cesses are to be paid to the local revenue authorities and not to the *muafidars*. KESHO DAS *v.* NARAIN SINGH. **W N A 1901, p. 160**.

14 Mortgage—Part-proprietor—Mortgage lien—Personal decree. 30 C. 794 Col. 329 P. I.

15 Suit for—Land cess—Rent—Second appeal. 13 M. L. J. 211 Col. 778 P. I.

16 *Cess*—Tiruppani *cess—Voluntary payment for a number of years.*

The *tiruppani* cess is one of an essentially voluntary character, and its payment for a number of years cannot be a ground for implying that there was a legal contract or obligation to continue to pay it. RAMALINGAM CHETTIAR *v.* RAMASAMI AIYAR

17 *Wajib-ul-Arz—Construction of document—House-tax—Cess—Rent.*

Under the Wajib-ul-arz of a village called Radhakund the zamindar was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village and also from the owners of shops and temples.

Held, that this payment (which was called "gharghanna") was not a house-tax, or cess, but merely ground-rent and did not require special sanction. BALWANT SINGH *v.* SHANKAR. **30 A 235**.

Cess Act.

Act II of 1877 and Act IX of 1880 (Bengal Cess Act).

See Col. 77—82 P. II.

Road cess returns—Returns made under section 95 Bengal Cess Act—Enhancement of rent—30 C. 1033 Col. 236 P. I.

Cess Act (II of 1887) *(Contd.)*

Cestinque trust.

1 *Gift to Mission Society for establishing Native Christian hamlet—House in hamlet let out to Native Christian tenant—Right to eject—Notice to quit, if to state reasons for unfitness of the tenant to occupy mission compound—Trust, duration and object of—Trust perpetual—Beneficiaries.*

The donor made a gift of certain premises to the Baptist Mission Society of England for the purpose of establishing a hamlet of Native Christians of the Baptist community and she appointed certain persons by name as Trustees for aiding and assisting in establishing the said hamlet. The Baptist Mission Society then built several houses on the land by subscriptions raised from the members of the Baptist Christian community. In one of these houses the defendant, a Native Christian, lived on payment of a monthly rent. Two notices to quit the house were served upon him by the Trustees. The defendant did not comply with the requisition of the said notices, but on the contrary set up an adverse title in himself. The trustees brought the present suit for his ejectment. It was contended for the defendant that the trust having been created for the benefit of the Native Christian community of the place and the trust having been discharged the plaintiffs were not entitled to evict the defendant without disclosing the reasons for their considering the defendant to be unfit as tenant.

Held, that the suit must be decreed, that the trust was not discharged and the functions of the Trustees did not come to an end upon houses being built and certain members of the Native Christian community being settled as tenants but was something like a perpetual trust.

That as for the purpose of carrying out the object for which the gift was made to the Baptist Mission Society the Trustees had a power of Management of the trust, they had also the power to eject a tenant. L. R. 15 Ch. Div. 247 ref. to.

That the Trustees were not bound to disclose the reasons why they considered the defendant to be unfit to occupy the house in the Mission compound. PARMANAND KARAN *v.* BAPTIST MISSION SOCIETY, **8 C. W. N. 1904 P. 918**.

2. *Civil Procedure Code (Act XIV of 1882), Section 17—Carrying on business—Agent—Manager of joint family.*

A manager of a joint family property is not an agent for the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent, or of partners, it is much more like that of trustee and *cestui que trust.* ANNAMALAI CHETTY *v.* MURUGASA CHETTY. **5 B., L., R. 494 P. C.=7 C. W. N. 754 (P. C.)**

Chadar Andazi Marriage.

1. Marriage between a Khatri and a Khatrani widow—Chadar Andazi—Legitimacy—Issue—Inheritance—4 P. R. 1905 Col: 63 P. I.

2. Marriage of widow by Chadar Andazi—Khatris—Custom—Hindu Law. 49 P. R. 1903.—*See Ceremonies. No. 4.*

Chak.

Oudh Laws Act (XVIII of 1876), S. 9, Cl. (2)—Co-sharer in mahal—Proprictor—Right of pre-emption—Oudh Land Revenue Act (XVII of 1876), Ch. VII, ss. 108, 112, 121—Share in mahal consisting of separate chak—Non-residence in village.

The plaintiff was owner of a *chak* of 33 acres in a village which for revenue purposes constituted a mahal, and by the settlement under which he held, he paid Rs. 40 a year of the revenue, that amount being paid through the *lambardar*; but the plaintiff did not reside in the village.

Held by the Judicial Committee that he was a co-sharer of the whole mahal within the meaning of s. 9 cl. (2) of the Oudh Laws Act (XVIII of 1876), and as such had a right of pre-emption under that section. Under the provisions of Ch. VII of the Oudh Land Revenue Act XVII of 1876) relating to the "Collection of Land Revenue" every "proprietor" liable for the revenue of the mahal is a co.sharer. The plaintiff was a proprietor" in the sense of s. 180, and the settlement of his land had been made with a *lambardar* in the sense of s. 112, and he was liable just as much as every other proprietor in the mahal for the whole arrear of the mahal in case of default. The fact that his share in the mahal consisted of a separate chak did not made him the less a co-share in the sense of this legislation; and the circumstance that the was not a resident of the village was immaterial.—MUNNU LAL *v.* MUHAMMAD ISMAIL, **6 B L R 761 = 9 C W N 129—26 A 574 (P C).**

Chakran Land.

See Chaukidari—Chakran Land.

Chambers.

Receiver—Application for appointment of.

An application for the appointment of a Receiver in place of the retiring Receiver is not an application which should be made before the Judge sitting in Chambers, but should be made in Court. STALKARTT, J. C. *v.* STALKARTT W. **28 C. 250.**

Chamber Judge.

1 *High Court Rules (Original Side) 80 (a 1)—Pauper, Petition to sue as—Prothonotary's decision—Application to Judge in Chambers—Right to be heard.*

The plaintiff filed a petition to be allowed to continue her suit in *forma pauperis.*

Chamber Judge *(Contd).*

The petition was heard by the Prothonotary under Rule 81 of the Bombay High Court Rules. The petitioner applied under Rule 80 (*a* 1) to have the matter adjourned into Court.

Held, that the party dissatisfied with the Prothonotary's decision is entitled to apply to the Chamber Judge to have the matter adjourned to him, and that the Judge in Chambers is bound to decide the matter for himself. MEGHBAI *v.* POONJABAI, **32 B. 163.**

2 *High Court Rules (original side) Rule 577—Costs—Taxing Master's decision on a question of costs—Review by the Chambers Judge—Third Counsel's costs in a defended long cause—Practice as to retaining of Caunsel and their costs—Costs of a third Counsel engaged to ask for transfer of case from one Judge to another—Practice.*

As a general rule the Judge in chambers will not, on a review of taxation, interfere with items of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items; but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

Where two Counsels are already briefed in case, and a third is instructed to make an application to transfer the case from one Judge to another, and the order making the transfer makes no provision as to costs, the costs should on taxation be refused between party and party, though they may be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two Counsel. If both Counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one Counsel only throughout, the full refreshers of the conducting Counsel and a nominal refresher of 2 G. M. 's of the other Counsel would be properly allowable against the opponent if ordered to pay costs. If the absent Counsel attends for portions of the time the case is at hearing, his refresher, proportionate to the time he attends, would also be properly allowable, in addition to the full refresher allowed to the Counsel who attends and conducts the case.

Where a party to a defended long cause engages two Counsel he has a right to the services of at least one of them. He is under no obligation whatever to engage a third Counsel. If both Counsel find that they would owing to other engagements be unable to go in and conduct the case when it is called on it is obviously the duty of one of

Chamber Judge (*Contd.*)

them to return the brief.

If three Counsel are engaged *before* the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allowed between party and party and which Counsel's fees should go between attorney and client. A solicitor engaging three Counsel is entitled to have his third Counsel's costs taxed between attorney and client if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third Counsel in order to safeguard his client's interests. If a third Counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so. BANOO BEGUM *v*, MIR AUN ALI. **32 B. 262.**

Champerty

1 *Champerty—Right of purchaser from rightful heir to sue trespasser for possession of estate— Sale consideration not wholly paid—Trespasser cannot plead that the sale gave no right to sue.*

A purchaser of the share of a rightful heir to a large estate brought a suit for recovery of possession against the defendant who had entered into possession without any right. The defendant pleaded *inter alia*, that the sale to the plaintiff was void as being champerous and a gambling in litigation and the suit did not lie. The sale deed recited the consideraiton, one lakh of rupees paid and the balance Rs. 50,000 to remain in deposit with the plaintiff to be expended in prosecuting the suit and in paying a monthly stipend of Rs. 53 to the heir an Rs. 20 to a *mukhtar*. The statement in the sale deed to the effect that one lakh had been paid was found not to be in accordance with the fact. Apart from the untrue recital there was no flaw in the transaction and there was nothing extortionate or unreasonable in the terms of the sale and there was no gambling in litigation.

Held, by the Privy Council, that the sale conferred a good title on the plaintiff and the suit properly lay.

That it was not open to the defendant to urge that the sale consideration was not wholly paid by the plaintiff.

That the defendant could succeed if he had shown that the sale was absolutely void ; its being voidable at the instance of the vendor gave no right to the defendant to challenge it. ACHAL RAM *v.* KAZIM HUSSAIN KHAN. **9 W N C 477. M L J 1905, p 197, 27 A 271 (P C.)**

2 Purchase of property to which there are adverse claims is legal, but the purchase merely for litigation is illegal. 2 N L R 17 Col 40 P I.

3 Legal contract-Agreement against public policy—Champerty—20 P L R 1906. 26 P R 1906 Col 284 P I.

NOTE—26 P R 196 read for 20 P R 1906.

Champerty and Maintenance.

1 *Hindu Law—Widow's Estate—Champerty and Maintenance—Public policy, conveyance opposed to—Prayer for general relief—Hindu widow, alienation by—Legal necessity—Family debts—Marriage expenses—Costs of litigation.*

Although the English law relating to champerty has not been extended to India, a conveyance of property, tending to foster gambling in litigation, is void, as being unconscionable, speculative and opposed to public policy. Ram Coomar Coodoo *v.* Chunder Canto Mookerjee, (I. L. R. 2 Cal. 233), and Fischer *v.* Kamala Naicker, (8 M. I. A, 170) referred to. A suit to set aside alienations of property made by three Hindu widows in favour of the defendants, was instituted by the plaintiffs A., B and C. The plaint stated that B. and C. were the reversioners to the widows and that they had conveyed their rights to A. It was prayed that possessions of the property might be given to A, and there was a general prayer "for such further or other relief as the nature of the case may require." The Lower Court dismissed the claim of A, but relying upon the prayer for general relief, made a decree in favour of B. and C.

Held, that the plaintiffs B and C were entitled to no relief in the suit.

Held, further, that a prayer for general relief is limited by the facts alleged and by the prayer for express relief. Cargill *v.* Bower, (L. R. 10 Ch. D. 502); Hiralal Mullick *v.* Matilal Mullick, (5 B. L. R. 682) and Jugul Kissore Lal Sing Deo *v.* Kartric Chunder Chattopadhya, (I. L. R. 21 Cal. 116), followed. Amongst cases of legal necessity authorising a Hindu widow to alienate properties inherited from a male, are (i) family debts not incurred by her, (ii) debts incurred by her for marriage ceremonies, and (iii) debts incurred by her for costs of litigation. Ram Coomar Mitter *v.* Ichamoyi Dasi, (I. L. R. 6 Cal. 36), Amjad Ali *v.* Moniram Kalita (I. L. R. 12 Cal. 52) and Hurry Mohun Rai *v.* Gonesh Chunder Doss, (I. L. R. 10 Cal. 823), followed. DEBI DAYAL SAHOO *v.* BHAN PERTAP SINGH. **8 C. W. N. 408=31 C. 433 (P. C.)**

2 *Agreement opposed to public policy—Inadequacy of price for property to be recovered by suit —Hindu law—Alienation by widow—Ratification of transactions not carried out by real heir of property—Contract Act (IX of 1872) s. 196—Real owner joining in later transactions —Legal necessity—Portion of consideration of deeds of sale justified by necessity -Form of decree for possession and mesne profits, where deeds were held invalid.*

There is no law in force in India similar in its effect to the English Law of Champerty and Maintenance so as to render void an agreement which would, were such English Law applicable, be considered champertous. Ram Coomar Coondoo *v.* Chunder Canto Mukerjee, I. L. R. 2 Cal. 233 ; L. R. 4 I. A. 23 ; Kunwar Ram Lal *v.* Nil Kanth, L.R. 20

Champerty and Maintenance (*Contd*)

I. A. 102 ; I. L. R. 20 Cal. 843, Achal Ram *v.* Kazim Husain Khan, I. L. R. 27 All. 274; L. R. 32 I. A. 113, followed. An assignment of property said to be worth three lakhs, by persons claiming to be the next reversioners on the death of a female owner, for a consideration of Rs. 52,600 of which sum Rs. 600 was paid at the time of the execution of the deed, and the balance payable in proportion to the success of a suit by the assignee and assignors to recover the property, for the prosecution of which suit the assignee was to supply the funds, *held* not to be a transaction contrary to public policy and void on that ground by reason of the provision for payment of the purchase money. Whether it was an unfair and unconscionable bargain by reason of the inadequacy of the price was a question between the assignors and assignee which it was unnecessary to decide in a suit in which the assignors did not repudiate the transaction, but asked that effect be given to it and for that purpose joined the assignee as plaintiff in the suit. A person, who claims title under conveyances from a Hindu female heir with a limited interest, and who seeks to enforce that title against reversioners is always subject to the burden of proving not only the genuineness of his conveyances, but the full comprehension by the limited owner of the nature of the alienations she was making, and also that those alienations were justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one, whose title he alleges to have been adverse to that owner. The defendant's title to the property in suit depended on an alienation made in his favour by one of three Hindu ladies, who was not the heir of the last male owner, and on two subsequent deeds of sale, which it was sought to set aside in this suit, in which the real owner had joined.

Held, with reference to the earlier transactions, that the onus on the defendant had not been discharged, and that there was no satisfactory evidence that they had been authorized in any way by the real owner. Nor could she ratify them under section 196 of the Contract Act (IX of 1872) by becoming a party to the later transactions; it would be a serious extension of the law, as hitherto applied, to hold that a woman with a limited interest could by acts expose facto charge upon the estate, which she represents, obligations not originally binding upon it. Though the deeds of sale were therefore invalid, the consideration being for the most part not justified by legal necessity, yet as to certain sums in both deeds as to which such necessity was established it was held that the first court had rightly made the decree for possession conditional on the payment by the plaintiff of such sums to the defendant as the deeds were void, as such, the claim for mesne profits was well founded. BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHA. **35 C. 420.**

Change of Attorney.

Attorney and client—Change of attorney by next friend of minor—Appeal—Costs.

An order dismissing an application made by the next friend of a minor for change of attorney is appealable.

The next friend of an infant plaintiff is as much entitled to change his solicitor as any other plaintiff who is *sui juris.*

If a next friend applies for a change of solicitor from some sinister motive against the interest of the infant, the Court would interfere to protect the infant by ordering the removal of the next friend.

Costs of the proceedings ordered to come out of the estate of the infant.

4 C. W. N., CLXXV, 5 C. W. N. LXXXIII, dissented from. DINENDRA NATH DUTT *v.* T. H. WILSON & CO. **5 W. N. C. p. 434=28 C. 264.**

Charge.

1 Attaching the property of the defendant before judgment has no charge on the property attached, so as to have priority over other creditors. 10 C. W. N. 634 Col. 1144 P. I.

2 *Assignment of charge on immoveables—190 P. L. R. 1905 Col. 476 P. I.*

3 *Auction purchaser's right to contest of a holder—Civil Procedure Code (Act XIV of 1882) S. 278, 283—Judgment-debtor not a party to objection proceedings, effect of.*

At a sale in execution of a decree for money, defendant-respondent had purchased certian property. Previous to the sale, plaintiff-appellant had successfully applied to the executing Court to have the sale effected subject to a charge for her maintenance, which she had secured by means of a suit brought by her against the judgment-debtor, and the respondent, accordingly, had purchased the property only subject to the charge. The judgment-debtor was not a party to the objection-proceedings. In the present suit against the respondent, appellant sought to enforce this charge. The lower Courts held that the respodent is not barred by S. 283 of the Code from disputing the existence of the alleged charge. The contention raised, in second appeal, that the respondent as execution purchaser is as much bound by the order upon the appellant's objection in execution as the decree holder, was overruled and it was held that the purchaser was not precluded from contesting the charge, by reason of the above order in execution, on the grounds that if the auction-purchaser is to be bound at all by the order, it must be as representative of the decree-holder and the view that the auction-pur-

Charge (*Contd*).

chaser represents the decree-holder *quoad* the result of the objection in the execution proceedings involves the anomaly of allowing the former even to file a suit under S. 283 of the Code, a course which seems nowhere to have been contemplated. 1 C. P. L. R. 3 and 7 C. P. L. R. 73 referred to. MR. DHOKA *v.* R. B. BEHARILAL KHAZANCHI, 1 N. L. R. 150.

4 Bengal Tenancy Act VIII of 1885 S. 65 —Suit on mortgage—Sale in satisfaction—6 C. W. N. 834 Col. 719 P. I.

5 Benamidar with the consent of owner—Benamidar's charge on mortgage property after redemption by him. 13 M. L. J. 1903 P. 228 Col. 24 P. II.

6 Benamidar's charge—Liability of owner after sale. 30 C. 778 Col. 81 P. II.

7 *Bona fide* purchaser for value without notice—Maintenance—Decree on compromise—Creating a charge. 28 A. 655 Col. 562 P. I.

8 Charge or mortgage—Construction of bond for a payment of debt—Simple mortgage—Attestation. 9 C. W. N. 1001 Col. 601 P. I.

9 Charge—Mortgage deed—Attestation, Adsence of. 7 B. L. R. 934 Col. 610 P. I.

10 *Compromise—Decree in terms of compromise—Charge upon property—Registration Rent Act (XXII of 1886 S. 153)*

In a suit for a certain sum of money a compromise was made between the plaintiff and R. One of the terms of the compromise was that R. should not transfer his share in a certain village till the payment of the money. The Court ordered that a decree should be drawn up in accordance with the compromise. The decree which was drawn up contained all the terms of the compromise except the said term. Subsequently the defendant sold the share of R. in execution of a decree notwithstanding the plaintiff's objection that he had a charge on the share under the compromise and the decree. The plaintiff then sued the defendant for the money which had been decreed to him against R. according to the terms of the compromise.

Held, that the compromise of a suit is not judicially given effect to merely by the order that a decree be prepared in accordance therewith and that in order that such effect may be given to it, a decree must be made in accordance therewith.

Held, further, that the compromise in so far as the stipulation that the defendant should not transfer his share until the payment of the money was concerned was not judicially given effect to.

Held, also, as the compromise was not registered, the stipulation was rendered ineffectual by the provisions of section 153, Oudh Rent Act. MATA DIN *v.* LAL RAGHURAJ SINGH, 40. C., 78

11 *Documents executed in the mofussil—Contracts of the people of India—Liberal construction—Regard to be had to all the circumstances of a transaction—Intention to make land security for payment of debt—Charge—Transfer of Property Act (IV of 1882), sec 100.*

Documents executed in the mofussil come within the statement of the Privy Council in Hunoomanpersaud Panday *v.* Mussummat Babooee Munraj Koonwaree (1856) 6 Moo. I A. 411 that "deeds and contracts of the people of India ought to be liberally construed The form of expression, the literal sense, is not to be regarded so much as the real meaning of the parties which the transaction discloses."

Where having regard to all the circumstances of a transaction there remains no doubt that the documents are sufficient and do show an intention to make the land security for the payment of the debt mentioned therein, the documents create a charge JANARDAN *v.* ANANT 32 B. 386.

12 Contribution—Mortgage decree—Execution of decree—Payment of decretal amount by one of the representations of the mortgagor. 9 C. W. N. 865 Col. 644 P. I.

13 Contribution—Suit for contribution of amount realised as revenue—Charge—Personal liability—Limitation—13 M. L. J. 1903 P. 83.—*See Cols. 1400 and 1793 P I and Madras Revenue Recovery Act II of (864) Ss. 2, 42.*

14 Contribution—Suit for contribution from co-sharer for money paid for—Government revenue—Limitation for. 15 M. L. J. 219—28 M. 493 Col. 1934 P. I.

15 Creation of a charge—Agreement to execute a mortgage deed. Title deeds—Deposit of 28 M. 54 Col. 590 P. I.

16 *Charge—Interest—Mortgage not providing for* post diam *interest.*

Where the mortgage-deed did not specifically provide for *post diem* interest, or make such interest a charge on the land—*Held*, that the mortgage could be redeemed only on payment of principal, the interest specifically contracted for and *post diem* interest by way of damages which had accrued within six years of suit.

Post diem interest by way of damages is recoverable as a charge on the property mortgaged in cases when such interest is not specifically contracted for. DIWAN JAWAHIR MAL *v.* RAJA SHAH. 21 P L R 1903=95 P R 1903.

17 Of debt on immoveable property—Power to lend money on equitable mortgage—Bank. 25 B. 52 Col. 8 P. II.

18 Of debt on immoveable property—Principal and agent—Limitation—Contract of service in writing registered. 35 C. 298 Col. 1857 P. I.

19 On property—Assessment—Payment by A. of assessment due on B.'s land does not give A a charge on such land contribution—Voluntary payment. 26 B. 437 Col. 1936 P. I.

20 Decree holder of a simple money decree with a charge on property how to enforce it. Compromise of mortgage suit. 28 A 58 Col. 715 P. I.

Charge (*Contd.*)

21 Dedication to a temple—Charge on village income—Grant in favour of temple—Prepetuity—Presumption. 4 O. C. 61 Col. 2170 P. I.

22 *Dedication, Mahommadan Law—Profits of land—Charge—Partition.*

The Mahomedan Law does not recognise a *wakf* of profits of land apart from the land itself, when the profits themselves are intended to be spent for the purposes of the endowment. Upon this point, there is no difference between the *Hanifeea* and the *Imameea* Schools of Law.

Assuming, however, that there may be a valid *wakf* of the profits of land, a dedication of a portion, merely of such profits, does not constitute a *wakf* of either the whole or a portion of the land. It creates at best a charge upon the land. 20 C. 116 and 6 I. A. 182 (P. C.) 5 C. L. R. 296—5 C. 438 R. and does not render it non-heritable, non-transferable or impartible. The existence of such a charge is, therefore, no bar to a partition, if the land is joint property. MOFAZZUL KARIM *v.* MOHAMMAD. **2 C L J 166.**

23 For Dower Muhammadan Law. 26 A. 28 Col. 1184 P. I.

24 *On family property—Hindu Law—Maintenance—Widow's right to maintenance.*

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement, and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value, even with the knowledge of the widow's claim for maintenance, unless the transfer has further been made with the intention of defeating the widow's claim. S. D. A., N.-W. P., 1864, Vol. I., p. 228; 2 Bom., 494; 22 All., 326, referred to THE BHARTPUR STATE *v.* GOPAL DEI. **W N A 1901, p. 207.**

25 Government Ryots directed by Government to pay revenue to trustees of a *mutt*—Right of suit. 26 M. 730 Col. 1885 P. I.

26 Haq Chaharum—Kabuliat providing haq chaharum. 2 A. L. J. 754 Col. 718 P. II.

27 *Identification of property—Hindu Law—Survivorship—Charge—Identification of property—Civil Procedure Code (Act XIV of 1882), Section 244—Representative—Purchase.*

Held, that a decree for maintenance creating a charge on ancestral property, passed against the father of a *Mitakshara* family to which the sons are not made parties, can be executed against the sons on the death of their father, when it is not disputed that the debt was either illegal or immoral. 14 Mad.. 283, p. 287, followed.

But if the property is not charged by the decree, the sons are entitled to object to property taken by them by survivorship being proceeded against in execution.

The fact that the decree does not specify the property by metes and bounds does not affect the question as to the creation of a charge, if the intention to create the charge is clear and the property can be otherwise identified.

A purchaser of the plaintiff's interest in the property is his representative within the meaning of Section 244 of the Civil Procedure Code. MINAKSHI ACHI *v.* CHINNAPPA UDAYAN. **24 M 689.**

28 *Charge—Inamdar's right to assessment—Limitation Act (XV of 1877), Schedule II, Articles* 110, 120.

In a suit for arrears of assessment an Inamdar is not entitled to a charge on the lands of, but only to a money decree against, the occupants.

Where in a suit for arrears for the years 1895-96 and 1896-97 a decree was passed against the defendant who had taken possession of the land in 1899 as purchaser of it,

Held, that the decree must be set aside.

Article 120 and not 110 of the Limitation Act applies to a suit for arrears of assessment by an Inamdar where the relationship between the parties is that of superior and inferior holder and not that of landlord and tenant. 25 *Bom.*, 556 *followed.*—VINAYAK MAHADEO *v.* LAKSHMAN NARAYAN, LAKSHMAN NARAYAN *v.* VINAYAK MAHADEO. **5 B. L. R., 700=28 B. 92.**

29 Interest. 95 P. R. 1902—*See No.* 16 *supra.*

30 Land Revenue. 26 B. 437—*See* 19 *supra.*

31 *Maintenance of Hindu widow —Transfer of Property Act (IV of* 1882), *Section* 39—*Maintenance of Hindu widow—Whether charge upon the estate—Hindu Law—*Mitakshara *School—Transfer of estate with intention to defeat right—Fraudulent intention—Purchaser with notice. Position of.*

When immovable property, from the profits of which a Hindu widow was entitled to receive her maintenance, was sold and the sale deed recited that the amount of maintenance would continue to be paid to the widow by the vendor, and that the property sold would not be subject to any charge for it.

Held, that this mere recital was not enough for holding that the conveyance was executed with the intention of defeating the right of the maintenance-holder, within the meaning of Section 39 of the Transfer of Property Act. It was necessary to enquire whether at the time of the sale there was sufficient property left in the hands of the vendor, out of which the amount of maintenance could be realised; and if there was not whether the vendee was aware of the fact

The intention to defeat the right of the maintenance-holder, against which provision is made in Section 39 of the Transfer of pro-

Charge *(Contd).*

perty Act, involves the idea of a fraudulent intention.—22, All., 326 (1900), approved.

Under the *Mitakshara*, the maintenance of a widow is not a charge upon the estate of her deceased husband. DIGAMBARI DEBI *v.* DHAN KUMARI BIBI. **10 C. W. N. 1074.**

32 Maintenance of Hindu widow—Suit for sale of property subject to a charge—29 A. 205 Col. 672 P. I.

33 Malikana—Suit for recovery of arrears of Malikana without seeking to enforce the charge upon the land—33 C. 998 Col. 1891 P. I.

34 *Merger—Charge—Decree—Security, extinction of—When kept alive—Transfer of Property Act (IV of 1882), s. 85—Parties—Appeal—Redemption, partial.*

It is not open to a mortgagee to throw the burden of the entire debt upon a portion only of the mortgaged property and release the remainder on the ground that it is subject to prior charges.

A first mortgagee, who purchases the mortgaged property from the mortgagor, may set up his prior security as a shield against a subsequent incumbrancer. 11 I. A. 126; 10 I. A. 62; 29 I. A. 9 and (1895) A. C. 11, F.

The same doctrine applies, even though the mortgagee may have sued on his mortgage and obtained a decree.

A decree obtained on a mortgage does not extinguish the security, though the security may be merged in the decree. Where, therefore, there is a subsisting prior incumbrance, and a puisne mortgagee advances money for the purpose of discharging it, his right to keep it alive, if it is for his benefit to do so, is not affected by the fact that the prior incumbrance had , at the time, taken the form of a decree 31 C. 863, Appl 20 M. 486, F.

A judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the judgment-creditor (1803) 3 East. 251 ; (1845) 4 Hare. 132 ; (1863) 9 Jurist. N. S. 764 ; (1877) 5 Ch. D 634 ; (1895) 1 I. R. 274 ; (1902) A. C. 147 and (1885) 15 L. R. I. 277, F. (1876) 4 Ch. D. 33, Distd.

S. 85 of the Transfer of Property Act is strictly applicable to a mortgage-suit in all its stages, whether in a Court of first instance or in a Court of appeal. Where, however, the plaintiffs in the Court of first instance, deliberatety abandoned their claim against some of the defendants and released the shares of the mortgaged property held by them and then obtained a decree against the remaining defendants, there was no duty cast by law upon these defendants to join as parties respondents to an appeal preferred by them against the plaintiff, such of the defendants as against whom the plaintiffs had abandoned their claim, 7 M. L. J. 266 and 9 M L. J. 49, Distd.

When a mortgagee has acquired, in whole or in part, the share of a mortgagor, partial

Charge *(Contd).*

redemption may be allowed-4 C. W. N. 507 ; 5 C. W. N. 83 and 30 C. 755. F. SURJIRAM MARWARI *v.* BURAAMDEO PERSAD. **2 C. L. J. 202.**

35 *Merger of charges—Prior and puisne incumbrances—Redemption, terms of—Mortgagee tenant bound to account.*

A first mortgagee, who purchases the mortgaged property from the mortgagor, may set up his prior security as a shield against a subsequent incumbrancer 10 C. 1035 and 29 C. 154, F.

When a mortgagee undertakes to collect rent from the tenants of the property comprised in his security and to apply them in satisfaction of his dues, if he himself is one of the tenants he must, when accounts are taken, allow credit for the rents payable by him, although, if, at that time, a suit were brought for the recovery of the rent, it might be *held* to be barred by limitation 5 C. 333, F.

A puisne incumbrancer, who has not been made a party to a suit by a prior mortgagee, retains his right of redemption, but he must exercise such right only upon the footing that the mortgage relied upon by the prior incumbrancer is subsisting and entitles him to all dues including interest, thereunder 18 C. 164=17 I. A. 201 and 21 C. 366=21 I. A. 1, Refd. to. RAM NATH MUKHOPADHYA *v.* BRAHMAMOYI DEBYA. **1 C. L. J. 531.**

36 *Mortgage—Construction—Interest—Charge on property—Amount.*

Where a mortgage deed provided " I shall without any objection pay to the said cerditor the fixed amount of interest for six months from this day."

Held, That the amount secured by the mortgage *plus* interest at the stipulated rate formed a charge on the property, and that the case amounted to one of money lent at interest and made payable on the security of certain property. NAND RAM *v.* KANDYAL. **1 A. L. L. 470.**

37 Mortgage—Attestation—Absence of charge. 9 C. W. N. 697—32 C. 720 Col. 601 P. I.

38 Mortgage between date of default and date of sale for arrears of revenue. Charge on sale proceeds. 3 C. L. J. 52 Col. 632 P. I.

39 Mortgage—Invalid creates a charge—Construction. 17 M. L. J. 39 Col. 609 P. I.

40 Mortgagor—Joint mortgage bond in ordinary form—Payment by one mortgagor and redemption of whole property mortgaged. 28 A. 482 (P. C.) Col. 701 P. I.

41 *Occupancy tenant.*

What does "charge" mean under S. 100 T. P. A. and 65 of the Bengal Tenancy Act—Difference between a mortgage and a charge. 33 C. 985 Col. 717 P. I.

42 Purchaser of a portion of a mortgaged property paying money to pay of a prior mortgage to actually supplies, pays the money —Contribution. 9 O. C. 259 Col. 598 P. I.

43 *Recovery of property subject to charge—Court Fees Act, S. 7, cl. IX—Forum of appeal.*

Charge (*Contd*).

Held that, where a plaintiff brings a suit for the recovery of certain property subject to a charge for an unknown amount, the value of the suit is the real value of the property, and not the supposed amount of charge, and the *forum* is to be determined accordingly. MOHAMMAD BAQAR *v.* N. M. BAQAR KHAN ALI. 10 O C 42.

44 *Mortgage—Redemption by one of co-mortgagors—Charge on the share of each of the other co-mortgagors for share of mortgage-debt—"Obtains possession," meaning of—Transfer of Property Act (IV of 1882) S. 95—Joint decree against several mortgagors.*

H. owned a two-annas share in a village which he mortgaged to one R. for Rs 1,000 with interest at the rate of Rs 1-8-0 per cent. per mensem. H. died, leaving as his heirs, his brother, the plaintiff, and the defendants who were his widow and three daughters. The plaintiff paid R. Rs 1,000 on account of the mortgage-debt, and subsequently Rs 480 6-0 more in satisfaction of a simple money-decree which R. had obtained for the balance of that debt. The plaintiff sued the defendants on the allegation that he had a charge on the mortgaged property for the share of the mortgage-debt which was due from the defendants and which he paid, and he was entitled to a decree for sale of their share in default in payment. He further alleged that the defendants were jointly liable. It was not denied that the two-annas share was mortgaged and the mortgage-debt had been paid off.

Held, that it did not matter that part of the debt was paid before the mortgagee was entitled to recover it, or that for the other part the mortgagee obtained a simple money-decree which the plaintiff satisfied: however the money was paid by the plaintiff, the mortgage was redeemed by such payment.

Held, further, that the plaintiff had a charge on the share of each of the defendants for the latter's proportion of what he had paid to redeem the mortgage. The liabilities of the defendants were, however, separate and he was not entitled to a decree for the sale of their shares jointly on their failure to pay their proportion of the mortgage-debt. He was entitled to separate decrees against each of the defendants for sale of the mortgaged property in default in payment of her proportionate share of the mortgage debt.

Held, also, that the words "obtains possession" in sec. 95, Transfer of Property Act, may be interpreted to mean "obtains possession" when the mortgagee had possession under his mortgage-GHULAM MAULA KHAN *v.* BANNO KHANAM, 4 O. C.,273.

45 *Mortgage-Redemption-Further charges, paying off of; before redeeming original mortgage—Penalty in case of default in payment on due date—Unconscionable bargain.*

On 2nd January, 1869, one M. mortgaged Gangapur to P. and D. for 16 years at 12 P. C. P. A. interest; possession was agreed to be given in default of payment on due date. The plaintiff appellant was the son of P. and the Defendants 1, 2 and 3 were the sons of the mortgagee D. and defendant 4 was a transferee from them. The plaintiff having acquired M's equity of redemption sued the defendants for redemption of the portion of Gangapur which was in their possession on payment of half the mortgage money due on the aforesaid deed. The defendants claimed an additional amount under two deeds alleged to be deeds of further charge (1) dated 19th July 1869; (2) dated 9th January 1872.

The first deed recited that M. had borrowed Rs. 387 from P. and D. bearing interest at one per cent. per mensem to be paid in full by *Baisakh* 1277 F. at the time of redemption of Gangapur. It further went on "that unless the aforesaid bond-debt is paid I shall not be in a position to redeem the village Ferozpur, that in case I fail to pay the amount due under the bond with interest on the date fixed for repayment, I shall pay Rs. 1/8 per day from the date of such default and interest shall cease to run from the date of such default.

The second deed set forth that the villages of Gangapur and Ferozpur were mortgaged by M. to P. and D. under a mortgage deed that Rs. 3,000 were due to the mortgagees on account of profits for which this deed was executed in their favour. The deed provided, "In addition to the previous deeds I shall pay and discharge the sum of Rs. 3,000 in two years...... the creditors above named have the power to realize their money from all my moveable and immoveable property of whatsoever kind, that the creditors shall further have the power to realize their money with interest in full from whichsoever of the mortgaged properties they like after payment of the money due to the previous mortgagee as well as from all other property." It was admitted that Gangapur was a hamlet of Ferozpur.

Held, that the first deed dated 19th July 1862 was intended to create a further charge on Gangapur and that the Plaintiff must pay it off at the time of redeeming Gangapur.

Held, further, that the penalty of Rs. 1-8 per day from the date of default was a monstrous and unconscionable one and could not be enforced in full.

Held, that the Plaintiff was entitled to redeem the mortgage dated 2nd January, 1869 without having to pay the amount due under the deed dated 9th January, 1872. CHANDRIKA PERSHAD *v.* JAGAN NATH. 8 O. C. 227.

46 Redemption—Suit for redeem converted into a suit to recover possession on payment of a charge. 10 O. C. 17 Col. 1968 P. I.

47 *Redemption—Transfer of Property Act (IV of 1882), Section 95—Mortgage—Charge—*

Charge (*Contd*).

Contribution suit—Redemption by one of several mortgagors—Purchasers in execution of simple money decree and decree to enforce charge.

Where one of several mortgagors redeemed the mortgaged property—

Held, that independent of section 95 of the Transfer of Property Act he had a charge on the shares of the other co-mortgagors and that he was entitled to enforce that charge. 3 All., 388, referred to.

One *B*. had purchased certain property including the property in dispute in this case at an auction sale held in execution of a simple money decree. A usufructuary mortgagee brought a suit to foreclose the mortgaged property. Thereupon *B*. paid the entire mortgaged-debt and sued the other mortgagors for contribution. *B*. claimed that the surplus paid by him over and above his own share might be decreed against the other mortgagors and that their property should be sold. A decree was passed in his favor in 1883 in the terms of his claim. In execution the plaintiff purchased the property in dispute in this case in 1891 and sued to enforce his charge. In 1886 in execution of a simple money decree the defendant had purchased the same property.

Held, that though the defendant's purchase was prior in date to the purchase of the plaintiff, and if their respective purchases were both at sales held in execution of simple money decrees, the defendant would be entitled to succeed, yet as *B*. had a charge on the property the plaintiff was entitled to succeed. MAHESH DUTT PANDEY *v.* TULSEE RAM. **A. W. N. 1906 P. 178.**

48 *Redemption Mortgage—Charge—Contribution—Redemption by one of several mortgagors.*

The right to enforce his charge acquired by one of several mortgagors by redeeming a usufructuary mortgage of the property dates from the day when he paid off the entire mortgage. It has no priority over a mortgage executed before the redemption, and a purchaser at an execution sale held to satisfy such a mortgage after the redemption has a better title to retain possession as against the redeeming Mortgagor. MAHESH DUTT PANDEY *v.* BABU DAN BAHADUR PAL. **A. W. N. 1906 P. 179.**

49 *Mortgage—Clog on the equity of redemption.*

A debt of Rs. 5,000 due on a previous Khata had become payable under a bond and for the liability thereunder and for another debt of Rs. 1,500 was substituted a fresh liability under a mortgage-deed, whereby the debtor obtained a period of two years from its date for the repayment of Rs. 5,000. It was provided in the deed that should the debtor have to redeem the property mortgaged for the other debt of Rs. 1,500 by the same deed, he should not lay claim to the property mortgaged unless he paid off both the sums wholly. The

Charge (*Concd*).

deed was stamped as for Rs. 1,500.

The question arose whether the property comprised in the deed had been made security for the prior and the subsequent debts or whether the agreement so far as it related to the earlier debt amounted merely to clog on an equity of redemption.

Held, by the Full Bench, that the debt of Rs. 5,000 was secured on the property as a charge by way of mortgage and that no question as to a clog on the equity of redemption arose in the case. HARI BHIVA *v.* VISHNU DINKAR. **6 B. L. R. 313 = 28 B. 349.**

50 Mortgage—Sale deed—Covenant for title—Covenant for quiet enjoyment—Money paid in redeeming property. 6 B. L. R. 832 Col. 592 P. I.

51. *Revenue—Payment of—Obiter dicta—Authority of—Charge on property—Unsolicited payment on behalf of another.*

The Judge ought with all due respect to examine into dicta of judges but he must not allow any number of them to effect his Judgement.

Unsolicited expenditure in respect of the property of another, even if made for the purpose of its preservation, gives no lien outside maritime law.

A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property for such payment. 14 Cal., 809; 14 All., 274, approved. SHIV RAO *v.* PUNDLIK. **4 B. L. R. 90 = 26 B. 437.**

52. Sale of property—Contribution—Purchaser of a portion of property. 2 A. L. J 698 Col: 642 P. I.

53. Sale of property, the subject of a charge—Right of charge holder to get a personal decree against his debtor—A. W. N. 1905 P. 154 Col: 696 P. I.

54 Shareholders paying revenue—Suit for contribution from co-sharer for money paid for government—Limitation for. 28 M. 493 Col. 1934 P. I.

55 Statutory and equitable—Vendor and purchaser—Charge on property sold—Appeal to privy council—Certificate of appeal, form of—"Substantial question of law"—31 C. 57 (P. C.) Col. 596 P. I.

56 Of unpaid vendor—Sale of property, the subject of a charge—Right of charge holder to get a personal decree against his debtor A. W. N. 1905 P. 144 Col. 696 P. I.

57 Of unpaid vendor—Limitation Act Art. 132. Applies to suits to enforce the charge created by section 55 of the transfer of Property Act. 29 M. 305 Col. 591 P. I.

Charitable Bequest

1 *Hindu Law—Will. Construction of—Reversion after life estate—Gift to poor relatives, dependants and servants—"My house" Moveable property—Securities for money—Limitation.*

Charitable Bequest *(Contd).*

A Will executed by a Hindu provided that her only surviving daughter shall be entitled to, the rents and profits of a certain house for her life. No provision was made as to what will happen to the house on the determination of her life-estate but there was a provision directing the executors after carrying out the provisions of the Will to sell the residue of such of the estate as consisted of landed property and to make over the proceeds thereof to the University of Calcutta.

The Will after dedicating a house to the service of a Thakur provided: "The said deity shall be located in my house and duly worshipped.

The testator for the purpose of endowing a *shebaitship* appointed his nephew a *shebait* for life and after his death directed that if he left a son, that son or adopted son should be the *shebait*. A proviso was added preferring the eldest to younger sons and giving the nephew a power of appointment by deed or Will. The nephew had a son.

There was also a devise in the following terms "I also direct that my executors and trustees shall at their discretion set apart a sum not exceeding Rupees Twenty-five thousand for distribution amongst my poor relatives, dependants and servants.

The residuary devise in favor of the Calcutta University ran thus "I direct that my executors shall after payment of all my just debts.........sell the rest and residue of such of my estate as consists of landed properties and my jewellery and furniture and make over the proceeds thereof and all moneys or securities of money of which I may die possessed to the University of Calcutta for the following purposes:—

In a suit by the daughter brought for the purpose of determining questions which arose on the construction of the Will to which the nephew's son was not impleaded as a party—

Held, (1) that the reversion in the house expectant on the determination of the plaintiff's life interest passed under the specific residuary devise in favour of the University of Calcutta.

(2) That the Thakur was intended to be located in the family dwelling house.

(3) That the limitation to the nephew was perfectly valid and the limitation to the son who was alive was equally valid. The question as to what might be the effect of these limitations in the event of the nephew dying and leaving no children without exercising the power of appointment conferred upon him should not be decided in the present suit, first because the son was not a party to the suit and secondly because it was not the practice of the

Charitable Bequest *(Contd).*

High Court to decide questions which might arise on a contingency which had not yet happened and might never happen.

(4) That the devise of Rs. 25,000 to poor relatives, dependants and servants was not void for uncertainty. *10 Ves., 522; 7 Ch. Div., 745; 2 Myln and Keen 59, referred to.*

(5) That the devise in favor of the Calcutta University did not cover all the testator's moveable property and that shares not secured on the property of a Company by way of debenture did not fall within the description of securities for money. SREEMUTTY MONORAMA DASSEE *v.* KALLY CHURN BONERJEE. **8 C. W. N. 273=31 C. 166.**

2 *Hindu Law—Will—Bequest to religious and charitable purposes.*

The residuary clause of the will of a Hindu governed by the Mitakshara school of Hindu law was as follows:—" And as to the rest and residue of my estate I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper." The bequests of the residuary estate was held to be a valid charitable bequest. The direction to spend and give away the whole of the residue in charity governs the words that immediately follow and therefore the purposes for which the fund is to be spent must be charitable, although they may at the same time be religious. *Ramgopal Bonnerjea* v. *Sibkissen Bonnerjea*, (1 Bom. H. C. 76 note) followed. *Pocock* v *Attorney-General*, (L. R. 3 Ch. D. 342), *Morarji Cullianji* v. *Nenbai*, (I. L. R. 17 Bom. 351), *Deb Shankar Naranbhai* v. *Motiram Jageshwar*, (I. L. R. 18 Bom. 136), *Runchordas Vandrawandas* v. *Parcatibhai* (L. R. 26 I. A. 71), *Gangbai* v. *Thavar Mulla*, (1 Bom. H. C. 71), *Advocate General* v. *Damothar Madhowjee*, (1 Bom. H. C. 76 note). PARBATI BIBEE *v.* RAM BARUN UPADHYA. **8 C. W. N. 653 =31 C. 895.**

3 *Will—Charitable legacy.*

A bequest for "some one or more charitable, educational or other philanthropic institution or institutions" is void for uncertainty. BAI CHADUNBAI *v.* DADY NUSSERWANJI. **3 B. L. R. 902=26 B. 632.**

4 Gift—Requisites of Gift to Hospital, Corporate Body not necessary—Revocation of gifts—Codicil—Gift to mission—6 C. W. N. 321 Col. 85 P. I.

5 Bequest to charitable uses in the presence of wife—26 M. 532 Col. 86 P. I.

Note 26 M. 523 Read 26 M. 532.

6 *Will—Bequest to Hindu wife—Females' estate—Void bequest—Charitable bequest—Lapsing of.*

When the testator appointed his wife as executor and heir and the will stated that if a son was born to him that son should be the owner of the residue and if

Charitable Bequest (*Contd.*)

no son was born then his wife should be the owner.

Held, that the wife took an absolute estate under the will.

A bequest in favour of charity fails as void for uncertainty.

In general the residuary gift carries every lapsed legacy and every legacy which on any ground fails to take effect, but that is subject to the rule that if the testator has shown some intention with regard to the excepted property inconsistent with its ever falling again into the residue, effect must be given to that intention.

Where a testator makes a bequest in favour of a person and that person dies before the legacy takes effect, it is a sound rule that the bequest goes on the testator's death as undisposed of residue to his heirs, because the testator must be presumed to have known when he provided for the bequest that the intended legatee might die before him. If with that knowledge he did not provide by way of an alternative disposition, he must be taken to have intended that it should, in the event of a failure of the bequest, go as undisposed of. But the same knowlege cannot be imputed in the absence of express words to a testator in the case of something which is not validly given away. There the testator thinks he is giving it away validly and the intention to treat it as part of property which he wishes to dispose of is clear. JAIRAM NARAYEN *v.* KESSOWJEE DEWJEE **4. B. L. R. 555.**

Charitable Endowment.

1 *Landlord and Tenant—Permanent tenancy—Evidence—Madras Regulation VII of 1817*—Ulavadai Miras—Purakudis—*Charitable endowments— Permanent lease granted by manager of temple.*

The expression "*Ulavadai Miras*" is of doubtful signification, whilst the word "*Purakudis*" has a well understood and definite meaning.

In a suit for ejectment filed by the manager of a temple the defendants claimed permanent rights of occupation in the land in suit.

There was no reliable evidence as to the origin of the relations between the tenants and the temple. The defendants relied chiefly on three documents, two of which were executed in 1813 and 180 respectively purporting to have been permanent leases given by the then manager of the temple to the predecessors in interest of the defendants and the third parties. After the passing of the Madras Regulation VII of 1817, a settlement was made by the Collector of the District in 1833 with the predecessors in interest of the defendants treating them as tenants without permanent rights of occupancy.

Held, by the Privy Council, reversing the judgment of the High Court, that it was not proved that defendants' tenancy

Chargeable Endowment (*Contd*).

was of a permanent nature. The tenants having been recognized only as non-occupancy tenants in 1831-1833 proceedings before the Collector could not claim the status of occupancy tenants on the strength of leases granted to their in 1813 and 1820 of which the Collector had presumably no knowledge. 6 M. H. C. R., 164; 11 Mad., 77; 5 Mad., 345, *referred to.*

The effect of Madras Regulation VII of 1817 was to supersede the powers of managers of charitable endowments to alienate charitable property, and to sanction the revision of existing appropriation if unduly made.

The powers of the Collector under the Regulation discussed. SEENA PENA REENA SEENA MAYANDI CHETTIYAR *v.* CHOKKALINGAM PILLAY. **8 C. W. N., 545 (P. C.).**

Charitable Trust.

1 Trust—Suit for a declaration that certain property is endowed property. 25 A, 631 Col. 1209 P. I.

Charitable uses.

1 Gift—Requisits of—Gift to Hospital—Corporate body not necessary—Revocation of gifts—Codicil—Gift to mission. 6 C. W N. 321 Col. 85 P. I.

Charity.

1 Administration of — Jurisdictiou of Courts, extent of—Religious institution—Trust. 15 M. L. J. 133—28 M. 319 Col. 1212 P. I.

2 *Bequest to legal sharers—Power of disposing one-third of the property—Bequest to trustees for charitable purposes—Void for uncertainty of subject-matter.*

Where, under the will of a Mahomedan testator, the widows have received more than they are entitled to, under Muhammadan Law, as legal share, *i. e.*, one-eighth of the estate, a decree for the balance over and above their share should be passed against them.

Muhammadan Law permits a very wide scope to a testator as regards the one-third of his property which he may dispose by will. His power of disposition for expenditure on charitable or religious purposes is subject to very slight restrictions.

Bequest of property by a Mahomedan testator for such charitable objects as the trustees appointed under the will may think proper, or for such purpose as that by which the testator may obtain eternal bliss, though valid under Mahomedan Law, is, on general principles, applicable to all testators, inoperative and void on account of uncertainty of the subject-matter of the trust. 22 B. 774, 23 B. 725, 30 B. 500, 31 C. 895, 9 Ves. 399 and L. R. 8 Ch. Dn., 854, R. SHAHAB-UD-DIN *v.* SOHAN LAL. **75 P. R. 1907.**

Charity (*Contd*).

3. *Charity--Wakf--Discretion of trustee--Benefit of family.*

To be a valid deed of *wakf* a deed must have the effect of granting the property in substance to charitable cases. Where its effect is to give the property in substance to the family or leaves the amount to be expended in charitable uses in the absolute and uncontrollable discretion of the *mutawali* and no one has a right to demand an account, the deed is not a valid deed of *wakf.*

Held, in consideration of the deed in question that it did not constitute a valid trust. MUSSTT MUJIB-UN-NISSA *v.* ABDUL RAHIM. **3 B. L. R. 114=5 C. W. N. 177=23 A. 283=28 I. A. 153; (P. C.)**

4. *Immoveable property -- Dedication to charity--Agiari--Man in possession--Right to sue for trespass.*

A person, who dedicates his immovable property to charity (*e.g.* for constructing and maintaining an *Agiari* for Parsees), can maintain an action with respect to trespass to the property. PESTONJI NUSSERWUNJI *v.* NEMCHAND MANECKCHAND **9 B. L. R. 1301.**

5 *Application to charity provided by a Parsi donor.*

Where under altered circumstances through lapse of time or through other causes it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefactions, the Court ought not to hesitate to give its sanction to a scheme which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original interest of such donor. HORMUSJI F. WARDEN RE. (DEVAR. J.) **9 B. L. R 1203.**

6 *Construction of--Bequest "for purposes of popular usefulness or for purposes of charity" is void for uncertainty--Charitable purposes if mixed with other indefinite purposes, the whole gift fails.*

Where, in a will, the following clause occurred : "As to whatever immoveable (and) moveable (property) in cash belonging to me may be in excess or may remain over as surplus, after a disposition shall have been made in accordance with what is stated in the clauses above written, my above-mentioned six executors are to make use of the same in such manner as they may unanimously think proper for purposes of popular usefulness or for purposes of 'charity.' And I give to them (*i. e.*) my above-mentiontd trustees full authority to use (the same) in that manner.

Held, that the bequest " for purposes of popular usefulness or for purposes of charity" was void uncertainty.

Held, also that the "purposes of popular usefulness " was different from " purposes of charity " and the word " or " was disjunctive.

Where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them, such as "charitable or benevolent " or "charitable or philanthropic," or "charitable or pious" purposes, or where the description includes purposes, which may or may not be charitable, and a discretion is vested in the trustees, the whole gift fails for uncertainty. TRIKUMDAS DAMODHAR *v.* HARIDAS MORARJI, **9 B. L. R. 560.**

7 Right to sue for charitable trust—25 A. 631. Col. 1209. P. I.

8 *Charity—Will—Gift to charitable purpose—Unnecessary and useless object—Cy pres doctrine—Trust incapable of being carried out at testator's death—Diversion of funds to useful and beneficial purpose—Power of Court.*

On the authority of *In re Campden Charities* (1881) 18 Ch. D 310 and of other cases it is clear that when under altered circumsances, through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction, the Court ought not to hesitate to give its sanction to a scheme which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor.

Each case in which an application is made to divert charity funds into other channels cy-pres must necessarily depend upon its own facts and circumstances and upon the evidences adduced before the Court. *In the matter of* HORMASJI FRAMJI WARDEN. **32 B 214.**

Charter Act—(24 and 25 vict. Ch. 104).

1 *S. 11—Warrant of Arrest—Power of High Court in the exercise of its ordinary original Civil jurisdiction to issue warrant against the judgment-debtor.*

Where a Judge of the High Court, in the exercise of his ordinary original Civil jurisdiction, directed a warrant to issue against the person of judgment-debtor wherever he might be found in the Presidency of Madras.—

Held, that the order was not in accordance with law. RAJAH OF RAMNAD *v.* SEETHARAM CHETTY, **26 M. 120.**

1 *(a) S. 13. See 6 B. L. R. 85 No. 9 infra.*

2 Ss. 14, 15-Review-High Court, power of, to review orders passed without jurisdiction in the Presidency Small Cause Court—30 C. 588 Col: 1329 P. I.

3. S. 15—Transfer of case—Court of the Resident of Aden—High Court--Superintendence of the, power of—The Municipal Officer, Aden, *v.* Hajee Ismail. 30 B. 246. (P. C.) See Letters Patent Bombay Cl: 13.

Charter Act (*Contd*).

4. S. 15—Sanction order—Interference—Village Munsiff is a Court and can administer oath—27 M. 223 Col: 1361. P. I.

5. S. 15—Right of Court to prevent abuse of process—bona fide application for summons—14 M. L. J. 329 Col: 1195 P. I.

6 S. 15—Power of High Court to interfere with order of subordinate Courts passed without jurisdiction. 3 M. L. T. 246—31 M. 60.—*See Commission.*

7 S. 15—Scope of—Power of High Court to stay Criminal proceedings ordered by Civil Courts. In re L. Gagiah. 4 M. L. T. 186.—*See High Court.*

8 *S. 15—Interference of High Court exercising civil jurisdiction—Civ. Pro. Code, S. 622—S. 15, Charter Act—Civ. P. Code S. 476—Considerations to be had regard to in exercising revisional jurisdiction of High Court—Stay of criminal proceedings pending a civil appeal—Conditions under which stay can be made.*

In a probate case before a District Judge, the present petitioners, among others, opposed the grant of probate. The District Judge, after hearing the evidence of both the parties, held that the will propounded had been duly executed and that the petitioners had conspired to prevent the grant of probate and had given false evidence in furtherance of that conspiracy. He, thereupon, instituted proceedings against the petitioners under S. 476, Crim. Pro. Code, and directed their prosecution under S. 193, I. P. C., in respect of the false statements made by them.

Held, that it was doubtful whether the High Court, exercising civil jurisdiction, could stay the criminal proceedings, that no case had been made out for the interference of the High Court, under S. 622, Civ. Pro. Code, and that the provisions of S. 15 of the Charter Act did not appear to give the High Court power to interfere in the case 23 C. 610 followed.

Held, also, that the High Court must have regard to the nature of the revisional jurisdiction and must not, in a case arising under S. 476, any more than in any other case, allow, what would virtually be, an appeal from the order of the Court below 23 A. 249 followed in principle.

Held, further, that where the Court below, being asked to postpone passing orders, under S. 476, Crim. Pro. Code, until the disposal of the appeal to the High Court refused to do so, but thought it fit, in the interests of justice, to take immediate action, the High Court ought not to stay proceedings, merely on the ground that a civil appeal is pending before it 26 B. 785 followed. HEM CHANDRA RAY *v.* ATAL BEHARI RAY, **35 C. 909.**

9 *S. 15—Order of remand—Judgment—Civil Procedure Code (Act XIV of 1882), S. 584—Second appeal—Ground.*

A judgment of a Judge of the High Court sitting singly and remanding a case after dealing with the whole case and setting aside the judgment and the decree of the lower Court is a judgment within the meaning of S. 15 of the Charter Act.

A question as to the weight which the lower Appellate Court should have given to certain documents, or that the lower Appellate Court misunderstood the result of the first Court's local investigation, is no ground of second appeal. RAI BENODE BEHARI BOSE *v.* RAI PASUPATI NATH BOSE. **13 C. W. N. 105.**

10 S. 15, 36—Res-judicata—Point not decided in prior suit—Letters Patent. Appeal—11 M. L. J. 1901 P. 10 Col. 966 P. I.

11 S. 29—*Hindu Law—Father's debts—Perpetual liability created by father—Civil Procedure Code (Act XIV of 1882), S 622—High Court—Revision—Civil Cases—Decree imposing perpetual liability—Second appeal treated as revision.*

The defendants' father executed to one *K*, in consideration of some existing debt, an agreement to pay in perpetuity Rs. 10-8-0 for the use of a certian temple. The annual payments were made up to January 1887. *K* assigned the right under the agreement to the plaintiffs' father after whose death the plaintiffs sued for arrears of past eleven years. It was contended for the defendants that they were not bound by their father's agreement. The claim was decreed and the decree affirmed upon appeal.

A second appeal filed in the High Court was allowed to be treated as an application for revision under section 622 of the Civil Procedure Code.

Held, that the agreement in question was a contract by which the defendants' father contracted a perpetual liability and such a contract was not, under Hindu Law, binding on the sons who were only liable to pay their father's debt.

There is nothing in the Hindu Law to bind a son by every contract of his father—nothing certainly to bind him by a contract creating virtually a perpetual liability to pay money. The fact that the liability will cease when the property devolves on the great-great-grandson does not make it the less a perpetual liability so far as the son is concerned. Whether the liabiltity is perpetual or not must be determined from the nature and terms of the contract, not from extraneous circumstances.

The High Court will exercise its extraordinary jurisdiction in cases where the effect of a decree of a lower Court is to impose a perpetual liability and thus affect the parties to an extent far beyond the mere money value of the suit. BALKRISHNA RAMCHANDRA *v.* JANARDANA VISHNU. **6 B L R 642.**

12 S. 39—Appeal to Privy Council—Order made on appeal—Amendment of decree—Application for. 30 C. 679 Col. 1292 P. I.

13 *Ss. 40, 13—Privy Council—Appeal to—*

Charter Act (*Contd*).

Interlocutory order - Jurisdiction—Question of. Where the High Court held that it had jurisdiction to transfer the case from the Aden Court to its own file and leave to appeal to Privy Council against the order transferring the suit was sought for—

Held, that the question raised being one of jurisdiction, leave applied for ought to be granted. Even assuming that the value of the suit was less than Rs 10,000 and the order was an interlocutory one the case was a fit one for the grant of the certificate applied for. MUNICIPAL OFFICER, ADEN *v.* ABDUL KAREEM. **6 B L R 85.**

Charter-party.

1 Bill of lading--Ship--Charter party--Time charter--Sub charter--Lien--"Without prejudice to this charter. 9 C. W. N. 1--1 A L. J. 551--28 B. 573 (P. C.) Col. 183 P II.

2 *Mercantile Law—Owner's lien under Charter-party against Sub-charterers.*

Held, that the ship-owner having authorised the sub-letting, his lien must be limited to the freight, for which the time-charterers have a lien: in effect it is limited to the freight payable under the sub charter. HAJEE GOOLAM MAHOMED *v.* CAPTAIN T. TURNER. **3 B L R 510.**

3 *Maritime Law—Charter party.*

In respect of the charterer's liability in discharging a ship's cargo, a sharp distinction is drawn between those cases where a fixed period of time is provided and those cases where no such period is fixed. There is no doubt that the duty of providing, and making proper use of sufficient means for the discharge of the cargo when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer, if, by the terms of the charter party, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it and which cause the ship to be detained in service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time, that is, a reasonable time under the circumstances. Hence a provision in a charter party that the cargo should be discharged as fast as vessel can deliver constitutes the vessel's capacity for delivering not as an absolute or unconditioned criterion, but as a criterion subject to the customs and facilities of the port. DATOBHOY JETHA *v.* HAJI GOOLAM HOOSEIN. **7 B. L. R. 670.**

Chattel.

Chattel—Pledge of—Hypothecation of moveable property—Validity of pledge not accompanied with possession. 9 C. W. N. 14 Col. 491 P. I.

Chauhans.

Custom of exclusion of daughters from inheritance among chauhans. What constitutes valid custom. 8 O. C. 94 Col. 166 P. I.

Cheque.

1 Payment by Banker of forged cheque—Customer's liability. 31 C. 249 Col. 9 P. II.

2 Entries in pass books—Banker and customer—Effect of—Estoppel. 25 B. 499 Col. 10 P. II

3 Post dated Cheque — Cheque -- Duly stamped--Evidence. 6 B. L. R. 699 Col: 879 P. I. BHAG SINGH *v.* SHARM SINGH. **60 P. W. R. 1907** *See Custom* (*Panjab Alienation.*)

Chhimbas.—

1. *Alienation—Gift by a* Chimba *occupancy tenant of* Mauzia Bhaman Kalan, *Lahore District, of his ancestral holding to his daughter's sons—Suit by reversioners to contest the alienation maintainable even after it has been successfully challenged by the landlords--Punjab Tenancy Act* (*XVI of 1887*), *Ss. 59, 60, &c.—Presumption of custom that the tenant is incompetent to alienate*—onus probandi.

Held, that where the reversioners of an occupancy tenant are entitled to succeed to his holding under the Punjab Tenancy Act (XVI of 1887), in the case of his dying sonless, they can maintain a suit to declare that by custom he is incompetent to alienate his holding and that its alienation by him shall not affect their reversionary rights, if any, notwithstanding that the alienation has successfully been challenged by the landlords according to the provisions of the said Act.

Held, also, on the analogy of 17 P. R. 1885, 20 P. R. 1896, 51 P. R. 1901, 6 P. R 1902, 96 P. R. 1905 and 39 P. R. 1906, that, as agriculture has formed the sole occupation of the family of the *Chhimba* parties, in this case, for several generations, and as they appear to have settled in the village with the Jat proprietory body, their landlords, the presumption is that they have adopted the custom of Jats as regards inheritance; and that the donees have to prove that the donor (B) is competent to gift his ancestral occupancy holding to them and as they have failed to show, either that by custom B is competent to do so, or that a Jat sonless proprietor of the village can gift his ancestral holding to his daughter's son, the gift in dispute is invalid and shall not affect the reversionary right of S and others.

Obiter.

Held, further, that in such a case, the said right of the reversioners is not enforceable where the tenant's alienation, allowed by the Punjab Tenancy Act (XVI of 1887), is in favour of the landlord. 88 P R 1895, 89 P R 1898 (F B), 49 P R 1889, 69 P. R. 1900 12 P R 1904. 21 P R 1905 *F*; 31 P R 189,

Chhimbas (*Contd*).

(F. B.), 115 P R 1901; 5, 12 and 58 P R 1906. D. BHAG SINGH *v.* SHARM SINGH.—**60 P. W. R. 1907.**

Chief Court of the Punjab.

1 Powers of Revision—Irregularity not cured—Transfer of case—Arguments by pleaders—Judgment without hearing pleaders of parties. 5 P L R 1905 Col. 1237 P. I.

2 Powers of revision—Execution of decree—Rateable distribution of assets realized—Revision—65 P. R. 1905 Col. 1193 P. I.

Chief of Tank.

1 *Custom—Muhammadan Law—Succession—Tank estate.*

Shah Nawaz Khan, Nawab of Tank, died leaving him surviving a grandson Ghulam Kasim Khan (the son of his elder son Muhammad Akbar, who had predeceased him) and a son Muhammad Afzal Khan. The estate was mutated in the names of both of them in equal shares.

The Government of India sanctioned the appointment of Ghulam Kasim Khan, the grandson of the late Nawab to be the successor "to the title and position of Nawab and Chief of Tank, and also to the entire jagir and cash assignment enjoyed by the late Nawab" subject to a deduction of certain emoluments "for the maintenance of the son and the two widows left by Shah Nawaz Khan" Nawab Ghulam Kasim Khan sued Muhammad Afzal Khan to recover the half share of Shah Nawaz's property.

When settlement of the country was made, after introduction of the British rule in 1849 it was the policy of the Government to recognize the occupiers of soil as proprietors of their respective lands. In 1875 the Government conferred upon Shah Nawaz Khan as an hereditary jagir, a cash allowance of Rs 25,000 per annum, together with the land revenue of seven villages named in the plaint. In sanctioning the grant the Governor General in Council expressly recognized that "the status accorded to the occupiers of the soil" under the Regular Settlement could not be altered.

The Government on the death of Shah Nawaz Khan had transferred Rs 5,000 of his cash allowance to the defendant. A village named Dabarra was entered in the name of the defendant at the request of Shah Nawaz Khan as a separate provision for him.

The Chief Court on appeal gave the plaintiff a decree for possession of a half share in seven villages mentioned in the plaint. As to the eighth village (Dabarra) the court gave the plaintiff a decree for possession "with this proviso that the decree will not be executable if within six months from the date defendant renounces all claims to the allowance of Rs. 5,000 per annum made to him by Government out of plaintiff's grant. If he either refuses or fails to renounce such claim within such period then plaintiff will be

Chief of Tank (*Contd*).

entitled to execute his decree."

Held, by the Privy Council, that the effect of the settlement was not to create a fresh osate subject to ordinary Law of inheritance but to continue to the chief for the time being, as it were *jure coronae*, the proprietorship of the villages which had been founded by his ancestory and the succession to which had therefore been regulated by the custom of the family.

Held, also, that as the cash allowance and the assignment of the village to the defendant arose from different sources and were independent of each-other the condition imposed by the decree of the Chief Court as regards Dabarra village could not be supported. SARDAR MUHMMAD AFZUL KHAN *v.* NAWAB GHULAM KASIM KHAN. **112 P. L. R., 1903=5 B. L. R. 486 (P. C).**

Child.

1 Presumption as to paternity of child born after death of husband—Non-access, proof of—Burden of proof—Illness of husband rendering act of begetting a child improbable. 29 C. 111 (P. C.) Col. 231 P. I.

2 *Mahomedan Law—Marraige*—Muta—*Children by* Mamtua *wife*—Shia *Sect—Legitimacy—Evidence Act (I of 1872), S. 32, cl.* (5)—Waqf—*Will—Testamentary* waqf.

The appellants alleging that they were the legitimate issue of Haji Begam's two grand-daughters sued for two-thirds of the property left by Haji Begam. They also claimed that a deed executed by Haji Begam which the appellant called *wakf*, be declared invalid. Haji Begum stated in the deed that she disposed of her Government Promissory Notes 'in the way of God for ever' and 'appropriated them for ever.' She also made occasional statements declaring the appellants' mothers to be her grand-daughters.

Held, that according to Mahomedan Law for *Shia Sect* whether the marraige is a permanent one, or a temporary or servile one, the child is affiliated to the man provided there has been a coition, and elapse of not less than six months and not more than ten months from the time of the coition to the birth of the child; and the only distinction, in the matter of the affiliation of the child to the man, between a permanent marriage and a *muta* or servile marriage, is that in the case of a permanent marriage, the child cannot be repudiated by the man otherwise than by *lian* or imprecation, whereas in the case of a *muta* or servile marriage, if the man repudiate the child, (not having previously acknowledged it), such repudiation is sufficient without *lian*.

Held, *also*, that the principle laid down in *Fazlun Bibi* v. *Umda Bibi* (10 W. R., 469) should be followed and that on the declaration by Haji Begam of the appellants'

Child *(Contd)*.

mothers as her grand-daugters it must be presumed that she meant her legitimate grand-daughters, nothing to the contrary having been shown. ANJUMAN ARA BEGAM *v.* SADIK ALI KHAN, **2 O C., 115.**

See for other facts Col. 167 P. I.

Chit Fund.

1 Chit Association of more than 20 persons unregistered--Registration—Suit to recover subscriptions paid to it. 1 M. L. T. 106 Col. 742 P. 1.

2 What is association within the meaning of S. 4—Legal relation creating joint or mutual rights necessary. 29 M. 477 Col. 742 P. I.

Chitty.

1 *Transaction, security-bond by prized subscriber under provision in, for payment in entirety on default in instalment, whether enforceable by assignee.*

A security bond, executed by the defendants to the foreman of the Chitty transaction in question, was assigned by the latter to the plaintiff, an unprized subscriber, in discharge of the subscriptions paid by him. On plaintiff suing under the security-bond for recovery, in a lump, of the subscriptions due by the defendants, it was urged that the plaintiff, as the assignee, could not claim the benefit of the clause in the security bond as to payment in a lump on default, since the clause was penal one and could enure only for the benefit of the assignor.

Held, that the above clause was not a penal one so as to be unenforceable 15 T. L. R. 182 F. and, the assignor's right to enforce such a stipulation not having been disputed, such a right could be claimed as well by the assignee, on the general principle that an assignee is ordinarily entitled to all the rights of his assignor. KRISHNAN RAMEN *v.* RAMEN AIYAPPEN. **21 T. L. R. 52.**

Chose in action.

1 *Pro-note—Suit on--Assignment of chose in action T. P. A. Ss. 130, 137.*

An assignee of a negotiable pro-note cannot sue on the pro note as such unless it be endorsed to him ; and even assuming that he would be entitled to sue on the chose in action if the note had been assigned to him otherwise than by endorsement, he cannot do so unless the assigument be in writing as required by S. 130 of the Transfer of Property Act. 30 M. 88 foll. 24 M. 654 ref to. ARUNACHELA REDDI *v.* SUBBA REDDI. **17 M. L. J. 393.**

2 Assignment of contract—Stamp. 9 B. L. R. 119 Col. 872 P. I.

3 Assignment of decree passed under S. 88 T. P. Act before filing of appeal—Lispendens. A. W. N. 1901 P. 91—23 A. 331 Col. 674 P. I.

4 Suit by endorse as assignee of chose in action-Endorsenment--Evidence of assignment, 24 M. 654 Col. 539 P. I.

Chose in action (*Contd*).

5 *Letters Patent—Madras—Article 15—Civil Procedure Code 1882, section 372—Appeal against order refusing assignee to be brought on record.*

Held, that an order dismissing on the merits an application by the assignee to be brought upon record as co-plaintiff made under article 15 of the Letters Patent.

Taking into consideration the circumstances of the case the High Court ordered the assignee to be joined as a co-plaintiff subject to the decree that had been passed previous to the making of the application by the assignee. THE COMMERCIAL BANK OF INDIA LD *v.* SABJU SAHEB. **24 M. 252.**

6 Suit by assignee of decree for declaration of validity of assignment. 26 M. 264 Col. 1503 P. I.

7 Voluntary conveyance--Suit to set aside--Circumstances surrounding and conduct of parties--Bonafide transaction---Fraud. 26 B. 577--*See Cause of action No. 70.*

Chota Nagpur Encumbered Estate Act.

See Bengal Act VI of 1876 *Cols.* 58—60 *P. II.*

2 Reports of cases as evidence--28 C. 171 Col. 1273 P. II.

Chota Nagpur—Landlord and Tenant Act.

See Bengal Act I of 1879 *Cols.* 66—68 *P. II.*

2 *S. 34—Registration, omission to apply for—Forfeiture—Alienation-Resumable tenure.*

When a tenure has been created by a deed which makes it resumable upon the failure of the heirs of the grantee, the interest created is not inalienable and the tenure is resumable only upon the contingency specified and not on the ground of forfeiture by reason of alienation. Omission to register the name of the successor or heir of the original grantee under S. 34 of Act I of 1879 B. C. does not work a forfeiture of the tenure. Under S. 34 of Act I of 1870 B. C. two conditions must be satisfied before an application for registration can be made, *viz.*, the applicant must be in possession and must be a transferee by succession or inheritance. Where, therefore, the successor of the original grantee had transferred his interest before Act I of 1879 B. C. came into force and gave him possession of the property, an application under S. 34 could not be made, either by the transferor or the transferee. When, under such circumstances, an order was made putting the zamindar in possession of the tenure, such order is not binding upon the transferee who is not a party thereto S. 4 of the Civil Procedure Code does not bar a suit in the Civil Court by the transferee for declaration that his title has not been effected by

Chota Nagpur (*Cont'd*).

such order under section 34 of Act I of 1879 B C and for recovery of possession. MAHARAJA KUMAR JAGATMOHAN NATH SHAH DEO *v.* BRINDA SAHA.— **1 C. L. J. 557.**

See for other facts Col. 910 P. I.

3 *As amended by Act V of 1905, B. C. S. 164—Record-of-rights—Land recorded as* mundari Khuntkatti *tenancy—Entry, suit to correct, if lies—Bengal Tenancy Act (VIII of 1885), S. 103 B—Presumption if applies in a suit to correct entry.*

Where a purchaser, under the provisions of S. 123 of the Chota Nagpur Tenancy Act of certain tenures of which a record-of-rights had been prepared, sued to have a declaration that certain entries in the record with regard to a *mundari khuntkattidari* tenancy were incorrect.

Held, that the provisions of S. 161 of the Act (I of 1879) as amended by Act V of 1905 applied;

That the object of these provisions was to make the entries irrebuttable and the Legislative intended to preclude suits of this nature.

The word "particulars" in Sec. 164 have a very wide application and cover entries declaring that the tenants have to pay certain rents named in the record-of rights to a person other than the plaintiff.

There is no limitation as to the nature of the suit to which the provisions of S. 103 B, B. T. Act, apply. The presumption as to the correctness of the entries in the record-of-rights will operate even in a suit to declare the entries incorrect. TOKHI SAHU *v.* TOSI MUNDA. **13 C. W. N. 111**

Chowthris

1 *Voluntary payments—Suit for declaration of right to receive fees as "chowdhris" of certain bazaars—Suit not maintainable.*

The plaitniffs sued for a declaration that they were the "chowdhris" of the bazaars in the villages Muhammadabad, Gohan, Chairabad and Behan, and that the defendants were not the "chowdhris" of the said bazaars and were not entitled to take 'chowdhris' dues.

Held, that such a suit was not maintainable. N. W. P. H. C. Rep. 1867, p. 271; Ib., p. 80 and N. W. P. H. C. Rep. 1869, p. 281 foll.—BARSATI *v.* CHAMRU. **1907 A. W. N. 228=A. L. J. 715=29 A. 683.**

Chowkidari Act

See Bengal Act VI. of 1870 Col: 55 to 57. P. I.

Chaukidari Chakran Land.

1 Assessment—Arrears for three years—Sale for arrears of three years—Sale, validiyt of. 11 C. W. N. 1107 Col. 34 P. II.

Chaukidari Chakran Land (*Contd*).

2 Contracts — Resumption of chakran land—Lessee from chowkidari, rights of. 12 C. W. N. 161—35 C. 185 Col. 56 P. II.

3 Purchaser—Presumption and transfer —Presumption of fact—Fresh settlement—Parent estate. 33 C. 596 Col. 55 P. II.

4 *Chowkidari,—Putni, construction—Zemindar—Putnidar—Lands held by Chowkidar, revert to whom, on resumption.*

In the absence of a contract to the contrary, the Zemindar, who appoints and dismisses chowkidars and is in enjoyment of their services since the creation of the *putni* lease, is entitled to the lands held by the chowkidars, after the resumption of such lands by the Government 5 C. L. J. 28 D. NITYA NUND HAZRA *v.* MAHARAJADHIRAJ BEJOY CHAND MOHATAB **7 C. L. J. 593.**

5 Resumption—Effect of—Trespasser—Bonafide lessee from—Status, 9 C. W. N. 571 Col. 157 P. II.

6 Resumption—Onus—Resumption and transfer 32 C. 1107 Col. 234 P. II.

7 *Resumption—Title—Chowkidar's power to appoint:—*

Certain Chaukidari Chakran lands were resumed by the Government and transferred to the holder of the *Zemindari* within which they were situated. Long anterior to this, the whole of the Zemindari excluding certain lands in khas possession of the Zemindar, had been granted in putni. The putnidar claimed to be entitled to the resumed land. The zemindar and the lessee from him resisted the claim on the ground that as under the putni lease right was reserved to the zemindar to appoint Chaukidars upon a vacancy arising in the office, the zemindar was entitled to the lands upon resumption.

Held, that the facts that the zemindar was entitled to make an appointment to the office of Chaukidar did not create in him an interest in the lands held by the Chaukidars, which upon resumption and transfer to the zemindar, would pass to the putnidar from whose lease they had not been excepted.—GRISH CHANDRA ROY *v.* HEM CHANDRA ROY. **5 C. L. J. 28.**

8 *Redemption of, settlement with zemindar, sale for non-payment of Government revenue—Surplus sale proceeds, apportionment of.*

When Chaukidari Chakran lands after resumption and transfer to the Zemindars, have been sold for non-payment of the Government assessment, the Zemindar as also the putnidar are entitled to share in the surplus sale proceeds, provided the Chakran lands are included within the putni grant. The determination of this question does not depend upon the decision of the question of the right of the putnidar to hold the chakran land upon payment of additional rent HARI DAS GOSWAMI *v.* NISTARINI GUPTA. **5 C. L. J. 30.**

Chaukidari Chakran Land (*Contd*).

9 *Redemption—Landlord and Tenant—Chowkidari Chakran Land, resumption of—Putni Lease—Ejectment.*

When under the terms of a putni lease the putnidar is entitled to all resumed lands and certain *chowkidari chakran* land within the putni is resumed by government and made over to the zamindar, the zamindar cannot by allowing the old chowkidar to remain on the land and accepting rent from him, protect the latter from ejectment at the instance of the plaintiff. Benad Lal Pakrashi *v.* Kalu Pratmanik, (I. L. R., 20 Cal. 708) and Hari Narain Mozumdar (4 C. W. N. 814) distinguished. UPENDRA NARAYAN BHUTTACHARYYA *v.* PARTAP CHANDER PARDHAN. **4 C. W. N. 820=31 C. 703.**

10 Resumption—Raiyat for 12 years before Act X of 1859 Bengal—Right of occupancy—Tenancy on resumption of land. 8 C. W. N. 860—31 C. 1021 Col. 27 P. II.

11 Resumption and settlement with zemindar-Right to putnidar to possession--Liability to pay revenue assessed--Resumed Land, if formed a separate estate--34 C. 109 Col. 57 P. II.

11 a *Resumption and transfer to Zamindar—Recovery of same by* putnidar—*Suit for specific performance, if necessary.*

Where *chakran* lands were included in the *putni potta* granted by the *Zamindars* to the plaintiffs before the resumption thereof under the Chowkidari Act.

Held--That, upon resumption and transfer of the lands to the Zamindars, the remedy of the putnidars was to bring a suit for recovery of possession, and not a suit for specific performanc of a contract 34 C. 564, *not followed*, 11 C. W. N. 201--34 C. 108 and 4 C. W. N. 814, *referred to.* KUMAR BUNWARI MUKUNDA DEB BAHADUR *v.* BINDHU SUNDAR THAKUR. **12 C. W. N. 459 =7 C. L. J. 439=35 C. 346.**

12 Suit for partial partition of Chowkidari of portion of estate whether maintainable. SAYD HABIBUR RASUL ABDUL FAIZ *v.* ASHITA MOHAN GHOSH. **12 C. W. N. 640** —*See Partition.*

13 Whether an entry in chowkidari register is made in discharge of official duty and in the ordinary course of business. SHEONANDAN SINGH *v.* JEONANDAN DUSADH. 13 C. W. N. 71.—*See Evidence Act S. 32 (2), 35.*

Chowkidari rates.

1 Local rate—Patwari rate—Liability of under-proprietor—Arrears of rent—Suit for. JAGESHAR *v.* MAHABIR BAKHSH SINGH. **5 O. C. 43.**—*See Local Rates* Act *V. of 1894 S. 7, 8, 14.*

Christians Native Trust.

1 Trust—Gift to Mission Society for establishing Native Christians hamlet—House in hamlet let out to notice christian tenant=Right to object, 8. C. W. N. 918 Col. 546 P. I.

Chudasama Gameti Garasias.

Custom—Hindu Law—Adoption—Onus—Age of ceremonial competence. 27 B, 492 Col. 2016 P. I.

Chundawand.

1 *Succession—Pagwand—Chundawand—Sarai Jats of Dholpur village, Batala Tahsil, Gurdaspur District.*

Found, that among Sarai Jats of Dholpur village, Batala Tahsil, Gurdaspur District, custom of *chundawand* prevails in matters of succession. LABH SINGH *v.* NARAIN SINGH. **142 P. L. R. 1906.**

2 *Custom-Succession—Chundavand— Pagvand—Rathis of Palampur.*

Held, that Rathis of Palampur are governed by *Chundavand* rule in matters of succession. MUSSAMMAT KUNDO *v.* SHIB DIAL. **17 P L R 1902=22 P R 1902.**

3 Custom-Succession-Chundawand. Pagwand—Whole and half blood—Name Bajputo of Hoshiapur Tehsil—Evidence Act I of 1872 S. 65 (*c*).

Found that Chundawand rule of succession prevailed the family of the parties who were Nam Rajputs of Hoshiarpur *Tahsil*, and that the agnates of the whole-blood had preference over the agnates of the half-blood on the principle laid down in the Full Bench Case.—*4 P. R.* 1891. NATHA *v.* HURMAT. **31 P R 1900=14 P L R 1904.**

See for other facts Col: 188 P. I.

4. *Custom—Tribal, Family—Succession—* Pagwand—Chundawand—*Yusafzai Pathans of Dujana, Rohtak District.*

Custom in the Punjab is tribal or family custom and not local custom. There is no general custom for a village. Different tribes living in the same village may observe different custom. In determining custom binding on the parties to a suit more account should be taken of the residence of the parties than of the villages where the land in suit is situate.

Found, that the Yusafzai Pathans of Dujana followed the *Pagwand* custom in matters of succession.

Held, that an entry in the *Riwaj-i-am* of one of the villages in which the property in suit was situate to the effect that *Chundawand* rule was prevailing in the village was not sufficient to prove that the parties were not governed by *Pagwan* rule ISHRAT ALI KHAN *v* AHMAD ALI KHAN **127 P. L. R. 1904.**

Chur land.

See alluvion and diluvion.

Circuit Committee.

Mokhasa tenure. Meaning of—Service tenure—Circuit Committee. Proceedings of—Evidence.

The tenure known as "Mokhasa" is one which was created by an assignment

Circuit Committee. (*Contd*).

of a village or land to an individual either rent-free or at a low quit-rent on condition of service.

Where such a tenure was created as a grant subject to a burden of service and not merely as a grant in lieu of wages, so long as the holder of the grant is willing and able to perform the service, the zamindar has no right to put an end to the tenure whether the service is required or not.

The proceedings of the Circuit Committee of 1786 are good evidence with reference to the system upon which the Government claimed to deal with the zemindar's property but they cannot affect the rights of the 'Mokhasadars' as against the zemindars. SRI RAJA VENKATA NARASIMHA APPA RAO BAHADUR *v.* SRI RAJA SOBHANADRI APPA RAO BAHADUR. **3. C. L. J. 1=8 B., L. R., 1=10 C. W. N. 161=3 A L. J. 55=16 M. L. J. 1=1 M. L. T. 3=29 M. 52 (P. C).**

Citation.

Probate and Administration Act (V of 1881)—Proof of will when heir-at-law not cited.

Where in an application for probate by one of several executors, the widow of the testator, who was the next heiress, was not cited, and she afterwards applied that the probate of the alleged Will may be re-called and it may be ordered that the said alleged Will be proved in her presence.

Held, that the petitioner was entitled to have the Will proved in her presence, and the Will should be re-called until proved by evidence given in the way usual in probate cases. ELOKESHI DASSI *v.* HARI PROSAD SOOR. **7 W. N. C., 450=30 C., 529.**

City of Bombay Improvement Act IV of 1898.

See Bombay Act IV of 1898 Cols. 222--224 P. II

City of Madras Municipal Act I of 1884.

See Madras Act I of 1884.

Civil Courts.

1 *See Act Bombay Act XIV of 1869 Col. 190, 191 P. II.*

2 *See Oudh Act IV of 1901.*

3 *See Chowkidari Chakran land.*

4 Jurisdiction of—Title—Question of—Extent of interest. 2 C. L. J. 351.

NOTE—2 C. L. J. 351 read for 2 L. J. 351 Col. 65 P. II.

5 Jurisdiction of--Suit for grant made by a Government officer on behalf of the Crown is maintainable. 26 M. 268 Col. 921 P. I.

Civil Courts (*Contd.*)

6 Jurisdiction of—Second appeal treated as application for revision. 7 B. L. R. 288 Col. 1320 P. I.

7 Jurisdiction of--Power to manage the judgement debtors estate. 28 C. 680 Col. 1320 P. I.

8 *Jurisdiction of--Kumaon Rules 1894, Rules 21, 30 and 49—Khaikari rights—Order of Settlement Officer. Suit for cancellation of—Jurisdiction of Civil and Revenue Courts.*

Held, that a Civil Court has no jurisdiction to hear a suit for cancellation of an order of a Settlement Officer in *Kumaon* declaring that a certain person possessed *Khaikari* rights in a certain land. KUMIA GIRO *v.* NAROTAM **A W N 1905 P 1.**

9 *Jurisdiction of—Rent Act—(XXII of 1886), s. 108, cl. (15)—Appointed lambardar—Profits collected by deceased lambardar, suit for, in Rent Court against his son (lambardar)*

The Plaintiff, a co-sharer, sued the Defendant who was lambardar of the mahal for the recovery of arrears of profits, a portion of which related to 1303 F. during which the Defendant's father was the lambardar.

Held, that a suit against the son or heir of a deceased lambardar who has been himself appointed lambardar for profits collected by his predecessors should in Oudh be laid in a Civil Court ; R. A. R. No 47, approved. BANKEY *v.* UMRAO LAL. **8 O. C., 206.**

10 *Jurisdiction of Civil and Revenue Courts —Suit by usufructuary mortgagee of an occupancy holding for possession.*

Held, that Civil Court and not Revenue Court has jurisdiction to entertain a suit for possession by a usufructuary mortgagee of an occupancy holding. BINDESHRI RAI *v.* SADHO CHARAN RAI. **W. N. A., 1904, P. 132=26 A. 591.**

11 Jurisdiction of—"Any other written grant"—"Treaty" construction of document. 29 B. 19 Col. 201 P. II.

12 *Magistrate acting under S. 488 Cr. P. Code—Effect of Civil Court's decree.*

Courts exercising jurisdiction under S. 488 of the Cr. P. Code, often decide questions of marriage, divorce, paternity and so forth but such decisions are not binding on the parties in their litigations in Civil Courts. On the other hand, if a competent Civil Court has decided that A is not and never has been the wife of B, then a Magistrate cannot, in proceedings under S. 488, hold that A is the wife of B and order B to maintain her. The Magistrate is bound, in such proceedings, to take into consideration the effect of a Civil Court's decree, if any, on the matters he has to decide in the proceedings. 14 C. 276 followed. NAWAB ZULFIKAR KHAN *v.* MUSSAMMAT ZAINAB BEGAM. **9 O. C. 49 (B).**

13 Possession by order of Civil Court, claim to joint possession Cr. P. Code S. 146.

Section 145 of the Criminal Procedure Code contemplates a dispute between two parties, each of which asserts the right to

Civil Courts (*Contd*)

hold actual possession of the property as against the other and not a dispute between parties claiming to hold joint possession, and neither contesting such right.—*4 C. W. N. 426 followed.*

In the latter case, if a breach of the peace is likely to take place the Magistrate is competent to take other measures to prevent it, leaving the contending parties to settle their disputes in the Civil Court if they cannot settle them amicably

The first party obtained a decree against the mother of the second party, in a suit in which the second party had been also impleaded as defendants, and property sold in execution of the decree was purchased by the first party and they obtained possession of it, and sale certificate was granted to them. The names of the second party were omitted by Court executing the decree from the sale-certificate, on the ground that they were not the debtors.

Held, that the possession of the first party should have been upheld by the Magistrate, and the other party referred to Civil Court—*5 C. W. N., 563, followed.* KRISTA ALAHADINI DASI *v.* RADHA SYAM PANDAY. **7 C. W. N. 118.**

14 *Power of Civil Courts to question reasons assigned by Revenue authorities for granting or refusing applications for Darkhast--Board's Standing order, No 15, Rule 4, 5, 7, 11, 13 and 14--Whether grant of a Patta is a matter of contract, Darkhast Rules--Nature of grant.*

A applied to the *tahsildar* under Rule IV of the Darkhast rules for a grant of land The *tahsildar* made the grant under rule VII on the 10th May 1897 and the grant stated that it was subject to the result of any appeal that might be preferred. On the 15th July 1897 and on the 2nd November 1897, two appeals were preferred to the Deputy Collector against the grant. On the 15th June 1898, the Deputy Collector issued a *patta* to A in pursuance of the grant. The appeals were heard on the 28th June 1899, after notice to A, and the grant by the *tahsildar* was set aside on the ground that the notice under Rule V. was not duly published. A appealed to the Collector and to the Board of Revenue and his appeals were dismissed. The present suit was instituted by A for a declaration that the lands had become his property and that the Deputy Collector's order cancelling the grant was null and void or in the alternative for a decree directing the defendant to pay the *kist* paid by A and the cost of the improvements effected by him. The Court of first instance granted the declaration prayed for. On appeal, the Subordinate judge, holding that it was not open to the Civil Courts to question the propriety of the cancellation by the Deputy Collector, modified the decree by granting the alternative relief claimed in respect of *kist* and improvements. On appeal to the High Court, *held*

Per Sir Arnold White, C. J. It is not open to a Civil Court to cancel a *patta* because some of the formalities of the Darkhast rules have not been observed. It may, however, set aside an order of an Appellate Revenue Tribunal which allows an appeal against a grant by a Revenue officer on the ground of irregularity of procedure if it is of opinion that there is no evidence of irregularity, although it will not be open to the Civil Court to interfere if the tahsildar declined to make the grant on the ground of irregularity of procedure. In the former case there is a conditional contract but in the latter there is no contract at all.

Per Benson, J.—Under the rules, the *tahsildar* has power only to make a conditional grant and the issue of a patta does not alter the conditional nature of the grant. A *patta* is in the nature of a mere bill and is not a grant or conveyance. It is not open to the Civil Courts to discuss the sufficiency or otherwise of the grounds on which the Darkhast authorities whether original or appellate grant or refuse to grant, Government lands to parties applying for them, so long as those authorities act within the scope of the authority conferred on them by the rules. *The Secretary of State for India* v. *Kasturi Reddi*, (I. L. R., 26 Mad. 268), referred to and approved. *Sappani Asari* v. *The Collector of Coimbatore*, (I. L. R., 26 Mad. 742), referred to and approved—MUTHU VEERA VANDAYAN *v.* SECRETARY OF STATE FOR INDIA. **1. M. L. T. 278=29 M. 461, appeal thereon dismissed, 2 M. L. T. 141 (F. B.)=M. 270.**

15 Religious Endowments Act S. 5—Appointment of manager by Civil Court—Revision. 26 M. 85 Col. 70 P. I.

16 Revenue Sale Law S. 5—Irregularity—Collector ordering exemption from sale—Conditional order—Effect of notice of sale—Courts power to examine. 10 C. W. N. 137 Col. 33 P. II.

Civil Courts Act XII of 1887.

S. 13—Decree—Execution—Civil Procedure Code (Act XIV of 1882) Ss. 223 and 649—"Court, which passed the decree."

After a decree was obtained in the Court of the Subordinate Judge of Muzaffurpore the Local Government by notification formed Darbhanga, which was included in the Muzaffurpore district, into a separate district: Afterwards the assignee of the decree applied to the Subordinate Judge of Darbhanga for institution of his name and execution of the decree. The suit, if it had been instituted at the time of the application would have had to have been instituted at the Darbhanga Court.

Held, that under the provisions of s. 649 of the Civil Procedure Code the Court at Darbhanga had jurisdiction to entertain the application. Lachman Pande *v.* Madan Mohun Shye, I. L. R. 6 Cal. 513, and Jahar *v.* Kamini Debi, I. L. R. 28 Cal. 238, followed

Civil Courts Act (XII of 1887) *(Contd.)*

Kalipado Mukerjee *v.* Dina Nath Mukerjee, I. L. R. 25 Cal. 315, and Banduranga Mudaliar *v.* Vythilinga Reddi, I. L. R. 30 Mad. 537 distinguished UDIT NARAIN CHAUDHURI *v.* MATHURA PRASAD. **35 C. 974.**

See for other cases Act XII of 1887 Cols. 786—792 P. I.

Civil and Revenue Courts.

1 *Act II of 1901 (Local) (Agra Tenancy Act) S. 177—Question of proprietary title—Jurisdiction—Civil and Revenue Courts.*

Held that the question whether a tenant, defendant in a suit for ejectment, is a tenant of one kind or another is not a question of proprietary title within the meaning of section 177 of the Agra Tenancy Act 1901. Chhitar Singh *v.* Rup Singh, Weekly Notes, 1906, p. 247, dissented from. NIRANJAN *v.* GAJADHAR. **30 A. 133.**

2 *Act II of* 1901 *(Local) (Agra Tenancy Act) Ss.* 177, 199, *200—Question of proprietary title—Appeal—Civil and Revenue Courts—Jurisdiction.*

When a Revenue Court, under the powers conferred on it by section 199 of the Agra Tenancy Act, 1901, decides a question of proprietary title it becomes for the moment a Civil Court; an appeal lies at the instance of either party to the District Judge and if such an appeal is wrongly preferred to and decided by a Commissioner, such decision will have no effect in preventing the Revenue Court's decree from becoming final. GENDA *v.* SUKH NATH RAI. **30 A. 25.**

Civil Courts, Lower Burma.

Jurisdiction of—Ss. 506—523 C. P. C. Act XIV of 1882—Award made otherwise than on a reference under—Suit to set aside such an award, maintainability of.

Held, that a suit to set aside an award made otherwise than on a reference under Chap. XXXVII of the Code is entertainable by a Civil Court in Lower Burma under S. 39 of the Specific Relief Act. LU THA *v.* MA SHWE ME. **3 L. B. R. 4.**

Civil Injury-Remedies.

Civil injury—Remedies—Penal Code (Act XLV of 1860), Section 99 and 415—Cheating—Injury to complainant—Trivial injury.

The offence of cheating, as defined in section 415 of the Indian Penal Code, requires that the person made to deliver property, &c., or to do or omit to do any thing which causes or is likely to cause him damage in body, mind, reputation or property and which he would not otherwise have done, should be the person who has been deceived. The offence is not committed if a third party, on whom no deception has been practised sustains pecuniary loss in consequence of the accused's act

Where the person deceived has suffered owing to deception a momentary annoyance and nothing else the Criminal Court will

Civil Injury-Remedies *(Contd)*

not take any notice of it under section 99 of the Indian Penal Code. 14 *P R* 1880 (*Cr*) *W. N. All.*, 1903 *p.* 23, 17 *Cal.*, 606 *referred to.*

Every civil wrong is not criminally indictable. SUNDAR SINGH *v.* THE KING-EMPEROR. **10 P. L. R. 1905=25 P. R. 1904** *(Cr.).*

Civil Judge, District Court.

Civil Judge—District Court—Court under section 26 of the Succession Certificate Act, 1889—Succession Certificate Act—Jurisdiction.

The Court of a Civil Judge not being inferior in grade to a District Court cannot be invested with the functions of that Court under section 26 of the Succession Certificate Act, 1889. HIRALAL MAYARAM *v.* KHUSHABIRAM AND GANGARAM. **15 C. P. L. R. 1902 P. 54.**

Civil Jurisdiction.

Civil Jurisdiction—Jurisdiction of High Court—Nature of High Court's revisional jurisdiction—Stay of pending Civil appeal—35 C. 909—See Charter Act s. 15.

Civil nature, suit of.

See Civil Procedure Code. Act V of 1908 S. 9 Cols. 911—928 P. I.

Civil Procedure Code. (Act V of 1908).

See Cols. 895 to 1717 P. I.

1 *S. I, OXXXII R. 1, 15—S. 1,- 440, 463—Lunacy—Suit by next friend—Plaintiff a person of unsound mind not so found—Not exhaustive—Landlord and tenant—Abandonment—Transfer by tenant of non-transferable holding—Usufructuary mortgage.*

The provisions of s. 463 of the Civil Procedure Code are not exhaustive, and a lunatic may sue through a next friend, even though not adjudged a lunatic under any law. When a tenant of a non-transferable holding executes a usufructuary mortgage of it, places the mortgagee in possession, abandons the holding and leaves the village, the landlord is entitled to treat the mortgagee as a trespasser and to ask for his ejectment.

Per Mookerjee J.—The Code of Civil Procedure is not exhaustive. A Court, in which a suit has been instituted by or against a lunatic not so found, has an inherent power to determine whether he is a lunatic and, if he is found to be so, to make an order for the appointment of a next friend or guardian *ad litem*—RASIK LAL DATTA *v.* BIDHUMUKHI DASI. **10 C. W. N. 719=4 C. L. J. 303—33 C. 1031.**

2 S. 1—S. 1—See Cols. 895, 896 P. I.

3 *S. 2—S. 2—Agra Tenancy Act (N. W. P. Act II of 1891), S. 175, 180.—'Decree'—'Order'—Appeal.*

Held that no appeal will lie from an

C. P. Code (Act V of 1908). (*Contd.*)

appellate order of a Collector, as distinguished from an apellate decree, in proceedings under the Agra Tenancy Act, 1901, in order to decide what are orders and what are decrees under the Agra Tenancy Act, 1901 the definitions contained in the Civil Procedure Code, S 2, must be applied.—DHANI RAM *v.* BHOLA SINGH **I. L. R. 27 A. 21= A. W. N. 1904 P. I. 152.**

4 S. 2—S. 2—Decree-Partition suit—Withdrawal of suit on appeal—6 B. L. R. 533—29 13 See Col. 1281 P. I.

5 *S. 2—S. 2—Decree—Settled accounts, order directing re-opening of—Attorney and client—Settlement of untaxed bills, when liable to be re-opened—Fiduciary relationship—Onus of showing good faith—Indian Contract Act (IX of 1872), S. 16—Evidence Act (I of 1872), S. 111—Independent advice, opportunity to obtain—Promissory note, assignment of, without endorsement.*

Plaintiff, a solicitor, had advanced various sums of money to a client from time to time on a mortgage bond and three further charges. The consideration for the third further charge was not paid in cash, but was made up of (1) amounts due to the plaintiff on several promissory notes in the plaintiff's fovour, (2) certain promissory notes executed by the client in favour in third party, which the plaintiff is said to have "taken up," (3) balance of amount due as interest on the mortgage and two further charges, and (4) a certain amount stated to have been found due to the plaintiff as costs for acting for him in various suits, upon a settlement made of amounts due under various taxed and untaxed bills a large remission having been in consideration of all the bills not being taxed.

In a suit by the plaintiff against the heirs of the deceased client to realize the amounts due on the mortgage and the three further charges, the plaintiff obtained a decree on the first three bonds, but the 4th bond was ordered to be reopened, and it was directed that the plaintiff "do get all his bills of costs up to the 3rd August, 1903 taxed by the Taxing Officer of the High Court, and then re-file the bills in this Court, that then a Commissioner be appointed to take accounts in the light of the observations in this case: that after the Commissioner's report is received and the parties are heard thereon, final decree will be drawn up under S. 89 of the Transfer of Property Act."

Held, that this order was a decree. The fact that the subordinate Judge intended hereafter to adjust the equities arising out of the contract, did not in any way do away with his adjudicatoion that the contract, as it stood, was not binding on the defendants 9. B. 183. D. and doubted, 15. B. 155—18. 1. A. 6 referred to.

As between attorney and client, the existence of fiduciary relationship alone, or the fact that certain bills of costs were not taxed but were settled out of Court by execution of a deed, will not justify a Court in re-opening accounts settled on which the bond is based, unless sufficient grounds of suspicion exist, or the bills are *prima facie* shown to be extortionate 1. Chr 73. followed. 1 Drury and Warran 567. D, and explained.

Section 16 of the Contract Act only presumes undue influence by a person in a position to dominate the will of another, when the contract appears on the face of it to be unconscionable.

To prove "good faith" of a transaction in which one party stands in a fiduciary relationship to the other, it is certainly not necessary to paove that all the accounts on which the contract is based are correct.

Under the practice obtaining in the original side of the High Court, taxation of bills of solicitors is deemed to be optional with the client and bills of costs are not infrequently adjusted without taxation.

The case of Monohur Doss *v.* Romanath Law (I. L. R. 3 C. 473) was decided on the special circumstances of that case and does not lay down any general rule of law.

An attorney may be bound under certain circumstances to advise his client to take independent advice. It is not his business to see that the attorney selected by his client fulfills his duties to his client and is not guilty of any remissness or negligence. If he sends his client to another attorney and is ready to comply with all reasonable demands for information, he cannot be expected to do more, or to be responsible for another's omissions.

If the parties to a promissory note agree that on the promissor executing a bond for the amount due in favour of a third person, the promisee would cancel the note, this arrangement would be a perfectly valid contract, whether the third party paid any money to the promisee or not.

Although a negotiable instrument can only be assigned by endorsement, that does not prevent any arrangement not to negotiate the note but to put an end to it. SHAMULDHONE DUTT *v.* SRIMUTTY SUSILA BALA DEBI, **12 C. W. N. 1102.**

6. *S. 2—S. 2—Arbitration Act (Act IX of 1899). Ss. 2 and 19—Order under S. 19 not a decree under S. 2, C. P. C., 1882—Revision—Powers of Chief Court under S. 70 (1) (b) Punjab Courts Act, 1884—"Could be instituted in a Presidency Town," in S. 2, Arbitration Act, Construction of.*

An order passed on an application, under S. 19, Act IX of 1899, for stay of proceedings or for refusing to stay proceedings, is not a decree within the terms of S. 2, C. P. C., 1882. So the Chief Court has no power to have the order revised, under S. 70 (1) (*b*), Punjab Courts Act, 1884. 76 P. R. 1908, 70 P. R. 1904 referred to, 18 C. 500 not followed.

C. P. Code. (Act V of 1908.) *Coned).*

The words "could be brought" in S. 2, Act IX of 1892 show that the Act is not limited to suits which cannot be instituted elsewhere than in a Presidency town, but applies to suits, which can be instituted, at the plaintiff's option, in a presidency town or elsewhere. CLEMENTS & Co. *v.* RATTAN SINGH, **145 P. R. 1908**

7. *S. 2 O. XLIR. 5—Ss. 2, 545. Order refusing to stay execution of a decree under appeal—Decree—Appeal.*

An order by District Judge refusing to make an order for stay of execution of a decree under appeal, is a decree, and is therefore appealable. 29 B. 72, 25 B. 243 referred to. PAMANDAS GIANCHAND *v.* YARIALDAS DHANOOMAL, **2 Sind. L. R. 24.**

8. S. 2—S. 2—See Col: 896—910 P. I.

9. S. 4—S. 4—See Cols: 911 P. I.

10. S. 6—S. 6—See Cols: 911 P. I.

11. *S. 9—S. 11—Offering—Sacrifice—Suit for offering, maintainability of.*

A and *B*. were the owners of a Zamindari within which was an idol *X*. According to an immemorial custom the flesh of the first goat offered to *X* by the Sebaits, was taken by the Zamindars. Upon the death of *A*, the Sebaits refused to allow his representative *C* to have a share of the goat. *C* sued for declaration of right to share in the flesh of the sacrificial goat.

Held, that the suit was maintainable. DURGA CHARAN PATHAK *v.* RAJABALA DEBI.

12 S. 9=S. 11—See Cols. 911—930 P. I.

13. S. 10—S. 12—See Cols: 930—932 P. I.

14 S. 11—S. 13—Resjudicata Col. 932 to 1050 P. I.

1 Applicability of Resjudicata—Resjudicata does not apply to an application under S. 90 T. P. A. 2 A. L. J. 379—A. W. N. 1905 P. 144. *See Col. 696 P. I.*

2 Competent Court Cols. 972, 998, 999 to 1003 P. I.

3 Co defendants between Cols. 982 to 985 P. I.

S. 11—S. 13—Suit against two persons—One of whom was exonerated and a decree passed against the other—Subsequent suit against the exonerated defendant—Bar under S. 13.

Where in a previous suit the defendant was exonerated, and the petition as against him was dismissed with costs, and a decree for the full amount was given against the other defendant, it was held that this was a dismissal of the claim against the exonerated defendant under S. 13. 23 B. 235, 32 B. 296 D. THIRUYENGADASAMY NAIDU *v.* BALAGURUNATHA CHETTY. **4 M. L. T. 413.**

4 Estoppel. Col. 992 P. I.

5 Evidence necessary to prove plea of. Col. 933 P. I.

6 Execution proceedings, applicability to. Cols. 945 to 955 P. I.

7 Exhaustive if. Col. 933 P. I.

8 Exparte decree. Cols. 953 and 955 P. I.

C. P. Code. (Act V. of 1998.) *(Contd.)*

9 Heard and finally decided. Cols. 1008 to 1011 P. I.

10 Inconsistent decrees. Col. 934 P. I.

11 Matter directly and substantially in issue. Cols. 955 to 979 P. I.

12 Necessary implication by Col. 935 P. I.

13 Parties—Reversioners. Cols. 988 to 990 P. I.

14 Parties, same. Cols. 979 to 982, 985 to 988, 991 to 996 P. I.

15 Rent and Civil Court. Cols. 1003 to 1006 P. I.

16 Revenue and Civil Court. Cols. 1006, 1007 P. I.

17 Settlement Court. Col. 1008 P. I.

18 Suit or issue. Col. 955 P. I.

19 Titles different. Col. 996 P. I.

20 Title same. Cols. 996, 997 P. I.

21 Expl. I. Col. 1011 P. I.

22 Expl. II. Col. 1011 P. I.

23 Expl. III. Col. 1012 P. I.

24 Expl. IV. Col. 1012 to 1032 P. I.

25 Expl. V. Col. 1033 to 1034 P. I.

26 Expl. VI. Col. 1034 and 1035 P. I.

Composite sections.

27 Ss. 11 and 102--Ss. 13, 586. Col. 1035 P. I.

28 S. 11, O. II R. 2--Ss. 13, 43. Cols. 1035 to 1040 P. I.

29 S. 11, O. X. R. 9, O. XXVI R. 13 14—Ss. 13, 196. Col. 1041 P. I.

30 S. 11, O. XXI R. 22, 53--Ss. 13, 248, 273. Col. 1042, 1043 P. I.

31 S. 11, O. XXI R. 66, 70--Ss. 13, 287. Col. 1043 P. I.

32 Ss. 11, 47--Ss. 13 244. Col. 1043, 1044 P. I.

33 S. 11, O XXI R. 66, 67--Ss. 13, 287. Col. 1049 P. I.

34 S. 11, O. XXI, R. 53--S. 13, 273, Cols. 1046 1048 P. I.

35 S. 11, O. XXIII. R. 2—S 13, 373. Col. 1047. P. I.

36 S. 11, O. XXVI R. 13, 14 and S. 96--S. 73, 326, 540--Col 1047. P. I.

37 S. 11 O. XLI. R. 23--S. 13, 562. Col. 1038. P. I.

38 S. 14 and 15--*See Cols 1050, 1051 P. I.*

39 *S. 16—S. 16—Proviso to—'Personal obedience' interpretation of—Applicability of the proviso where all the defendants do not reside within the jurisdiction of the Court where the suit is instituted.*

The expression 'personal obedience' in the proviso to S. 16 must be interpreted with special reference to the fact that the defendants reside or work within the jurisdiction of the Court, whose order is to be obeyed. The obedience must be such as the defendants could render without going beyond that jurisdiction. In the case of more than one defendant, the proviso is inapplicable, unless all the defendants reside or carry on business or personally work for gain within the jurisdiction of the Court where the suit is filed, if that is not the Court within the

C. P. Code. (Act V of 1908.) (*Contd*).

local limits of whose jurisdiction the property is situate. 23. B. 756 followed BHOJRAJ MAHESARI BANIA *v.* HIRALAL, **1 N. L. R. 121.**

40 S. 16--S. 16--Sepecial jurisdiction--First class subordinate Judge. 8. B. L. R. 616. Col 191, P. II.

41 *S. 16—S. 16 (d)—Sale of immoveable property in foreign territory by order of British Insolvency Court—Property not solely that of insolvent—Two thirds of property owned by plaintiffs—Suit to recover two-thirds of purchase-money, whether a suit for the determination of an interest in immoveable property--Jurisdiction—Revision.*

A house, which was the joint property of the plaintiffs and the defendant, their brother, who became an insolvent, was situate in a place within the jurisdiction of a foreign state. It was sold by the order of a British Insolvency Court during certain insolvency proceedings taken against the defendant. The proceeds of the sale, after deducting commission, were made over to another defendant, who was the mortgagee-creditor of the defendant, and the plaintiffs sued the mortgagee creditor for a refund of their two-thirds share of the purchase money.

Held, that the suit directly affected an interest in immoveable property, and, as such, was one "for the determination of any right to or interest in immoveable property," within the meaning of S. 16 (*d*) of the Civ. Pro. Code, that it could only be taken cognisance of by the Court within whose jurisdiction the property was situate, and as such was not maintainable in British Courts 28 M. 227 E; 4 B. H. C. 173, 6 B. H. C 29, 23 B. 22, 24 B 407, 6 M. 344 referred to, nor, should there be any doubt on the question of jurisdiction, was it a proper case for interference on revision. HARI RAM *v.* KANSHI RAM. **122 P. R. 1908.**

42 *Ss. 16, 18--Ss. 16, 19—Misjoinder of parties—Multifariousness—Suit by heir to recover property from co-heir and transferees from him—Property situate in different districts—Compromise of part of claim—Jurisdiction.*

The plaintiff sued as heiress of her father to recover from her brother and from certain transferees from him her share in the property of her deceased father. The suit was brought in the Court of the Subordinate Judge of Bareilly. Part of the property claimed was situated in the Bareilly district and part in the district of Bara Banki in Oudh. During the course of the suit a compromise was arrived at regarding the Bareilly property and the suit proceeded with reference to the property in Oudh alone.

Held, (1) that the plaintiff had properly impleaded her brother and the transferees from him as co-defendants in one suit, and (2) that there being no fraud or improper motive alleged with reference either to the compromise or to the filing of the suit in the Court at Bareilly, the Court was not by reason

C. P. Code. (Act V of 1908.) (*Contd*).

of the compromise divested of jurisdiction to hear and decide the suit in respect of the property situate in Oudh Ram Raji *v.* Dhup Narain, Weekly Notes, 1885, p 125, overruled Indar Kuar v. Gur Prasad, I. L. R. 11 All. 33, Mazhar Ali Khan *v.* Sajjad Husain Khan, I. L. R 24 All. 358, Parbati Kunwar *v.* Mahmud Fatima, I. L. R 29 All, 267, Ishan Chunder Hazra *v.* Rameswar Mondul, I. L. R 24 Cal, 831, and Nundo Kumar Nasker *v.* Banomali Gayan, I. L. R. 29 Cal., 871, referred to, Ganeshi Lal *v.* Khairati Singh, I. L. R 16 All, 279, distinguished, Khatija *v.* Ismail, I. L. R. 12 Mad., 380, followed. KUBRA JAN *v.* RAM BALI. **A. W. N 1908 P. 235=5 A. L. J. 647=4 M. L. T. 392=30 A. 560.**

43 S. 16—S. 16.--*See Cols. 1052—1053 P. I.*

44 S. 17—S. 19 & O. O. 397.--*See* Cause of action. No. 93, 30 A. 560 No. 42 *supra.* and Col. 1053 P. I.

44 (*a*)—S. 18—S. 19—30 A. 560 No. 42 *supra.*

45 Ss. 18 to 37.—*See Cols. 1053 to 1070 P. I.*

46 *Ss. 38, 39, 41, 113—Ss. 223, 617--Decree passed by a Court of Small Causes—Attachment and sale of immoveable property—Decree sent for execution to Munsiff—Appeal—Ss. 27 and 35, Provincial Small Causes Courts Act.*

A decree passed by a Court of Small Causes sought to attach and sell immoveable property and was, therefore, sent for execution to the Munsiff's Court under S. 223, Code of Civil Procedure. Application having been made for execution in the Munsiff's Court, the judgment-debtor raised certain objections which were overruled.

Held, that the appeal lay to the District Judge, neither the suit nor the execution proceedings having been transferred to the Munsiff's Court, but the decree having been sent under S. 223 of the Code. Had the suit or the execution proceeding been transferred to the Munsiff's Court under S. 25 of the Code or the execution proceedings instituted in the Munsiff's Court under S. 35, Provincial Small Causes Courts Act, the proceedings held in the Munsiff's Court might be regarded as proceedings held by a Court of Small Causes. S. 27 of Small Causes Courts Act has no application to a case of this kind, ATWARI *v.* MAIKU. **5 A. L. J. 612.**

47 *S. 38, 39, 41, O. XXI R 29—S. 223, 243—Execution of decree—Suit between decree-holder and judgement-debtor—Competency of Court executing decree to stay execution pending suit.*

A Court, to which decree is transmitted for execution, has power to act under S. 243, C. P. Code and has jurisdiction to stay proceedings under that section in execution of the former decree, until a suit pending in that Court between the judgment-debtor and the decree-holder is decided. 6 N W. P. 181, 7 A. 73, and 10 A 389 referred to. BHAGVAN KAUR *v.* GAJINDAR SINGH, **130 P. R. 1908.**

48. *S. 38 to 44—See Cols. 1070 to 1073 P. I.*

49. *S. 47, 244 whether bars the trial of an*

C. P. Code (Act V of 1908.) (*Contd.*)

issue involved in the question mentioned in the section—Issue raised at the instance of a defendant in a suit brought against him.

The effect of S. 244, Civ. Pro. Code, is to debar a plaintiff from bringing a suit for the determination of a question, relating to the execution, discharge, or satisfaction of a decree which has arisen between himself and the defendant as parties to the suit in which the decree was obtained, but not to debar a defendant from setting by way of defence a matter which relates to the execution, discharge, or satisfaction of a decree obtained in a suit to which he and the plaintiff were parties. All that S. 244 enacts is that certain questions therein specified shall be determined by the order of the Court executing the decree and not by separate suit; the section bars a suit brought for the determination of certain questions, but does not bar the trial of any *issue* involved in those questions, if the *issue* is raised at the instance of a defendant in a suit brought against him. 24 C. 355, 26 C. 946, followed. YENKATARAMANACHARIAR *v.* MEENAKSHISUNDARAMAIYER. **4 M. L. T. 285.**

50 *S. 47—S. 244—Decree* nisi—*Decree absolute—Transfer of Property Act (IV of 1882), s. 93.*

An application for redemption or foreclosure under a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and, until a decree *nisi* is made absolute, there is no decree capable of execution. 21 C. 818, 22 B 77 followed. SIR JEHANGIR C. JEHANGIR *v.* THE HOPE MILLS, LTD. **10 B. L. R. 1057.**

51 *Ss 47, 50—Ss. 244, 234—Questions arising in execution—Legal representatives of debtor—Decree-holder—Sons of a deceased Hindu debtor can raise questions of illegality or immorality of their father's debt, in execution proceedings—Separate suit, not permissible—Limitation Act, art 179—Appeal by some of the defendants—Limitation for darkhast against defendants who have not appealed.*

There is no substantial distinction in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under section 234 of the Civil Procedure Code. All questions between them and the decree-holder relating to execution must alike be disposed of under s. 244 of the Code. Where the sons of a deceased Hindu debtor are added as legal representatives in the course of a suit and before the decree is pronounced, it is open to them to dispute in execution proceedings the liability of the ancestral proprietor for the debt of their father on the ground that the debt was tainted with immorality or illegality. They cannot insist on the decree holder resorting to a fresh suit to enforce their pious obligation as Hindu sons to satisfy the debt out of the ancestral properties, because the question having arisen in execution proceedings between the decree-holder and themselves as parties to the suit, a separate suit is rendered inadmissible by the provisions of s. 244 of the Civil Pro. Code.

Where only some of several persons affected by a decree have appealed against it, the date of the appellate decree forms the basis from which the period of limitation under art. 179 of the Limitation Act should be computed, even in the case of those who have not appealed against the original decree. SHIVRAM *v.* SAKHRAM. **10 B. L. R. 939.**

52 *S. 47—S. 244*—See Cols. 1073 to 1138 P. I.

53 *Ss. 48 to 50*—See Cols. 1138 to 1150 P. I.

54 S. 50—234—10 B. L. R. 939 No. 48 *supra.*

55 *Ss. 52 to 54*—See Cols. 1150 to 1152 P. I.

56 *Ss. 55, 145—Ss. 336, 253—Surety, liability of.*

When a surety gives security under s. 336 for the appearance of, or payment by, a person arrested in execution of a decree for money, he can be proceeded against on default in execution proceedings. 109 P. R. 1906 (F. B.) Appl. GURAN DITT *v.* PALA SINGH. **143 P. R. 1908.**

57 S. 55 *See Cols. 1154, 1155 P. I.*

58 Ss. 58, 60—*See Col. 1156 to 1164.*

59 S. 60=S. 266—33 C 666. *See Cause of Action No. 117.*

60 Ss. 63 to 87—*See Cols. 1164 to 1203 P. I.*

61 S. 88—4 M. L. T. 335 Col. 1513 P. I.

62 Ss 89 to 98—*See Cols: 1203 to 1231 P. I.*

63 S. 98—S. 575—Court can extend time for giving security—87. P. R. 1908. Col: 1686. P. I.

64 S. 99—S. 578—4. O. C. 273. *See Charge No. 44.*

65 Ss. 99 to 104—*See Cols. 1232 to 1276. P. I.*

66 *S. 104—S. 588—Appeal against order setting aside* ex-parte *decree.*

No appeal lies from an order setting aside an *ex-parte* decree. BURA RAM *v.* MITHA RAM, **103 P. R. 1905=45. P L. R. 1906.**

67 *S. 104—S. 588—Order specified in S. 588 (17) passed by Court inferior to District Court, appeal lies to District Court and not to High Court from.—*

Where an order under S. 351 appealable under S. 588 (17), has been made by a Court subordinate to the District Court cl. (a) of the proviso to S 519 of the Code lays it down that an appeal from such an order shall lie to the District Court. The appellate tribunal is fixed with reference to the grade of the original Court passing

C P. Code. (Act V of 1908.) *(Contd).*

the order from which the appeal has to be made, and, if such Court is one subordinate to the District Court, then irrespective of the jurisdiction-value of the suit, in which the order has been made, appeal from such order lies to the District Court and not to the High Court (*a*). The word "subordinate" in S. 589 must, in the absence of the express provision or clear inference from the context to the contrary, be taken to be used in the same sense as in the definition of "District Court" in S. 2 of the Code 23. A. 56, 27, B. 604 appr, and 17. M. 377. Diss.—HARDAYALMAL *v.* K. C. SARKAR, **2 N. L. R. 54**

68 S. 104, 106, O. XLIII, R. 1—Ss. 588, 589, 351.

Rejection of application for declaration of insolvency—Appeal.

An order made by a District Judge under S. 351 of the Code, rejecting an application for a declaration of insolvency, is, by virtue of Punjab Government Notification No. 940. dated 24th October, 1888, appealable to the Divisional Court, irrespective of the value of the subject-matter involved. RAJA RAM *v.* PRABH DIAL, **159. P. W. R. 1908=98. P. R. 1908.**

69 Ss. 106 to 115—*See Cols. 1276 to 1356. P. I.*

69 (*a*) S. 113—5. A. L. and 512. No. 46 *supra.*

70 S. 115— S. 622—4. M. L. T. 352. Col: 153 4. P. I.

71 S. 115—S. 622—*Petition for revision —Act XV of 1882 (Presidency Small Cause Courts Act), section 38—Without making application to Full Bench.*

Except in very special cases, the High Court will not interfere under section 622, Civil Procedure Code when the party aggrieved has a remedy elsewhere, *e. g.*, by an application under section 38 of the presidency Small Cause Courts Act. SIGNOR COPPA ANGELS *v.* D'ANGELIS. **4 M. L. T. 325.**

72 S. 115—S. 622—*Land Acquisition Act ss. 18, 30, 31, 32—Jurisdiction of District Judge to order refund of money paid by Collector under s. 31.*

A District Judge has no jurisdiction to order a refund of money paid by a Collector under the Land Acquisition Act without any irregularity apparent at the time and without any order from the Civil Court, and an application under section 622 of the Civil Procedure Code against his order lies. It is open to doubt whether s. 18 of the Land Acquisition Act, which deals *inter alia* with objections as to the persons, to whom compensation is payable, or s. 30, which deals with disputes as to the person, to whom compensation is payable, can have any application after the money has actually been paid away under section 31 (2).—GOBINDA RANEE DASEE *v.* BRINDA RANEE DASEE. **35 C. 1104**

73 S. 120 to 154—*See Col. 1356 to 1372*

C. P. Code. (Act V of 1908.) *(Contd.) P. I.*

74 S. 145—143 P. R. 1908 No. 56 *supra.*

75 O. I. R. 1 to 13—*See Cols.* 1372 *to* 1401 *P. I.*

76 O I R 13—S. 34, 5. A. L. J. 554—30 A. 538—*See Col. 1399 P. I.*

77 O. II. to O. VI. R. 14—*See Cols.* 1041 *to* 1433 *P. I.*

78 *O. VI. R. 14, 15, O. XIV. R. 1, 2—Ss.* 115, 146—*Written statement not verified—Proper course for taking objection.*

Where a written statement filed on behalf of the defendant was actually received by the Court and no application was made by the plaintiff to have it taken of the file on the ground of its not being signed and verified by the defendant as required by s. 115, Civil Procedure Code and the question was raised for the first time on appeal after the case had been fought out in the first Court on the footing of an improper written statement.

Held, that in such circumstances the Appellate Court was not qualified in decreeing the suit on the footing that there was no defence, by reason of the written statement not being signed or verified by the defendant and the case should have been tried on the merits. RUSTOM GAZI *v.* TARA PRASANNA CHOWDHRI. **11 C W N 871.**

79 O. VII. R. 1 to R. 11—*See* Cols. 1434 to 1443 P. I.

80 O. VII R. 11=S. 53—Debuttor property—Permanent lease—Grant of—Amendment of plaint. 33 C. 511 Col. 1760 P. I.

81 *O VII R 11=S. 53—Proviso—Leave granted—Amendment of plaint—Alteration of nature of suit.*

The plaintiff originally claimed a share in two houses as heir to his wife ; but subsequently he applied for and obtained leave to amend his plaint so as to claim the whole of the two houses as his own property, the houses having originally been purchased by the plaintiff in the name of his wife.

Held, that this amendment was not obnoxious to the prohibition contained in the proviso to S. 53 of the Code of Procedure. MIAN JAN *v.* ABDUL. **1907 A W N 203.**

82 *O VII R. 11=S. 53, cl. (b)—Plaint not duly signed and verified—Amendment, on determination of issue, return for, if allowed.*

Where, in a case, upon an issue as to whether the plaint was duly signed and verified, the Court finds that the suit is not properly signed and verified, it cannot act under cl. (b) of this section and order the return of the plaint for amendment. The proper order in such a case is to direct the removal of the plaint from the file of registered suits ; such an order will, however, not debar the plaintiff from bringing a fresh suit, subject to the law of limitation. BARODA PROSAD BOSE *v* GIRIJANATH ROY CHOWDHURY, **2 C. L. J. 11.**

83 O VII R 11—S 53—A. W. N. 1906 P. 220 *See Amendment No 27 P. I.*

84 O VIII R. 1 to O X R 4 *See Cols. 1444 to 1470 P. I.*

C. P. Code. (Act V of 1908.) *(Contd.)*

85 O X R 4—S. 120—7 B. L. R. 709 Col. 215 P. I.

86 *O XI R 8, 11, 21—S. 126, 127, 136—Interrogatories to defendant—Extention of time allowed—Defence struck out before expiry of ten days—Validity thereof.*

On the 14th November, 1903, the leave of the Court was obtained to serve the defendant in a suit with interrogatories under Chap. X of the Code. There was no direct evidence as to the exact date on which the interrogatories were served on the defendant. On behalf of the defendant, an application was made for extension of time till the 30th. However, on the 24th November, the Court passed an order under S. 127. The question for determination was whether or not an order to have the defence of the defendant struck out was proper and valid.

Held, no order can be passed under S. 127 until there has been an omission or refusal to answer interrogatories. There was certainly no refusal, for the defendant only asked for time, and on the 24th, there had been no omission, for the ten days allowed by law had not expired. Consequently, the order striking out the defence was not proper. 18 C. 420 (F. B.) followed. PANDIT BAKHT NARAIN *v.* BHOGA SINGH. **8 O. C. 172.**

88 O XI R 12, 13. *See Col. 1470 P. I.*

89 *OXI. R. 14—S. 130—Inspection—Discretion of Court—Jurisdiction of High Court—Revision:—*

Civil Courts have jurisdiction to deal with documents produced by parties in obedience to an order under S. 130, C. P. C., in such manner as appears just, and the High Court will not interfere in revision with the discretion exercised by inferior Courts under the section. Where documents have been filed as relating to matters in issue in the suit, Courts will be exercising a good discretion in allowing the opposite parties to inspect and take copies of them, unless they relate exclusively to the case of the party producting them and contain nothing supporting or tending to support his opponents' case. Indeed a strong case should be made out by the party who opposes the inspection petition when the documents in respect of which inspection is asked for are letters written by the party applying for inspection.—BALAMONY *v.* RAMASAWMY CHETTIAR. **17 M. L. J. 79=2 M. L. T 88=30 M. 230.**

90 O. XI. R 15 to O. XIV R. 1, 2—*See Cols.* 1470 *to* 1472 *P. I.*

91 O. XIV R. 1, 2—S. 146. 11 C. W. N. 871 No. 78 *supra.*

92 O. XIV. R. 6 to O. XVI. R. 4. *See Col.* 1472 *to* 1473 *P. I.*

93 *O. XVI R. 2, 4—S. 160, 162—Witnesses—Expenses—Jurisdiction of Court to pass order for payment of expenses of witness before decree:—*

A Court is competent before passing the decree in the suit to order a party to pay the expenses of a witness summoned by him in case such expenses were not paid into Court before the summons were issued. There is nothing in the provisions of 160, 162, C. P. C., to protect a party who asks the Court to issue a summons from liability to pay the expenses of the witness, if the Court, *per incuriam* or, in order to save delay, issues the summons without seeing beforehand that the party applying for the summons discharges the duty imposed on him by the law.—CHENCHURAMAYYA *v.* NARASIMHAYYA. **17 M. L. J. 435.**

94 XVI R. 7 See Col. 1473 P. I.

95 *O. XVI. R 13, 17, 18—S. 175—Hindu Law—Charitable trusts, when colorable—Limitation Act (XV of 1877), Article 91—Laches—Undue influence. Deed executed under—Fiduciary relation—Deed between persons standing in—Letters Patent, Clause 36.*

A deed of trust can be held to be nominal only when no charity or trust is brought into existence, when there is no proof of the application of the alleged endowments for the maintenance thereof and the whole conduct of the parties is inconsistent with the hypothesis of a genuine trust.

Per Sir S. Subrahmania Ayyar, Offg. C. J.—The provisions in a trust deed denying to the public any interest in the charities and authorising the change of the trust property are not inconsistent with the creation of a valid trust ; and even if they were, they would be only in valid conditions annexed to a valid trust.

The doctrine that Courts will regard with jealousy transactions between persons standing in the fiduciary relation of parent and child will not apply when no advantage is secured to the former at the expense of the latter ; and where the properties are already impressed with the trust, the appointment of the father, as sole trustee, is no such advantage as such a right exists under the Hindu Law.—1 M. H. C. R, 415 referred to.

A party who has not sued within the period prescribed by article 91, schedule II of the Limitation Act, to set aside an instrument on the ground of undue influence cannot be heard in derogation of the rights created by it. 15, Cal. 58 followed.

One of two executants of a deed cannot, after the death of the other set up the undue influence exercised by that other to defeat the rights of beneficiaries under the deed, when he had ample opportunities to do so in the lifetime of the other, and when if he had done so the other party would have had legal power to carry out his intentions in favour of the beneficiaries by other means.

Per Sankaran Nair, J.—The provision that the public shall have no interest in the trust converts it into a private trust, if any trust is created which can be put an end to at any time; and the right to change the properties and to exclude or withdraw them

C. P. Code. (Act V of 1908.) *(Contd).*

as conferred by the deed implies a power not to create a trust so far as any or all of such properties are concerned. The above are not simply invalid provisions annexed to a valid trust, but rather negative the creation of any valid irrevocable trust at all.

Where the author of an alleged trust intended to create a trust only enforceable after his death, reserving power to himself to dispose of the properties such trust can not after his death be enforced at the instance of a volunteer even so far as the properties as he may not have disposed of are concerned. A trust will be void if the subject of it is uncertain, as when it is to attach such properties as the author should not dispose of during his life. The doctrine applied by Courts of Equity in regard to transactions between persons standing in the fiduciary relation of father and child will apply even when the father takes only as trustee. The ground of interference in such cases is not any benefit derived by the father, but the presumption that the son was not a free agent. The rule will apply when the person claiming is a volunteer with notice of the confidential relation; and the burden will be on such person to show that the son understood the terms and did form an independent opinion on the matter. Recitals in the deed calculated to produce irresistible moral pressure, as the alleged wishes of ancestors, etc., will be evidence of an improper exercise of parental influence, when such recitals are not true. *By Court.*—S. 575 of the Code of Civil Procedure does not apply in the case of appeals under cl. 15 of the Letters Patent from judgments of the High Court in the exercise of its Original Jurisdiction. Under cl. 36 of the Letters Patent where the Judges are equally divided in opinion, the judgment of the Senior Judge will prevail. ROOP LAUL *v.* LAKSHMI DOSS. **I. L. R., 29 M. 1.**

96 O. XVI. R. 18 to O. XVIII. R. 13. *See Col: 1474—1477. P. I.*

97 *O XVIII R 13—S. 189—Evidence—Memorandum of substance of evidence.*

S. 189 of the Civil Procedure Code requires that a judge should make a memorandum of the substance of the evidence of each witness. Where the munsiff had given the shortest abstract of the substance of the evidence of the plaintiff and his witnesses taken as a whole.

Held, that he had not complied with s. 189 and the case should be remanded to have the evidence taken down according to law. AMRITA SAHA *v.* PANCHCOURIE, **9 C W. N. 418.**

98 *O. XX R. 1—S. 198—Judgment—Judgment to be pronounced in open Court or on some future day.*

Failure to observe the provisions of S. 198 of the Civil Procedure Code and the not uncommon parties in the Mofussil Courts to omit to pronounce judgment in open Court, strongly disapproved of. BAI DAHI *v.* HARGOVANDAS, **I. L. R. 30 B. 455; 8 B. L. R. 229.**

C. P. Code (Act V of 1908.) *(Contd.)*

99 O. XX. R 1.—*See Cols: 1478, 1479, P. I.*

100 *O. XX R. 2—S. 199—Judgment written when judge on leave. Dilivery by successor in office—Validity.*

Where a Judge, who has heard a case, took leave, before putting his judgment in writing, and his judgment subsequently written was delivered by his succesror in office—

Held that the judgment was properly pronounced. The provisions of S. 199, C. P. C. having been complied with. RANI SUNDER KOER *v.* CHANDRESHWAR PARASAD NARAYAN SINGH. **11 C. W. N. 501=34. C. 293.**

See for other facts col. 189. P. I.

101 O. XX. R. 2—S. 199—Act done in discharge of duty—Judicial officer—Jurisdiction—Judgment 30 B. 241. Col 58. P. I.

102 O. XX. R. 2 to 4—*See Cols. 1472 to 1481. P. I.*

103 *O. XX. R. 4.—S. 203 (1)—"Court of Small Causes"—Subordinate Judges invested with Small Cause powers—Judgment—Reasons for the judgment.*

The Court of a Subordinate Judge invested with Small Cause Court powers is governed by paragraph (1) of S. 203 of C. P. C. 1882. The judgment written by a Subordinate Judge as a Court of Small Causes need not therefore contain more than the points for determination and the decision thereon. NARAIN SITARAM *v.* BHAGA GANGA. **9 B. L. R. 327; 31 B. 314; F. B.**

104 O. XX. R. 5 to 11. *See Col 1481 to 1490. P. I.*

105 *O. XX. R. 11—S. 210—Formal order not drawn up—Construction of order—Real intention—Limitation.*

In construing pleadings, judgments and decrees and orders passed in this country, the most liberal construction must always be accepted.

Where a judgment was passed on the 21st July, 1902, and on the 24th, an arrangement by the parties to pay the decretal amount by instalments was filed and explained to the judgment-debtor, who accepted the terms, but no formal orders were pased under s. 210, Civ. Pro. Code, and the formal decree in the case was drawn up on the 25th, according to the original judgment, the decree bearing the date of the judgment, and thereafter, the judgment-debtor paid the instalments regularly up to June, 1905.

Held, an application by the decree-holder for execution for the balance of the judgment-debt, presented on the 17th February, 1906, was not barred. KEDAR NATH BANERJEE *v.* KULMAN SARDAR. **5 C. L. J. 25.**

106 O. XX. R. 11—S. 210—Debtor agreeing to pay exorbitant amount to interest—Courts' power to relieve the debtor—Money decree—High Court decree can be made payable by instalment.

Under S. 210 of the Civil Procedure Code,

C. P. Code. (Act V of 1908). (*Contd.*)

the High Court has the power to make its money decrees payable by instalment. POMA DONGRA *v.* WILLIAM GILLESPIE. **9 B. L. R. 143.**

See for other facts Col. 262 P. I.

107 O. XX. R. 12, O. X. L. I. R. 20—Ss. 211, 559—Parties—Respondent—Addition of, by Court after limitation—Mesne profits—Interest. 33 C. 329 Col. 1797 P. I.

108 O. XX. R. 12, 15.—*See Col. 1490 to 1493 P. I. and No. 110 infra.*

109 *O. XX. R.* 16—*S. 215 A. Preliminary decree under—Amount of Court fees to be paid on appeal—Court fees Act VII of 1870 S. 7 (IV.) (b)—Cancellation of deed—Equity—Fraud—Misrepresentation—Undue influence—Defendant relying on representations made by plaintiff—Estoppel by conduct—Relief in equity, conditions for seeking.*

Suit for possession by partition of a third share of the property left by B, who died on 20th October, 1900, leaving him surviving an uncle, two cousins, and three sisters. The uncle, the plaintiff in the suit, took possession of the deceased's estate and managed it. On the 25th July, 1901, an agreement was executed by the plaintiff and by the mothers of the two minor defendants, who were defendants 1 and 2 in the suit, appointing D, third defendant, an arbitrator for adopting Bhagat Ram, whom, according to the agreement, B had, during his lifetime, nominated to be appointed as his adopted son. This nomination clause was subsequently added at the plaintiff's request and was attested by him. On the 27th July 1901, D, arbitrator, gave his award in pursuance of the agreement of reference, dated 25th July. It was stated in the award that, according to the desire expressed by B, deceased, during his lifetime, his cousin, Bhagat Ram, was made his adopted son, and further provisions were made, setting apart funds for charitable purposes, for marriages of minor sisters of B and fixing maintenance for the plaintiff and others as required by the reference. A deed of release was executed on the same date and registered along with the award on 30th July, 1901 whereby the plaintiff and the other reversionary heirs of B acknowledged Bhagat Ram as his adopted son, and agreed to abide by the settlement made by the arbitrator, relinquishing all claim to the estate of B in favour of Bhagat Ram, his adopted son. There was at the same time executed and registered an agreement by the mother of Bhagat Ram, (his father being then admittedly a lunatic), giving Bhagat Ram in adoption as desired by B, when alive, and a power of attorney, appointing D as a general agent for managing business. The next day, *i. e.*, on 31st July the plaintiff wrote a letter handing over possession to D, of the estate as detailed therein and of which the plaitiff had hitherto held possession as a manager and heir. On 26th July, 1904, the plaintiff sued alleging that D, third defendant, having represented that he would partition the estate of D among his heirs, including the plaintiff, got an agreement of reference for that purpose executed in his own favour, but taking advantage of the confidence reposed in him as a relative and of the youth and ignorance of the plaintiff, he executed and registered an award contrary to the purport of the agreement, and further fraudulently caused the plaintiff to execute a deed of acquittance in favour of the first defendant without any consideration. There was no direct proof to support the allegation of misrepresentation and fraud made in the plaint, nor that the plaintiff was induced to execute the document in question by any undue influence exercised over him by D.

Held, that there was absolutely nothing in the relative circumstances of the parties to induce a belief that the plaintiff was duped by a false representation, or that an unfair advantage was taken of his youth and ignorance as alleged in the plaint, that plaintiff could not resile from the position deliberately adopted by him in 1901 as he was met, not only by the adoption he acknowledged, but by his own release, and he could not get over these obstacles without proving misrepresentation, fraud and undue influence as alleged 28 C. 15 (P. C.) L. R. 23 Ch. D. P. 278, 1 Chit. R. R. 119, L. R. 2 Ap. Ca. 815 and 4 I. A. 31 referred to, and that the plaintiff, therefore, was clearly estopped 25 C. 662, 15 M. 486, 18 M. 397 referred to, from disputing the adoption, since he had himself encouraged and concurred in it.

When a plaintiff attempts to set aside certain deeds executed and registered by him on the ground of fraud, undue influence or misrepresentation, he ought to make a specific allegation on which he relies. The defendant is called upon to meet only the case as alleged, and if the plaintiff fails to substantiate his allegation or to make some specific charge, his case is bound to fail and to be dismissed.

In an appeal against a preliminary decree under S. 215 A, C. P. C. 1882, the appellant ought, under S. 7 (iv) (*b*), Court Fees Act, 1870, to pay an *ad valorem* Court-fee on the amount at which the suit was valued in the plaint. 18 B. 209 relied on.

A Court of Equity will not grant relief and set aside deeds (release deeds, for instance,) executed by a person, where the proceedings were entirely started by him and deliberately carried through by executing and registering several deed and by delivering possession, whereby he secured a provision of maintenance for himself, to which he would not otherwise be entitled 28 C. 15 (P. C.) referred to. BHAGAT RAM *v.* GOKAL CHAND. **150 P. R. 1908.**

110 *O XX R.* 16, 15, 10—*Ss.* 215 *A*, 215, 216—*Jurisdiction of Court—Partnership—Suit for balance on settlement of account—Decree cannot be passed in favor of defendant.*

When after a partnership is dissolved the plaintiff sues for his share of an alleged balance as due to him by the defendant the Court has no jurisdiction to

C. P. Code. (Act V of 1908.) *(Contd).*

pass a decree in favour of the defendant for the sum which it finds is due to him by the plaintiff, it can only dismiss the plaintiff's suit in case no money is found due to him. MISRI LAL *v.* BANARSI DAS. **3 A L J 233=W N A 1906 P 111.**

111 O. XX. R. 16 to O. XXI. R. — 2 *See Cols. 1493 to 1498 P. I.*

112 *O XXI R. 22 S. 258.—Execution of Decree—Objection to execution—Adjustment of Decree not certified.*

The judgment-debtor objected to the execution of a decree for mesne profits and costs on the ground of an agreement between them and the decree-holder whereby the latter agreed to execute a sale deed of the lands in suit in favour of the former in consideration of an amount made up of the price of the lands and the decreed mesne profits and costs.

Held, that, under S. 258 of the Civil Procedure Code, the objection was not valid. Rammayyar *v.* Rammayyar (I. L. R., 21 Mad. 356), followed. SEETHARAMA AIYAR *v.* CHINNA CHENGA REDDY, **16 M L J 33.**

113 O. XXI. R. 4 to 11 (2)—*See Col 1498 to 1500, P. I.*

114 O XXI. R. 11 (2)—S. 256—Application for possession—Execution of decree. 4 L. B. R. 1907. P. 83. *See Col, 687. P. I.*

115 O XXI R 11 (2)—Addition of parties—Party appellant—Test—Guardian ad-litem 5. C. L. J. 434. *See Col. 69 P. II.*

116 O. XXI. R. 13, 15.—*See Col. 1500, 1501, P. I.*

117 *O. XXI R. 15—S. 231—Joint decree for money—Payment out of Court to one of the decree-holders—Judgment-debtor discharged only if payment be for benefit of all, otherwise not.*

Where a payment is made, out of Court, to one of several joint decree-holders, such payment will discharge the judgment-debtor, if it is proved to be for the benefit of all and if it is certified to the Court. But, if the payment is not proved to be for the benefit of all the decree-holders, such payment will operate as a discharge to the extent only of the share of the decree-amount to which the payee is entitled. The Code (Civil Procedure) regards the interest of joint decree-holders as a tenancy-in-common, and the principle underlying S. 231 must govern payments made out of Court. 9 C. 831, 15 M. 343 and 18 M. 464 followed. SAMBHUSA *v.* GOPAL. **1 N. L. R. 24.**

118 *O XXI R 14, 32—231, 260—Execution of decree for perpetual injunction. Application for—Notice to judgment-debtor whether necessary—Execution by one of two decree-holders without notice—Relief not prayed for, weather allowable.*

In executing a decree for perpetual injunction against a judgment-debtor, who has deliberately disobeyed an order of Court, has tried to evade it by colourable transfers of the property, and has had ample opportunities to contest the allegations of the decree-holder, the Court is not bound to issue any notice to the judgment-debtor before passing an order under section 260 of the Civil Procedure Code nor is any notice necessary under section 231.

The rule laid down in 8 Cal., 174, is not of general application.

The decree-holder is not necessarily limited to the relief asked for in his application, but may be granted other reliefs which the law allows him. *19 Bom., 34, distinguished ; 26 Bom., 287 referred to.* DURGA DAS NANDI *v.* DEORAJ AGARWALLA. **3 C. L. J. 112. 10 W. N., C. 297=33. C. 306.**

119 *O XXI R. 16—S. 232.—Execution of Decree—Order allowed to become final—Subsequent regular suit—Transfer of decree, for execution.*

Held, that no suit will lie to establish a right to execute a decree when an order dismissing an application under s 232 of the Civil Procedure Code has been allowed to become final Budhan Singh *v.* Salig Ram (I. A. L. J., p. 61), approved. Sheoraj Singh *v.* Amin-uddin Khan (I. L. R., 20 All. 539. distinguished.—AMANATULLAH KHAN *v.* SARDHA PRASAD. **3 A L J 428=A W N 1906 P 433=28 A 613.**

120 *O. XXI. R. 16=S. 232—Execution—Execution of money-decree—Transfer of the decree to one judgment-debtor—Execution of the decree by one judgment-debtor against his co-judgment-debtors allowed where the decree is passed against them as legal representative of the deceased relations and against the property of the deceased—Direction in the decree that the personal liabibity of the judgnent-debtors be determined in execution proceedings does not make the decree a money-decree.*

C. obtained a decree against P. as the legal representative of A. and against S. as the legal representative of L. It directed among other things that C. should recover Rs. 22,748 and costs from the property of A. and L.; that C. was entitled to get back from the possession of P. and S. as heirs respectively of A. and L. all books of account, bonds and other papers belonging to C.'s father and that "it will be decided during the execution proceedings as to how far the heir defendants are personally liable in this suit.

C. died after he had obtained this decree leaving P. as his heir, to whom the decree was transferred by operation of law. P. then applied for execution of the decree against S. The Subordinate Judge rejected the application on the ground that P. was precluded by the proviso to section 232 of the Civil Procedure Code from executing the decree against his co-judgment-debtor S.

Held, (1) that there was nothing in the decree which saddled P. and S. with any personal liability to pay money, either jointly

C. P. Code. (Act V of 1908.) *(Contd).*

or severally ; the amount of Rs. 22, 748 and costs which was recoverable under the decree was made payable not by P. and S. but out of the property of A. and L.

(2) That although by reason of the direction in the decree that the question of the personal liability of P. and S. should be determined in execution proceedings there might be subsequently, when that liability had been determined, a decree for money against them ; until then it was a mere contingency which could not make the decree as it existed a decree for money against P. and S.

(3) That, therefore, P. was entitled to execute the decree against the estate of L. in the hands of S.

In section 232 of the Civil Procedure Code (Act XIV of 1882) the phrase "a decree for money against several persons" means a personal decree for the payment of money by two or more defendants jointly. Clause (*b*) of the proviso to the section does not extend to a decree which may become a decree for money against several persons on determination by the Court. It applies only where in the decree there is a distinct order upon the defendants personally to pay the money. PANACHAND *v.* SUNDRABAI **9 B. L. R. 409=31 B. 308.**

121 O XXI R 16=S. 232—Step in aid of execution—Application to be recognised as the representative of decree-holder. 17 M. L. J. 475 Col. 2019. P. I.

122 *O. XXI. R. 16, S. 47—Ss. 232, 244 Transfer by decree-holder of property comprised in decree—Right of transferee to apply for execution of decree.*

Properties comprised in a decree for possession of some lands were acquired by appellants by virtue of two mortgages foreclosed in their favour. The appellants applied under S. 232 to permit them as transferees, by operation of law, to execute the decree, obtained by their mortgagors.

Held, that appellants were the representatives of the original decree-holders, within the meaning of S. 244, and that they were entitled to apply to be placed on the record and to be permitted to execute the decree obtained by their transferor, that on a transfer of property, the transferee acquires all the rights attaching to such property at the time of transfer including the right to execute decrees 11 B. 368; 16, C. 347; 21. M. 353 and 16 A. 284 refd to. RAI BAHADUR LALA ONKARDAS *v.* SHAHBAZ KHAN. **1 N L. R 49.**

123 *O XXI R 16 S 47—Ss. 232, 244—Dismissal without enquiry of an application under S. 232, failure to appeal from—Separate suit for declaration, whether maintainable.*

Plaintiff had applied to be made a party to certain execution proceedings, but the District Munsiff dismissed his petition, even without any enquiry into the question as to whether the plaintiff was the legal representative of the deceased judgment-creditor. It was open to the plaintiff to appeal against that order 25 M. 548 referred to but without doing so, he brought the present suit for declaration of his right to represent the judgment-creditor.

Held, since his remedy was by way of appeal and he failed to take that remedy, he could not now bring a separate suit to obtain the same remedy. KUNHAMMAD *v.* AMAD. **16 M. L. J. 27.**

124 *O XXI R. 16, S. 47—S. 232, 244—Appeal:—*

Where an application by the executor to the estate of a Hindu lady to execute a decree which fell to her share upon a partition of her husband's estate between herself and her sons was refused on the objection of the sons and the judgment-debtors that the lady had only a life interest in the decree and that it passed on her death to her sons:—

Held, that an appeal lay from the order under S. 244, C. P. C. the question arising being question between the legal representative of the lady and the judgment-debtors. HRIDOY KANT BHATTACHERJEE *v.* BEHARI LAL MOOKERJEE. **11 C. W. N. 239, 240.**

125 O XXI R 16, O XXII R 4—S. 232, 368—Application to transferee of decree to bring in defendants representative on record—Step in aid of execution. 17 M. L. J. 485. *See Limitation Act Art 179 (4).*

126 *O. XXI. R. 16, O. XXII R. 10—Ss. 232, 372—Assignee not brought on record—Title to execute—Transferee decree-holder—Transfer of decree before it was passed.*

The words of S. 232 relating to a transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the agreement.

The words "decree-holder" must be construed as meaning decree-holder in fact and not as including a party who in equity may afterwards become entitled to the rights of the actual decree-holder.

Where a plaintiff assigned the decree to be passed in his favour to another, but the suit was allowed to proceed in the name of the assignor only—

Held, that the assignee was not entitled to execute the decree as the transferee decree-holder within the meaning of S. 232, C. P. C. BHANDARI *v.* RAMACHANDRA KAMTHI. **2 M. L. T. 197=17 M. L. J 391.**

127 O. XXI R. 16 to 23—*See Cols: 1501 to 1506 P. I.*

128 *O. XXI R. 2—S. 248—Issue of notice on a time barred execution-application, effect of.*

The improper admission of an application for execution of a decree, which, at the date thereof, was clearly time barred, and the issue of a notice thereon under S. 248, Civ. Pro. Code, could not have the effect of reviving the decree. Nor could a second application for execution, within three years of the

C. P. Code (Act V of 1908) (*Contd*).

first, be of any avail. KAMMAL SINGH *v.* LARAITI. 2 A. L. J. 67.

129 O. XXI. R. 22—S. 248—Execution of decree—Limitation—Date of issue of notice under S. 248 C. P. C. 10, C. W. N. 303 Col. 2020. P. I.

130 O. XXI. R. 22—248—Execution of decree or order—" Date of issuing notice", meaning of 30 M. 30. Col. 2020 P. I.

131 O XXI R. 22 -S. 248—Decree—Execution—Application for execution—Notice—Date of the order. A. W. N. 1908 P. 245—30 A. 536 Col. 2019 P. I.

132 O. XXI. R. 24 to 29. *See Cols. 1507, 1508 P. I.*

133 O. XXI. R. 29—S. 243.—*See* 130 P. R. 1908 No. 47 *supra*.

134 O. XXI. R. 30 to 32 *See Cols. 1508, 1509 P. I.*

135 O. XXI R. 33—S. 260—Execution of decree—Injunction—Limitation—Executing Court cannot go behind decree. 29 M. 314 Col. 1986. P. I.

136 O XXXI. R. 32—S. 260—Principal and agent—Suit for an account—Form of decree. 27 A 374 Col. 367 P. I.

137 O XXI. R. 32—S. 260—Execution of decree—Limitation—Injunction. A. W. N. 1906 P. 10—*See Limitation Act Art 179 P. I.*

138 O. XXI R. 34 to 46—*See Col.* 1509 *to* 1512 *P. I.*

139 O. XXI R. 46, S. 63, O XXXVIII R 12—S. 268, 285, 490—Attachment before judgment of debt due to Judgement debtor—Decree of Small Cause Court and orignal Court—Payment by debtor of judgemnt debtor into Small Cause Court—Voluntary payment—Liability of debtor to pay again—Effect of S. 490 of the Code.

A person had two decrees passed against him, one by Small Cause Court and the other by munsiffs Court, both being preceded by attachment before judgement of a debt due to him. The debtor of the judgement-debtor paid the amount of the decree of the Small Cause Court, notwithstanding a notice issued by the Munsiff's Court prior to attachment after decree in Small Cause Court, to pay the amount of its decree.

Held, that the payment was a voluntary payment and having been made at the defendants' own risk in the Court of inferior jurisdiction with a full knowledge of the attachment by the higher Court, the defendants are liable to pay again and that there was no realization of the money paid by the defendants into the Small Cause Court in the proper sense of that term by that Court. The effect of Section 490, Civil Procedure Code, is to put a person attaching before judgment in the same position as if he has attached after decree if a decree is passed in his favor after the attachment before judgment. RAMASAMY UDAYAR *v.* CHAKRAPANY CHETTIAR. 17 M. L. J., 488.

140. O XXI R. 51 to 53. *See Cols 1512 to 1514 P. I.*

C. P. Code (Act V of 1908) (*Contd.*)

141. *O. XXI R. 53—S. 273—Pre-emptor, rights of—Decree passed in favour of the vendee, right to execute, by the pre-emptor.*

One S. K., a Zemindar of a certain village, brought a suit against the appellants for possession of a house and land situate in the village alleging them to be trespassers. During the pendency of the suit, S. K., sold the village to A and A's name was entered on the record in place of S. K. The decree for possession of the house and land was passed in favour of A. Before execution of the decree, the respondent brought a suit for pre-emption against A and got a decree. He then applied for execution of the decree passed in favour of A. It was contended on behalf of the appellants that the respondent had no right to execute the decree.

Held, that the respondent could execute the decree passed in favour of A inasmuch as a pre emptor stands in the shoes of the vendee in respect of all the rights and obligations arising from the sale, under which he has derived his title, and by reason of the sale and the decree for pre-emption he is the representative in interest of the original vendor. 7 A. 775 (F. B.) referred to. RAM RATAN *v.* JUGRAJ. 8 O. C. 183.

142 *O. XXI R. 53—S. 27—Execution of decree—Attachment—Decree for money—Decree for sale of mortgaged property.*

A decree for the sale of immovable property under section 88 of the Transfer of Property Act is not a decree for the payment of money or a decree for money, and is therefore liable to attachment and sale under the penultimate clause of section 273 of the Code of Civil Procedure. DELHI AND LONDON BANK LD., *v.* PARTAB SINGH. 3 A. L. J. 585=A. W. N. 1906 P. 236=1 M. L. T. 247=28 A 771.

143 O. XXI R. 54—*See Cols. 1514, 1515 P. I.*

144 O. XXI R. 54, O. XL R. 1 to 3—S. 274, 503—Mortgage of a zamindari which is impartible by the holder thereof and the members of his family—Suit for sale of the mortgage property. 30 M. 255 Col. 557 P. I.

145 O. XXI R. 58—*See Cols. 1515 to 1522 P. I.*

146 O. XXI R. 58—S. 278—Compulsory. depositer—Provident Fund—Contributions by a railway servant—Liability of the contributions to be attached on the servants leaving the Company's service. 29 B. 259 Col. 868 P. I.

147 O XXI R 58—S. 278—Rent-decree—Execution—Landlords interest in tenure sold after decree—Decree for rent, if continued to be first charge on tenure. 33 C, 566 Col. 121 P. II.

148 *O XXI R 58—S. 278—Applicability of —Property directed to be sold under mortgage-decree, claim to—Executing Court, competency of, to vary a decree.*

It is settled law that S. 278 is not applicable to claims preferred to properties directed to be sold under mortgage-decrees. 14 C. 631; 18 B. 89; 1 C. W. N, 701 and 10 A. 480

C. P. Code (Act V of 1908) *(Contd).*

referred to. A Court executing a decree cannot take upon itself to alter or vary that decree. SUNOO MODI *v.* Mt. LATKARI. **1 N. L. R. 142.**

149 *O XXI R 58, 60—Ss. 278, 280—Execution of decree—Suit for declaration that property sought to be attached belongs to judgment-debtor—Procedure.*

Where a judgment-creditor seeking execution against property alleged to be that of the judgment-debtor is met with a plea that the property in question is not the property of the judgment debtor, the judgment-creditor is not obliged to take proceedings under S. 278 of the Code of Civil Procedure and wait until an adverse order is passed in those proceedings, but may at once institute a regular suit for a declaration that the property sought to be taken in execution is the property of the judgment-debtor. 18 A. 410 and 23 R. 266 foll. 16 A. 165 and 1904 A. W. N. p. 190 distinguished. MAKBUL FATIMA *v.* LALTA KUNWAR. **1907 A. W. N. 207; 4 A. L J. 574.**

150 O. XXI. R 58, 61, 63—Ss. 278, 281, 283—Claim to attached property—Investigation of claim 32. C. 537, Col. 1820. P. I.

151 *O. XXI. R 58, 61, 63—Ss. 278, 281 and 283—'Right which the plaintiff claims to the propery in dispute, meaning of.*

The words " the right which the plaintiff claims to the property in dispute" in S. 283 of the Code mean the right which is claimed in that proceeding in respect of the property, that is, the right to have it sold or the right to have it released from attachment. They do not mean the right or title to the property. The three Ss. 278, 281 and 283 must be read together 15. C. 674 and 31. C. 228 followed.

When, therefore, a claimant, being unsuccessful in a claim under S. 278, has got the property released from attachment by coming to terms with the decree-holder without notice to the judgment-debtors a suit subsequently brought by him against judgement-debtor for recovery of possession is not barred under S. 283 of the Code. MORSHIA BARAYAL *v.* ELAHI BUX KHAN. **8 C L J 381.**

152 O. XXI R 58, 61, 63--Attachment, objection against--Dismissal of objection—Declaratory suit—Limitation. 29. M. 225 Col. 956 P. I

153 O XXI R 58, 62—Ss. 278, 282. Appeal—Jurisdiction—Value of suit for purposes of jurisdiction—Execution of decree—Attachment.—Objection against. 71 P. L. R. 1906 Col. 761 P. 1.

154 *O XXI R 58, 63—Ss. 278 and 283—Suit by unsuccessful objector for recovery of price of his property sold in execution of decree passed against third party—Summary dismissal of objections to attachment of property—Appeal—Small Cause Court, jurisdiction of.*

The respondent No.1 attached the crop of respondent No. 2 in the execution of a decree and the appellant filed an objection under S. 278, alleging that the crop was his and not the judgment-debtor's. His objection was summarily dismissed without any investigation. He instituted a regular suit for recovery of the price realised by sale of the attached property.

Held, that the suit was one such as is referred to in S. 283 and not being one triable by a Court of Small Causes and not having been tried as such, an appeal lay from the decision of the first Court. RAM SARAN SINGH *v.* RAJA PARTAB BAHADUR SINGH. **8 O. C. 231.**

155 *OXXI R 58, 91—Ss. 278, 313 Entertainment of claim petition after sale but before confirmation, legality of—*

On a question raised as to whether a Civil Court has jurisdiction to entertain an objection, under S. 278 of the Code, after the attached property had been sold, *held*, that it is competent for a Civil Court to entertain such an objection after the property had been sold but before the confirmation of the sale, because there is no reason for thinking that the Legislature intended to make the mere holding of a sale a bar to an objection under S. 278 and, further, though, under S. 313 of the Code, the auction purchaser may himself apply to set aside the sale on the ground that the person, whose property purported to be sold had no saleable interest therein, yet it is distinctly to the auction-purchaser's advantage that a valid claim to the property should be established before he has paid away his money rather than afterwards. 26 C. 727 (733), referred to. BHAGCHAND *v.* MT. JHUNIA. **1 N. L. R. 167.**

155 (a) OXXI R. 58—S. 278.—33, C. 1158 No 158 *infra.*

156. OXXI R. 60 *See Cols 1522, 1523 P. I.*

157. *OXXI R 63--S. 280—Attachment--Release from attachment— Decree—Execution.*

A release from attachment under the provisions of the Civil Procedure Code can only be made under Section 280 of the Code. The section indicates the condition, on which alone that release can be directed. So a Court, before directing a release must hold those conditions established. CHIMANLAL BALABHAI *v.* N. C. MACLEOD **8. B. L. R. 794**

158. OXXI R. 60, 58, 61, 62, 63—Ss. 280, 278, 281, 282, 283—Execution of decree—Attachment. Objections against—Release from attachment—Order set aside—Fresh attachment not necessary 33 C. 1158 Col: 2 P. II.

159. O XXI R. 60—S. 280—See 4 A. L. 574 No. 149 *supra.*

160. O. XXI R. 61 See Col: 1523 P. I.

161. O. XXI R. 61—S. 281 *See 32 C 537.* No. 150, 8 C. L. J. 381 No. 151, 29 M. 225, No. 152, 33 C. 1158 No. 158 *supra.*

162. O. XXI R. 62. *See Cols. 1523 P. I. 2*

163. *O. XXI R. 62, 63, 66, 70—Ss. 282, 83 287—Execution-sale—Sale in execution of a simple money decree of mortgaged property—*

C. P. Code (Act V of 1908) *(Contd)*

Notification of mortgage—Purchaser not estopped from disputing the existence of the mortgage.

In execution of a simple money decree, the rights of a mortgagor in certain property ostensibly subject to a mortgage were put up to sale. The property was not sold subject to the mortgage, as contemplated by s. 282 of the Code of Civil Procedure, but the existence of the mortgage was notified in the proclamation of sale for the benefit of intending purchaser.

Held, on a suit brought by the mortgagee for sale, that the auction purchaser was not under the circumstances debarred from proving that the mortgage in suit was fictitious and without consideration. Inayat Singh *v.* Izzat-un-Nissa, (I. L. R., 27 All. 97), referred to. SHIB KUNWAR SINGH *v.* SHEO PRASAD SINGH. **3 A. L. J. 200=28 A. 418.**

164. O XXI R. 62—S. 282—*See* 71 P. L. R. 1906 No. 153, 33 C, 1158 No. 158 *supra.*

165, OXXI R. 63 *See* Cols: 1524 to 1526 P. I.

166. O. XXI R. 63—S 283—This Section not applicable to Suits under S. 283 C. P. C. Prayer for further relief not necessary. 29 M. 151 Col: 539 P. I.

167 *O. XXI. R. 63—S. 283—S. 283—Suit under—Valuation of suit—Jurisdiction.*

A suit by a defeated claimant, under section 283, for a declaration that the property attached belongs to him and not to the judgment-debtor ought, for purposes of jurisdiction, to be valued according to the value of the property, the subject-matter of the suit, and not according to the amount of the decree in execution of which the attachment was made, if the decree amount is larger than the value of the property. 15 C. 104, 31 C. 511, 17 A. 69 27 A. 440 referred to NARAYAN GANESH GHATATE *v.* BHIORAJ. **2 N. L. R. 87.**

168 O. XXI. R. 63—S. 283—Attachment—Wrongful seizure through court—Suit for recovery of money paid—Limitation. 4 M. L. T. 271—*See Col. 1835 P. I.*

169 O. XXI R 63—S. 283—32 C. 537 No. 150, 3 C. L. J. 381 No. 151, 29 M. 225 No. 152, 8 O. C. 281 No. 154. 33 C. 1158 No. 178, 28 A. 418 No. 163 *supra.*

170 *O. XXI. R. 64—S. 284—Not in accordance with T. P. A.—Instalment decree providing for sale of mortgaged properties in default—Decree if can be executed—Order absolute, necessary—Cursus curiæ—General jurisdiction—T. P. A., S. 589—Attachment not necessary.*

In a mortgage suit the parties came to an amicable settlement and an instalment decree was passed on the basis of a *solenama.* As it was the intention of the parties that on the failure of the judgment-debtor to comply with the terms of the *solenama,* the mortgaged properties should be sold, the decree which at first did not direct a sale was amended so as to contain such a direction. Upon an application to enforce the decree, it was objected that having regard to the form of the decree no order could be made under section 89 T. P. A., and that the only remedy of the decree-holder was to bring a fresh suit.

Held, that it was immaterial whether an order under section 89 T. P. A. could be passed or not. The decree as made was a valid decree and expressed the intention of the parties, and the Court had power in order to do justice between the parties to direct its enforcement by a sale of the properties. The Court had general jurisdiction to direct such a sale either under Section 284, Civil Procedure Code or under section 89 T. P. A. or under both 5 P. C. App. 516 and 2 I. A. 219 foll. Having regard to the terms of the decree, no attachment of the properties ordered to be sold was necessary. ABIR PRAMANICK *v.* JAHOR MAHOMED MANDOL. **11 C W N 879=6 C. L. J. 95 =34 C. 886.**

171 O XXI. R 64—S. 284—Sale by inferior Court of property attached by a superior Court—Jurisdiction. 34 C. 836 Col. 1165 P. I.

172 O XXI. R. 66, 70—*See Cols. 1530 to 1535 P. I.*

173 O. XXI. R. 66, 70—S. 287. 28 A. 418 No. 163 *supra.*

174 O. XXI. R. 67 to 69 Col. 1536 to 1538, P. I.

175 *O XXI R 69—S. 291—Sale proclamation —Stay of sale—Necessity for a fresh proclamation—Irregularities—Procedure—Not by suit but by objection before sale.*

Assuming that a fresh proclamation is necessary before a fresh sale, after the previous sale was stayed, an ommission to issue it is only an irregularity and if it involved no loss to the judgment-debtor, the sale cannot be set aside. The only course open to the judgment-debtors is to object to the canfirmation of sale and not to impeach the sale by regular suit. GAJRAJMATI TEORAIN *v.* SAIYED AKBAR HUSAIN. (LORD MAC NAGHTEN). **17 M. L. J. 112; 9 B. L. R. 83; 11 C. W. N. 393; 29 A. 136; 5 C. L. J. 138; 34 I. A. 37; P. C.**

176 *O. XXI. R. 71 to 72.* See Col: 1538 P. I.

177 *O. XXI. R. 72—S. 294 Petition under —Step in aid of execution of decree 8 O. C. 161.* See Act IX of 1908 (Limitation Act), Art. 182.

178 *O. XXI R. 73* to *91.* See Cols: 1538 to 1556 P. I.

179 O. XXI R. 91—S. 313 1 N. L. R. 167 No 155 *supra.*

180 *O. XXI R. 92 to 93.* See Cols: 1557 to 1560 P. I.

181 *O XXI R 93—S. 315—Jurisdiction of Small Cause Court—Maintainability of suit by auction purchaser for refund of purchase money.*

In a suit by the auction purchaser, against the decree-holder, for refund of purchase

C P Code (Act V of 1908) *(Contd.)*

money proportionate to a share in the purchased property, of which he has been deprived on a suit by a third party, there is no contract between the plaintiff auction purchaser and the decree-holder, and therefore there is no question of rescission or specific performance of contract.

The Small Cause Court has therefore jurisdiction to entertain the suit.

2 *Held*, also that in addition to the summary remedy provided by S. 315, Civ. Pro. Code, 1882, a regular suit is maintainable under the circumstances and conditions prescribed in the section. GURDIT SINGH *v.* GHANAYA LAL. **114 P. R. 1908.**

182 *O XXI R 94. See Col. 1561 P. I.*

183 *O XXI R 94—S. 316—Limitation Act—Art. 10—Execution of decree—Sale—S. 316, C. P. C., 1882, sale-certificate granted under—Ss. 51 and 89, Registration Act, 1877—Copy of sale-certificate registered under S. 89, Registration Act—Effect.*

A sale certificate granted under S. 316, C. P. C., of which a copy has been forwarded to the registering officer in accordance with S. 89, Registration Act, and duly filed in register of non-testamentary documents relating to immoveable property prescribed in S. 51 of the Act by the registering officer is not a registered document within the meaning of Art. 10, Limitation Act. FATTEH SINGH *v.* DAROPDI. **142 P. R. 1908 (F. B.).**

183 O XXI R 95. *See Cols 1561, 1562 P. I.*

184 O XXI R 95—S. 318—Decree-holder, holding, sale certificate applying for delivery of possession. 4 M. L. T. 350 Col. 1994 P. I.

185 *O XXI R. 95, S. 47—S. 318, 244—Execution of Decree—Purchaser of undivided share must sue for partition by separate suit—S. 244 no bar.*

The purchaser at a Court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member. The Court cannot, on a mere application for execution by such purchaser, enforce his right by an order for partition. No such order can be made under S. 318 of the Code of Civil Procedure and the dismissal by the Court of an application by the purchaser under S. 318 cannot be a bar to a suit by the purchaser for partition. S. 244 of the Code of Civil Procedure is no bar to such a suit. YELUMALAI CHETTI *v.* SRINIVASA CHETTI, **29 M. 294**

186 O XXI R 96 to O XXII R 4 *See* Cols 1562 to 1582 P. I.

187 O XXII R 4—S. 368—17 M. L. J. 495 No. 125 *supra.*

188 O XXII R 5 to 10 *See* Cols. 1583, 1584 P. I.

189 O XXII R 10—S. 372. 17 M. L. J. 391 No. 127 *supra.*

190 O XXII R 11 to O XXIII R 1 *See* Cols. 1584 to 1592 P. I.

C P Code (Act V of 1908) *(Contd.)*

191 *O. XXIII. R. 1—S. 373—Unconditional withdrawal of appeal and claim—Second suit—Not maintainable.*

A suit for redemption was dismissed by the Court of first instance for want of necessary parties. In the appellate Court the plaintiff put in an application saying that he did not wish to prosecute his "appeal or claim," the other side having given up his costs. The plaintiff then brought a second suit to redeem.

Held, that the effect of the application was that the plaintiff gave up all his claims to redeem the property, the consideration for the withdrawal being that the respondents give up their costs, and the suit was barred by the last paragraph of S. 373 of the Code. RAM PRASAD *v.* DUNGAR SINGH. **4 A L J 201 = A W N (1907) 91.**

192 *O. XXIII R. 1—S. 373—Withdrawal of suit for declaration without obtaining leave to bring another suit—Suit for possession by reversioner after institution of fresh suit—Subsequent suit for the same matter.*

Held, that where a reversioner withdraws his suit for a declaration without obtaining leave to bring another suit under S. 373 of the code, his subsequent suit for possession will not be barred under the provisions of that section. 21 C. 265, 21 M. 35; 2 A. L. J. 59 R JANGI SINGH *v.* DURGA SINGH. **9 O C 164**

193 *O XXIII R. 1—S. 373—Withdrawal of Suit—Court has power to extend time for payment of costs.*

Where a party has been permitted to withdraw from a suit with liberty to bring a fresh suit if he should pay costs within a named date under s. 373 of the Code of Civil Procedure, the Court has power to extend the time for payment when it is absolutely impossible for the party to pay such costs on or before the day so fixed. PERIA MUTHIRIAN *v.* KARAPPANNA MUTHIRIAN, **29 M. 370.**

194 *O. XXIII. R. 1—S. 373—Suit for redemption with a prayer for recovery of surplus profits—Improper valuation of Court fees.*

S. 373 of the Code of Civil Procedure empowers a Court to allow a plaintiff to abandon a part of his claim, with liberty to bring a fresh suit in respect of the part so abandoned, if the Court is satisfied that the suit must fail by reason of some formal defect or that there is sufficient ground for permitting him to abandon part of his claim. This section was intended to meet, amongst other cases, a case in which there has been an improper valuation of the Court fee stamp. HUSANI BEGAM *v.* COLLECTOR OF CAWNPORE, **4 A. L. J. 375. A. W. N. 1907. P. 133—29. A. 471.**

194 (a) *O. XXIII. R 1—S. 373—Pauper—Defendant is not allowed to defend suit in* forma pauperis.

There is no provision in the law under which a defendant may defend suit in *forma*

C P Code (Act V of 1908) *(Contd.)*

pauperis. ARTHUR COATES *v.* SECRETARY OF STATE. **54 P. R., 1905.**

195 O XXIII R 3 See Cols. 1592 to 1903, P. I.

196 *O XXIII R 3—S. 375—Compromise by natural son in a suit against adopted son of his father—Effect on minor sons of natural son—Afterborn son impeaching compromise—Compromise not registered—Binding nature of compromise so far as it dealt with properties not subject-matter of suit*—Mitakshara *family—Right of adopted son's son to share in family property along with natural son of adoptor—Extent of his share.*

An Oriya Brahmin, governed by the *Mitakshara* law, took a son in adoption; after this, he had a natural son born. The plaintiffs, in the present suit, were the sons of the natural son of the owner, who made the adoption; and defendant No. 1, the son of the adopted son. The adopted son pre-deceased the adoptor and, after the death of the latter, defendant No. 1 got his name registered in the Collectorate in respect of an eight-annas share in certain Zemindaries left by the adoptive father of his father. Thereupon, the natural son of the owner brought several suits to recover, from the present defendant No. 1. the share of the Zemindaries which he got registered in his name on the ground that the adoption was neither true in fact nor valid in law. The parties to these suits, however, entered into a compromise and, in pursuance of the compromise, the present defendant No. 1 got possession of certain properties. The present first plaintiff was a minor during the pendency of the previous suits and second plaintiff was not born then. The present suit was for a declaration that the compromise effected by their father was not binding on plaintiffs and to eject defendants from the plaint properties and place them and their father in joint possession of the same. The petition of the compromise dealt also with properties not the subject of the previous suits.

Held the second plaintiff, not having been born at the time of the compromise, could not impeach it. So far as the first plaintiff was concerned, the first question for consideration was whether defendant No. 1, the natural son of an adopted son, was entitled to any share when there was a natural son to the adoptor. According to Hindu Law, an adopted son occupies the same position and has the same rights and privileges in the family of the adoptor, as the legitimate son, except in a few specified instances. An absolute adoption operates as birth of the boy in the family of adoption and as civil death in the family of birth. An adopted son, by the very fact of his adoption acquires a vested interest in the ancestral property of his adoptive father; he does not become divested of such interest, though its extent may

C P Code (Act V of 1908) *(Contd.)*

be altered, by the subsequent birth of a legitimate son of his adoptor, and the grandson by the adopted son acquires by birth a right in his grand-father's estate, which entitles him to share in such property though his father be dead, along with the legitimate son of his grand-father. And the share which an adopted son gets is a fifth of the entire property and a fourth of the natural son's share (17 B. 100 and 1 M H. C. R. 45 refd. to and F) 4. C. 425 Exp and diss from. Consequently, defendant No. 1 was entitled to a fifth of the whole property left by the adoptor. The next question was, whether the compromise was beneficial to the present plaintiffs. There is a considerable conflict or opinion as to whether the share to be allotted to the adopted son on partition is not more than one-fifth. And the compromise, under the circumstances, was settled on terms most favourable to the present plaintiffs. Though the present 1st plaintiff was not a party to those suits, as the compromise was executed by the *Karta* of the family and as he was not prejudiced thereby, it was binding on him. 14 M. I. A. 367, 1 A 651; 16 A. 231; and I Bom. H. C. R. App. 51 refd to. There was no proof that the compromise was the result of mistake in equality of position, undue influence, coercion or fraud, such as would be sufficient in law to vitiate it. Mere inequality of benefit could not afford sufficient ground for vitiating it. 2 M. I. A. 181; 7 M. I. A. 311; 14 M. I. A. 24; 8 C. 138 and 22 B. 482 Refd to. But that portion of the compromise, which dealt with properties not the subject of the previous suits, could not be enforced, since the petition of compromise was not registered as required by S. 17 of the Registration Act 30 C. 783, 26 I. A. 101=22 M. 503 referred to, 29 I. A. 9=20 A. 171 exp. and dist. In the result, the plaintiffs were given a decree in respect of four-fifth of the plaint properties, which were not the subject-matter of the previous suits and, as regards properties comprised in the previous suits, the compromise-decree was held binding. BIRBHADRA RATH *v.* KALPATARU PANDA. **1 C. L. J. 388.**

See also for the same case Col. 463 P. I.

197. O. XXIII R. 4 to O. XXVI R. 13 See Cols: 1604 to 1607 P. I.

198. *O. XXVI. R. 13—S. 396—Appointment of commissioner, discretionary—Decree finality of—Conduct of parties.*

It is not obligatory on the Court, in every case in which a decree is made for the partition of immoveables not paying revenue to Government, to appoint a Commissioner under section 396 of the Code of Civil Procedure; and such a decree is not, in all cases, to be considered pending till action is taken under section 396. Where such a decree, not followed by action under section 396, is created by the Court and the parties as a final decree in execution proceedings, it is not open to a party subsequently to contend that the decree had not become final. KRISH

C P Code (Act V of 1908) *(Contd.)*

NAMACHARIAR *v.* KUPPAMMAL. **31 M. 540.**

199. O. XXVI. R. 14 to O. XXXII. R. 1 See Cols: 1608 to 1611 P. I.

200. O. XXXII R. 1—S. 437--See 33 C. 1094 No. 1 *supra.*

201. O XXXII. R. 1, 4 (2) to O. XXXII. R. 4 (1) *See Cols: 1612 to 1618 P. I.*

202. O. XXXII, R. 4 (1)—S. 457—Guardian of minor plaintiff respodent—Married women — Custom — Alienation by father. Necessity for sale established. WADHAWA MAL *v.* WADHAWA. **8 P. R 1908=144 P. L. R. 1908=33 P. W. R. 1908** *See Col: 1618 No. 2898 P. I.*

203. O. XXXII. R. 6 to R. 15 *See Cols: 1619 to 1627 P. I.*

203. O. XXXII R. 15—463 See 33 C. 1094 No. 1 *supra.*

204 O XXXIII R 1 to O XXXVIII R 6 See Cols. 1628 to 1634 P. I.

204 a O XXXVII—Ch. XXXIX. Applicability of. See Jurisdiction of Small Cause Court. 1 S. L. R. 243.

205 *O XXXVIII R. 6--S. 483--Attachment on insufficient grounds--Damages--Proof of malice--Memo of objections withdrawn--Jurisdiction as to costs.*

An order under S. 483, Civ. Pro. Code, where the application has been made on insufficient grounds must necessarily cause damage to the credit and reputation of the party against whom the order is made, and general and special damages are recoverable.

Quaere:--Whether it is necessary to prove that the defendant acted maliciously in the above case.

The practice as to the form of an order when a memorandum of objection has not been stamped and has not been moved, does not seem to be uniform, but orders dismissing the memorandum in such circumstances have been made and there is jurisdiction to make the order. If there is jurisdiction for making an order dismissing an application, there is of course jurisdiction to make an order dismissing it with costs. 11 Q B. D. 674, Appl. PALANI KUMARASAMI PILLAI *v.* UDAYAR NADAN. **4 M. L. T. 303.**

206 O. XXXVIII R. 7, 12--*See Col. 1635 P. I.*

207 O. XXXVIII R. 16--S. 490--Attachment before judgement--Confirmation of attachment after decree--Starting point of limitation. 8 B. L. R. 567 Col. 1980 P. I.

208 O. XXXVIII R. 16—S. 490--*See 17 M. L. J. 488 No. 139 supra.*

209 O. XXXIX R. 1 to O. XLI R. 5--*See Cols. 1635 to 1653 P. I.*

210 O. XLI R. 5—S. 545—2. S. L. R. 24 No. 7 *supra.*

211 O XLI R. 6 to R. 20--*See 1654 to 1660 P. I.*

212 O. XLI R. 20—S. 559. 33 C. 329 No. 107 *supra.*

C P Code (Act V of 1908) *(Contd).*

213 O XLI R 21 to 23. *See Cols: 1661 to 1679 P. I.*

214 O XLI R 23—S. 562—Execution of decree—Limitation—Application for a "seal warrant." A. W. N. 1906 P. 27. *See Col. 2003 P. I.*

215 *O XLI R 23—S. 562—Letters Patent --Appeal—Remand, order of--Letters Patent, 1865 s. 15--"Judgment"--Transferability of occupancy holding.*

An order of remand passed by a single Judge of the High Court, under s. 562 of the Code of Civil Procedure, 1882, is a "judgment" within the meaning of s. 15 of the Letters Patent, and an appeal lies from such an order under the Charter. GOPINATH PATI *v.* MOHESHWAR PRADHAL. **35 C. 1096.**

216 *O XLI R 23--Ss. 562, 564--Illegal order of remand--Validity--Waiver--Appeal from final decree--Objection to remand--Appeal from order of remand after final decree:*

An erroneous order of remand does not affect the jurisdiction of a Court and consequently may be cured by consent. A party who has consented to an erroneous order of remand is not entitled to treat it as void and incapable of being validated by consent or waiver. No appeal can be filled against the order of remand after final decree.

When an order of remand has been made, its validity may be challenged directly and immediately by an appeal under S. 588, Cl. (28), or indirectly under S. 591 when an appeal is preferred against the final decree in the suit. The party affected by the order of remand should make his election. He may, if he chooses, prefer an appeal against the order of remand and obtain a stay of proceedings during the pendency of the appeal; he may, on the other hand, carry out the order of remand, take the chance of a successful termination of the suit in his favour, and, in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand. 5 C. L. J. 580 considered. BAIKUNTHA NATH DEY *v.* NAWAB SALIMULLA BAHADUR. **6 C. L. J. 547.**

217 O XLI R 25 to O XLIII R 1. *See Cols. 1679 to 1685 P. I.*

218 O XLIII R 1--S. 588. *See 98 P. R. 1908 No. 68 supra.*

219 O XLIII R 2 to O XLIV R 3. *See cols. 1685, 1686.*

220 *O XLIV R 3, S. 109—S. 600, 595—Privy Council -Application for leave to appeal—Substantial question of law—Suit below Rs. 10,000-Appeal to Privy Council, case "otherwise fit one for"—Question of general interest or public importance.*

In an application for leave to appeal to Her Majesty in Council in a suit valued at less than Rs. 10,000. The question

C P Code (Act V of 1908) *(Contd).*

was whether the provisions of sec. 600 of Civil Procedure Code, covered the appellant's case.

Held, that the fact of a substantial question of law being involved in the case is not, by itself, a sufficient ground for granting leave to appeal and that something more is required. It must, in addition, be a question of general interest or of great public and private importance or the like. (Banarsi Prasad *v.* Kashi Krishna Narain, 23 All., 227; Radha Krishna Das *v.* Rai Krishun Chand, 23 All., 415; and Moti Chand *v.* Ganga Prasad, 6 C W. N., 62, referred to)—BHAGWAN PARSHAD *v* THAKUR RUDR PARTAB NARAIN SINGH. **5 O. C., 168**

221 *O XLIV R 13—S. 608—Civil Procedure Code (Act XIV of 1882), s. 603—Special leave to appeal to Privy Council—Stay of execution of decree—Jurisdiction of Judicial Commissioner—Court executing decree, power of, to stay execution.*

The applicant obtained special leave from Her Majesty in Council to appeal against the decree of the Judicial Commissioner of Oudh, an application for leave to appeal to Her Majesty in Council having been rejected by the Judicial Commissioner.

Held, that the Court refusing the said leave has no power to stay the execution of the decree but the Court executing the decree, on a proper application, has power to stay execution so as to enable the applicant to apply to Her Majesty in Council to pass an order staying the execution of the decree pending the disposal of the appeal—ABDUL AZIZ KHAN *v.* JAHANGIR BAKHSH KHAN, **3 O. C. 243.**

222 O XLV R 1 to O XLVII R 1—*See Cols. 1686 to 1688 P. I.*

223 O XLVII R 1—S. 624—Review of judgment by another Judge—Clerical error —Application by minors for review of judgment—Jurisdiction. 3 O. C. 316 Col. 1745 P. I.

224 *O XLVII R 1, 4—S. 624, 626 (c)—Review of judgment before the Judge other than the one who delivered judgment—Jurisdiction.*

The defendant applied to an Assistant Collector who had passed an *ex parte* decree, for a review of his judgment. The said Assistant Collector directed notice to issue to the plaintiff and subsequently partly heard the application which was based not on the ground of the discovery of new and important matter or evidence, or of a clerical error apparent on the face of the decree but on other grounds. Before the application was disposed of, he was transferred. His successor dismissed the application on the ground that he had no jurisdiction.

Held, that where an application for a review of judgment on grounds other than those mentioned in section 624 is presented to the Judge who delivered it and he has thereupon directed notice to be given to the other party, the application may be heard and disposed of by his successor.

Held, also, that the Assistant Collector had jurisdiction. DUNYAPAT *v.* GANESHI, **3 O C 363.**

225 O. XLVII. R. 2 to. Sch: II. R. 1—*See Cols 1688 to 1690, P. I.*

226 *Sch: II. R. 1=S. 206—Execution of decree—Costs, question as to, referred in, by agent of judgment-debtor having no express power to refer it to—Subsequent ratification by principal of his agent's reference of the question of costs to arbitration.*

The respondents held a decree against the husband of appellant No. 1, in which there was a question as to costs incurred in an appeal to the Privy Council. In execution-proceedings of this decree, the decree-holders and the agent of the judgment-debtor applied to have this question of costs referred to arbitration. The agent was not specially authorised to refer the matter to arbitration. The reference was, however, subsequently ratified by his principal, the judgment debtor.

The award was objected to, on behalf of the appellants, on two grounds: Firstly, that Chap. XXXVII of the Code of Civil Procedure relating to arbitration did not apply to execution-prceedings: secondly, the award was illegal and void *ab initio* because it was made on the application of an agent not specially authorised in writing to make such an application.

Held, that Chap. XXXVII of the Code of Civil Procedure relating to arbitration applies also to execution-proceedings

Held, further, that where the principal, subsequent to the reference, ratified the conduct of his agent, such ratification cured the defect in procedure.—17 A. 106 (P. C.), Exp. 9 M. 451 24 C. 469 and 23 P. 629, refd. to. MUSSAMMAT SATTAR-UN-NISSA *v.* SHAIKH MUHAMMAD RUHULLA, **8 O C 263.**

227 Sch: II. R. 2 to. Sch. III. R. 11—*See Cols: 1620 to 1717.—*

Civil Rules of practice (Madras).

Step in aid of execution—Application for order absolute not in accordance with the Civil Rules of Practice—17 M. L. J. 596 Col. 2018 P. I.

Claim.

1 Arrears of rent—Decree—Attachment, 28 C. 382 Col. 1516 P. I.

2 To attached property—Possession—Title —Question for determination—29 C. 543 Col. 1517 P. I.

3 Claim in the alternative—Effect on suit where there has been no previous tender or payment of mortgage amount—24 M. 408 Col. 612 P. I.

Claim (Contd).

4 Claim of right--Practice--Rule to show cause--Explanation by Magistrate- 7 C. W. N 859 Col. 227 P. II.

5 Claim--Abandonment of---Or portion thereof--*See Act V of 1908 (C. P. C.) O. II R. II—S. 43 Col. 1402--1418 P. I.*

6 Claim--Parties to suit--Separate suit not barred--30 C. 134 Col. 1091 P. I.

7 Co-heirs--Decree against one of co-heirs of debtor--Transfer by him—23 A. 263 Col. 1524 P. I.

8 Interest—-Claim petition—-Order dismissing claim by mortgagees—11 M. L. J. 346=25 M. 555 Col: 1269 P. I.

9 *Party--Civil Procedure Code (Act XIV of 1882), Section 283--Objection by claimant to attachment allowed--Judgment debtor not made party to the proceeding—-Determination of ownership of property not conclusive against the rights of the judgment debtor.*

When an objection preferred under Section 278 of the Civil Procedure Code to the attachment of property made as that of the judgment-debtor is allowed, and the judgment-debtor, not being served with notice of the objection proceeding satisfies the decree, the decision as regards the ownership of the property is not conclusive against him. 4 *M. H. C. R.*, 472, *doubted.* AMBALATHILAKATH MOIDIN KUTTI *v.* AMBALATHILAKATH KUNHI KUTTI ALI. **25 M. 721.**

10 Possession—Appeal—Objection to attachment by judgment-debtor, as trustee—6 C. W. N. 63. *See Col: 1117, P. I.*

11 Right to receive a debt—Attachment of—Property in the possession of a judgment debtor—24 M. 20. *See Cols: 423 P. I.*

12 Petition—-Debt— Attachment—-Objection to attachment—Limitation—27 M. 67=13 M. L. J. 467.

13 Partition of property—Causes of action distinct 1 L. B. R. 1900 1902, P. 7—Col: 241, P. II.

14 Partition—Proceedings—Transferee of portion of estate—Lessee of share of estate for term—27 M. 361, Col: 568 P. I.

15 Proceedings order in claim--26 A. 382 Col. 1765 P. I.

16 Proof of—Insolvency—5 C. W. N. 91 Col. 1236 P. I.

17 *Claim by puisne incumbrancer--Prior incumbrancer party defendant--Lien of prior mortgagee--Apportionment of among several properties.*

While a Court may in a suit where a prior incumbrancer is a party defendant either order that the sale of the property should be held subject to the prior mortgage or that it should be sold free from the incumbrance of that mortgage if the prior incumbrancer so consents, there is no adequate authority for holding in a suit brought by a second mortgagee to bring to sale one out of several properties over which the first mortgagee holds a lien, that the first mortgagee can be compelled to assent to an apportionment of his lien among the different properties. Maharajah Kisher Pertab *v.* Lala Nund, 25 W. R. 388; Ram Dhun Dhur *v.* Mohesh Chundr, Cal. 406; Kanti Ram *v.* Kutubuddin, 22 Cal. 33, distinguished. MA KYAW *v.* MA SHWE MA AND ANOTHER. **1 L. B. R. 1900 1902 P 210.**

18 *Land purchased from ostensible owners --Claim to recover--Proof of purchase with notice.*

Where plaintiffs had, by giving possession and reporting to the thugyi years previously that they had sold the land outright to the first defendant, put him in the position of ostensible owner of the property, and first defendant in turn put the second and third defendants in the position of ostensible owners.

Held, that plaintiffs in claiming to recover from persons who had bought from the ostensible owners were bound to allege that those persons bought with notice, actual or constructive, that the land was not the absolute property of the ostensible owners, and to fix them with knowledge of this. U. TO AND ANOTHER *v.* R M. M. S. MEYAPPA CHETTY AND FOUR OTHERS. **1 L. B. R. 1900-1902 P. 160.**

19 Claim of eldest son to one fourth share of the general joint estate of the death of the mother, when the father marries again—Eldest daughter--Claim of to a share of the general joint estate on the death of the mother 1 L. B. R. 1900-1902 P. 23. *See Col. 246 P. II.*

Claimant.

1 Proof, quantum of—Mere suspicion of benami, 29 C. 543 Col. 1517 P. I.

2 Order in claim--27 M. 361 Col. 568 P. I.

3 Remedy of objector or claimant against order—High Court—Revisional Jurisdiction—Procedure—Practice—Attached property. 1 L. B. R. 1900-1902 p 180 Col. 1517 P. I.

4 Rival claimants—Letters of administration. 1 L. B. R. 1900-1902 P. 284 Col. 517 P. I.

Clause for forfeiture of property.

1 Mortgage Deed containing Redemption suit—Transfer of possession—Transfer of ownership, Evidence of. 1 L. B. R. 1900-1902 P. 215. *See Burden of Proof (Redemption suit).*

Clerical error.

Review of judgement by another Judge—Application by minors for review of judgement—Jurisdiction. 3 O. C. 316 Col. 1745 P. I.

Client and Solicitor's Clerk.

See Solicitor's Clerk and Client.

Clog.

1 *Mortgage--Clog on equity of redemption—Construction of document--Interest—Profit.*

Held, that the following terms contained

Clog (*Contd*).

in a usufructuary mortgage did not constitute a clog on the mortgagors' right to redemption :—

"The interest of the mortgage money and the profits of the lands mortgaged, have been declared to be equal. We shall obtain redemption of the mortgaged property from the possession of the mortgagee on payment of the whole of the mortgage money in a lump sum in the month of *Jeth* when the land is unoccupied by crops. The mortgagee is at liberty to cultivate the land mortgaged himself or have it cultivated by any other person. We shall have no objection. Should the whole or part of the land mortgaged be cultivated by us in any year, we shall pay the arrears due by us at the time of harvest and before the Government instalment has fallen due. If we raise any objection, the mortgage shall be at liberty to recover the same from us and our mortgaged and other moveable and immoveable properties by means of distress or a suit. Should any part thereof remain unpaid we shall pay it together with interest at one rupee per cent per mensem and the mortgage money in a lump sum at the time of the redemption of the mortgage. We shall not be entitled to redemption without its payment. 26 All., 559 distinguished. SETH CHHATAR MAL *v.* LALA BAIJ NATH. **A. W N 1906 p. 202.**

2. Mortgage — Redemption — Clog on equity of redemption—Lease to mortgagee—Public charitable property—Alienation of—Applicability of—Advocate general representing public charity—Adverse possession—Interest. MOHAMED CASSUM DHARAMSEY *v.* JOSEPH EZALIEL. **7 B. L. R 772.** *See Mortgage Redemption.*

3. *Transfer of Property Act IV of 1882--Ss. 60 and 61--Clog on equity of redemption--Deeds of further charge on property previously mortgaged--Bonds stipulating repayment of money borrowed within time fixed for redemption of a previous usufructuary mortgage--Foreclosure, suit for.*

The predecessors in title of defendants mortgaged, with possession, the property in suit for Rs. 1,000 by a deed executed on 16th July, 1891, and on the same date borrowed a further sum of Rs. 100 upon the same security. On 13th June, 1892, 25th March, 1894, and 15th October, 1895, they borrowed further sums The deeds of those dates were registered and recited that the aforesaid property was held upon usufructuary mortgage by the plaintiff under the deed of July 16th, 1891, that the sums now borrowed should be paid with interest within the time fixed in the original mortgage deed, and that the mortgagors should not be able to redeem the mortgage without payment of the amount due on the three subsequent deeds. The plaintiff brought a suit to foreclose his mortgage claiming the amount, due under all five deeds. The defendants admitted that the money secured by the deeds of July 16th, 1891, was due, but denied that the last three deeds created any further charge on the property.

Held, (*per* Wells, A. J. C.,) that the three last deeds, which practically amounted to fresh mortgages were not a clog on the equity of redemption and having regard to Ss. 60 and 61 of the Act, the plaintiff could enforce them against the defendants. The principle on which the prohibition of clogging mortgages is based is one of equity, that, when a man is borrowing and pressed for money, he may not have to assent to unreasonable terms, and, therefore, in the mortgage-deed, there must not be any provision, which fetters his right to redeem. But this principle does not apply to a case where a man has deliberately increased the amount of the mortgage-money by taking further loans, and equity will not deprive the mortgagee of his dues.

Held, (*per* Scott, J. C.), that the three last deeds did not create mortgages or practically amount to fresh mortgages, but that, having regard to the provisions of S. 60 of the Act, they did not clog or fetter the defendans' equity of redemption and could be enforced. 26 A. 559—A. W. N. 1904 P. 123 and 1 A. L. J. 579 Diss. RADHA KRISHNA *v.* SHEO DIAL. **8 O. C. 132.**

4 Clog on —Contract to pay off subsequent mortgages before redeeming prior mortgage. Validity—Contract to pay off on unsecured debt--DURGA PERSHAD *v.* DUKH ROY. **9. C. W. N. 789.** *See Mortgage (Redemption).*

5 Two or more subjects—Meaning of—Mortgage—S. 17 of the Court-fees Act not confined to cases where the relief claimed are cumulative. 30. M. 61. Col. 123. P. I.

6 Hard and inequitable condition in a mortgage deed. 6. O. C. 167 Col. 316 P. I.

Code.

1 Suit by Hindu Father for establishment of his right as guardian and for custody of his infant child. 26 A. 594 Col. 808 P. I.

2 Attachment—Pensions, political—Code. Essence of—26 M. 423 Col. 146 P. I.

3 Attestation of mortgage—Bond meaning of the word "attested"—Attestation in the presence of the mortgagor after having received from him a personal acknowledgement of the signature 27 B. 91 Col. 607 P. I

Co-Defendants--Resjudicata between.

See C. P. C. S. 13 Cols. 980 to 984. P. I.

Codicil.

1 Probate—Will with alterations in pencil—Practice 29 C. 311 Col. 81 P. I.

Co-emption.

1 *Punjab Pre-emption Act II 1905—Ss. 2 (3) and 14--Pre-emption-Suit commenced since the passing of the Act—Pre-emptor and ven-*

Co-emption (*Contd*)

dee being co-sharers--Priority--Co-emption.

Where a sale took place before the passing of the Act, but the suit for pre-emption was filed after the Act had come into force, the claim should, under cl. 3, section 2, be decided in accordance with the provisions of the Act.

Section 14 deals with several pre-emptors claiming in respect of the same property and does not provide for the case of a pre-emptor claiming against a vendee, who has equal right with him.

Where the pre-emptor and vendee are both co-sharers in a *Khata* the pre-emptor has no priority over the vendee and is not entitled to claim pre-emption, by himself, against the vendee of the whole or any part of the property sold. 54 P. R., 1882 and 94 P. R. 1904 (F. B.), R.

The right of pre-emption attaches to the entire bargain to which the right applies, and no change has been made in this respect by the Pre-emption Act. The claim, whether joint or several, must be for the entire property to which the right attaches.

The present Act has made no provision for co-emption. KHAN ZAMAN *v.* FATTEH SHER. **83 P R 1907.**

Cœricion.

1 Fear of prosecution—Contract. 7 B. L. R. 603 Col. 256 P. I.

Cœrcion and Pressure.

1 Undue influence--Distinction between-Plea of—25 B. 10 at 19 Col. 263 P. I.

Co heirs.

1 Decree against one co-heir of debtor --Transfer by him--Transferee could plead *jus tertu.* 23 A. 263 Col. 1524 P. I.

Coinage Act (Act XXIII of 1870).

See Col. 139 P. I.

Coinage and Paper Currency Act. (XXII of 1899).

See Col. 139 P. I.

Co judgment debtors.

1 Mortgage decree--One paying the whole decree debt—Lien. 26 B. 379 Col. 566 P. I.

Collateral agreement.

1 Brokerage on wagering contract whether void. 1 L. B. R. 1900--1902 P. 128 Col. 295 P. I.

Collection Charges.

1 Landlord and Tenant--Abwab—Rent—8 C. W. N. 529 Col. 126 P. II.

Collection Charges (*Contd*).

2 Trespasser--Mesne profits—Collection expenses. 23 A. 252 Col. 1490 P. I.

3 Trespasser—Mesne profits—Assessment of. 24 A. 376 Col. 1490 P. I.

Collector.

1 Aquisition of land by--Owner--Land--Notice of enquiry--Government, power of, to acquire property for a company--Land aquisition proceedings by collector -Jurisdiction --Collector holding enquiry, whether a judicial officer. 30 C. 36 Col. 840 P. I.

2 Adjudication by--Stamp--Reference to Chief Court, when may be made--Powers of court as to documents not put in evidence. 131 P. L. R. 1906 Col. 883 P. I.

3 Award of collector under--Subsequent reference to the court under the Land Acquisition Act S. 19, whether could be made. GOVIND RAO BADHAS *v.* COLLECTOR OF NAGPUR. **2 N. L. R. 172.**

4 Authority of—Collector authorized by Board of Revenue to raise loan—District Registration of a deed concerning lands situated in separate Registration Sub-district 3 C. L J. 165 cols: 459. 811 P. I.

5 Certificate of—Suit relating to right to realize revenue—Time granted to procure certificate 25 A. 73 Cols: 143 P. I.

6 Duty of—Application by collector for enquiry may be made—Costs of enquiry. 6 C. W. N. 898 Col: 126 P. I.

6 Execution of—Collector contravening the accretal command of a Civil Court in execution--Jurisdiction of Court. 28 B. 233 Col: 1152 P. I.

7 *Jurisdiction of--Collector's Revisional powers in Darkhast case--Regulation VI of 1803-S. 9—Regulation VII of 1828, S. 3—Grant by Tahsildar without consulting Municipal Council--- Validity of grant---Appeal—-Darkhas, Rules.*

Where in the matter of a grant of house-site an order passed by the Tahsildar was after appeal filed in the Sub-Divisional Officer's Court set aside by the Collector, and the order of the Collector was communicated to the Tahsildar by the Sub-Divisional Officer

Held, that order of the Tahsildar was not set aside legally.

Held, also, that Section 9 of Regulation II of 1803 did not apply to the case since the matter was not governed by any Regulation in force in 1803 or by any Regulation subsesequently enacted. The matter was governed by executive orders of Government which directed that the right of appeal from a Tahsildar's order with reference to the grant of a house-site should lie to the Sub-Divisional Officer (not to the Collector), and that the order of the Sub-Divisional Officer should be final. In the matters not dealt with by the Regulations the Collector has no revisional power similar to that given to him by the Regulations in matters dealt with therein, and the Collector's order on appeal to the

Collector (*Contd*).

Sub-Collector could not be regarded as an order made by the Collector in the legal exercise of his revisional powers.

Judgment reported in *M. L. J*, 1902. page 417, *reversed*. SAPPANI ASARI *v*: THE COLLECTOR OF COIMBATORE. **M. L. J., 1903, p. 472=26 M, 742.**

8 Meaning of—Collector can not delegate his to Deputy Colector—Legality of award. 8 O. C. 118 Col. 838 P. I.

Collectorate.

Duty of collectorate office—Land Revenue Rules—Rule 29—Sale to recover arrears of revenue—Mistake in challan as to Towzi number and registered owner of estate—Suit to set aside sale—Endorsement on back of money order.

The plaintiff in remitting by a revenue money-order revenue payable in respect of an estate made two mistakes, a mistake in the Towzi number and a mistake in the name of the registered owner, the name of the estate and the amount of the revenue in respect of that estate was correctly stated on the money-order. The revenue reached the Collectorate office in due time but was credited to a wrong estate. The estate in respect of which the revenue was remitted was sold for arrears of revenue and the plaintiff brought the present suit to have the sale set aside on the ground of there being no arrears.

Held, that the claim must be decreed, that it was the duty of the officers of the Collectorate, under Rule 29 of the Land Revenue Rules, to give the plaintiff an opportunity of rectifying the mistakes.

That the endorsement on the back of the money-order to the effect that the remitter is to be liable for any mistake and that the Collectorate is to be guided by the Towzi number, did not relieve the Collectorate from doing that which under the Rules their officers ought to have done. 25 *Cal.* 833 (P. C.) referred to. SYED SHAH HAMID HOSSEIN *v*. CHWDHRY SHAIKH MUKHDUN RAZA. **9 C. W. N. 300=32 C. 229.**

Collusion.

1 In a suit on mortgage, where collusion and fraud are pleaded by a subsequent auction purchaser of the mortgaged property, the onus is upon the plaintiff. 5 C. W. N. 403 Col. 298 P. I.

2 Suit by person dispossessed of immoveable property—Physical possession-Constructive possession—Tenant. Dispossession of—Collusion between tenant and stranger—Cause of action. 6 C. W. N. Col. 313 P. I.

Colonial Courts of Admiralty Act 1890 (53 and 54 Vict. C. 27).

Admiralty jurisdiction—Maritime lien—Damage done by a ship. 29 C, 402 Col. 2041 P. I.

Commencement of Act.

Validity of Notifications under—Collector—Notice 28 C. 487 Col. 58 P. II.

Commission.

1 Accounts to examine—When he to take Evidence under S. 398. C. P. C. He not a judge or an Arbitrator—His decision, value of 6 C. L. J. 105 Col. 1609 P. I.

2 Account to examine—Report of a Commissioner—Order confirming the report, appeal from—Appeal Court, power of, to deal with findings of fact by the Commissioner 5 C. W. N. 692 Col. 1606 P. I.

3 *Deduction of by mortgagee—Mortgage executed by Hindu widow to pay off her husband's debts—Mortgage made by Hindu widow for benefit of her husband's estate—Commission deducted by mortgagee from mortgage-money advanced by him—Possesssion on redemption, when mortgagor entitled to—Khali Fasl of Jeth, stipulation as to taking of possession by mortgagor after redemption in—Costs in redemption suits—New plea taken by plaintiff at time of argument.*

On the 17th of May, 1881, Ishri Singh's widow mortgaged certain lands to K. S. for Rs. 10,000 at 12 per cent per annum, with compound interest. Out of this money, the widow paid Rs. 9,950 to B. N. in satisfaction of a debt due to him from her husband, which carried interest at 15 per cent. per annum and Rs. 100 were deducted by the mortgagees on account of *tipawan* (by way of commission). The mortgagee obtained a decree for possession, and on the 22nd April, 1885, obtained possession of the mortgaged property. Subsequently the reversionary heirs of Ishri Singh sued the mortgagees for redemption and possession of the property mortgaged. An issue to the following effect was framed:—"Was the mortgage dated the 17th May, 1881, for consideration and for payment of Ishri Singh's debt?" Later on in the course of the argument, the plaintiffs were allowed to urge that even if the issue be found in the affirmative, the mortgage was invalid because there was no danger of the property being sold for the debt due to B. N. and it was not beneficial to the estate.

Held, that the plaintiffs should not have been allowed to raise the new plea at a last stage of the suit, and should have been limited to the case made out by the pleadings and the issue as to the validity of the mortgage.

Held, *also*, that the mortgage was one which was beneficial to the estate and such as a prudent owner might have made. The defendants were, therefore, entitled to be paid compound interest for the period between the date of the mortgage and the date on which they obtained possession.

Held, that the appellants were not entitled to claim from the respondents the sum of Rs. 100 which they took by way

Commission (*Contd.*)

of commission, and which did not benefit the estate.

Held, also, that the plaintiffs were entitled to redemption on payment of the mortgage-money within 6 months fixed by the Court in spite of the condition in the deed of mortgage about their taking possession in the *Khali Fasl* of *Jeth*.

Held, also, that in redemption suits, parties should pay and be paid costs in proportion to success and failure as regards the amount alleged to be due on the mortgage unless there are special reasons to the contrary.—KALKA SINGH *v.* SHEO RAJ SINGH, **4 O C 347**.

4 *Of examination of persons not exempted by C. P. C.—Jurisdiction of Civil Court to issue such commission—Legality*

A Civil Court has no jurisdiction to issue a commission for the examination of a witness on grounds other than those mentioned in the Civ. Pro. Code ; such jurisdiction is only conferred in the case of persons who are exempted under the Code from attendance, or are unable from sickness or infirmity to attend.

The High Court has power to interfere, under S. 15 of the Charter Act, with the orders of Subordinate Courts passed without jurisdiction 9 C. 295 (P. C.) F. SOMASUNDRAM CHETTIAR *v.* MANICKAYASKA DESIKA GNANASAMBANDA PANDARA SUANADHI **8 M. L. T. 246**.

5 To Examination of person--Evidence of purdanashin lady by commission is a part of the record. 35 C. 28 Col. 1606 P. I.

6 To fix boundaries--Confusion of--Jurisdiction of Court--Equity. 29 B 73 Col. 233 P. II.

6 Exclusion of evidence taken on--Hindu Law--Adoption--Brahmo father's right to give his son for adoption—Pleadings—Issue—Waiver--Onus—Right of party to use of. 30 C. 999 Col 2050 P. I.

7 Additional costs not entered in the decree, how recovered. 10 C. W. N. 234 col. 1608 P. I.

8 To take evidence--Practice--Civil cases 30 C. 934 col. 387 P. I.

9 To enquire into the charges against the Maharaja of Panna not a court--Appeal to Privy Council--Act of the Governor General of India in council--Act of State. 6 B. L. R. 763 Col. 47 P. I.

10 To examine witnesses--Witnesses--Issue of summons--Issue of commission--*Bona fide* application for summons--Right of court to prevent abuse of process--Charter Act. 28 M. 28 col. 1195 P. I.

11 To examine witnesses--Arbitration --Powers of Court to issue. 7 B. L. R. 560 Col. 1206 P. I.

12 To make partition---Preliminary order—Commissioner's report--Order for sale 5 C. W. N. 128 Col. 830 P. I.

13 Evidence taken on, not evidence in suit until tendered by party. 9 C. W. N. 794 Col. 1605 P. I.

Commissioner.

1 Commissioner of kumaun--Power of High Court to revise order of. 21 A. 348 Col. 501 P. I.

Note—21 A. 348 read for 21 A 381.

2 Commissioner of Police—License--Eating house--Discretion to refuse license. 4 B L R 1--26 B. 396 Col. 447 P. I.

3 Commissioner's report in partition suit --Modification of jurisdiction of Court to modify--2 A L J 709--28 A 75 Col. 1606 P. I.

4 Commissioner's report--Partition deed --Decree made in accordance with--29 B 366 Col. 873 P. I.

5 Commissioner's report—Preliminary order—Order for sale—5 C W N 128 Col. 830 P. I.

6 Commissioner's duty--Partition suit—Appointment of only one commissioner. 6 B L R 586 Col. 1606 P. I.

7 Commissioner in partition suit--Appeal—Order refusing application for appointment of commissioner to effect division of property--28 M 127 Col. 1984 P. I.

9 *Commissioner's power of reviewing an* ex-parte *order—Finality—Village Chowkidars Act VI of 1870, (B. C.), Ss. 58, 60 and 61—Jurisdiction of Civil Court --Necessity of notice —Regulation VII of 1822, S. 21.*

If an order has been improperly obtained from a Court, for instance, without service of the notice of proceedings upon the party sought to be affected, the Court has an inherent jurisdiction, as soon as it is apprised of the fact, to recall the order on the ground that no Court will tolerate an abuse of its process.

Under S. 21 of Regulation VII of 1822, which is made applicable, by S. 60 of Act VI of 1870 (B. C.), notice of the proceedings should be given and the Commissioner has jurisdiction to set aside an *ex parte* order made without service of notice to the party interested.

The word 'final' in S. 61 of Act VI of 1870 (B. C.) means that there could be no interference by an appellate Court and does not preclude a review by the Court which made the order.

An order made by the Commissioner, without notice to the interested party. is not binding upon him and does not oust the jurisdiction of the Civil Court to determine the question of title to the property affected by the order.

Semble:—An order regularly made under S. 61, is final and conclusive in reference only to the appellate jurisdiction of the superior revenue authorities and such finality does not affect the jurisdiction of the Civil Court to decide the question of title to the property. HIRALAL MUKERJI *v.* PREMAMOYEE DEBI. **2 C L J 306**.

10 Commissioner's report—Uncontested in Court below—Power of appellate court to go behind the report. 4 C. L. J. 37 Col. 110 P. II.

11 Commissioner's report--Reference to--Appeal against decree based on Commissioner's report where the parties had agreed

Commissioner (*Contd.*)

to abide by his report. 29 C 306 Col. 1472 P. I.

12 Commissioner, report of—Order confirming the report, appeal from—Appeal court, power of, to deal with findings of fact by the Commissioner. 5 C. W. N. 692 Col: 1606 P I.

13. *Commissioner, Special—Power to sell—Vesting the property in the Special Commissioner—Procedure.*

The Court has no power or jurisdiction whatever—inherent or conferred—first, to appoint a Special Commissioner for sale of immoveable property; secondly, to vest immoveable property in a Special commissioner; and, lastly, to empower any such Special Commissioner to execute a conveyance of such property. ANANDRAO BHAI *v.* SITABAI, **10 B. L. R. 1176.**

Committee.

1. Powers and duties of—Transaction of business by committee or by circulation—Control over Manager. 15 M. L. J. 185 Col: 75 P. I.

2 Of a Lunatic—Remuneration to a Committee Court—Jurisdiction to pass the order—Next-of kin of lunatic not entitled to be heard on the application—Lunatic when sane can impeach the order.

The Court has a discretionary power to allow a Committee of a lunatic, appointed under Act XXXIV of 1858, remuneration, but will only allow it under special circumstances. When some relation or friend of the lunatic can be found who is willing to act as Committee, the Court will not, as a rule, allow remuneration to such a person: but when no such person can be found and an official of the Court has to be appointed, the Court will exercise its discretion and allow remuneration. But in all cases the Court has the jurisdiction.

On an application for remuneration by a Committee of a lunatic, the next-of-kin of the lunatic have no right to be heard in their own interests, as they have no vested interest in the estate. But a lunatic, if he becomes of sound mind, has the right to impeach any order which he considers has been made without proper regard to his interest; and he can impeach the order for remuneration even after the Committee has passed his accounts. This right devolves on the lunatic's death upon his heirs. MULJI DAMODAR *v.* ROMANJI MANCHERJI. **10 B. L. R. 772.**

Common business.

Act done by husband in pursuance of binding on wife—Sale of immoveable property by husband without knowledge of wife. 1 L. B. R. 1900—1902 P. 11 Col. 244 P. II.

Common carriers.

1 Liability for negligence—Carriers by sea under common law—Foreign carriers contracting in Calcutta, law applicable to—Negligence and misfeasance. 28 M. 400 Col. 332 P. II.

Common carriers (*Contd.*)

2 Railway Company—Negligence—Duty in carrying passengers and luggage—Burden of proof. 28 C. 401 Col. 824 P. I.

3 Right by prescription—Riparian owners—Right to construct dams on a stream—Custom—Injunction—Suit by plaintiffs on behalf of a class. 29 C. 100 Col. 1585 P. I.

Common Land.

1 *Mortgage—Mortgage of common land—Loss of security—Right of mortgagee.*

Where the defendants mortgaged a part of a common-holding with the plaintiff and the latter on being deprived of the security by wrongful act of the defendants claimed that another part of the mortgagors share in the common holding be made available to him by way of mortgage

Held, that the claim was valid. 21 W. R. 293, 18 Mad., 492, 101 P. R. 1893, 32 P. R., 1900, S. C., P. L. R., 1900 p. 337 referred to. SUNDAR SINGH *v.* NATHA. **89 P. R. 1903.**

Common Manager.

His right to sue for recovery of possession of land. 8 C. W. N. 214 Col. 132 P. II.

Community ill-defined.

1 *Title to particular office or emolument—Capacity to hold.*

The whole of an ill-defined community, such as all the members of the Vadagalla community, wherever residing, cannot be entitled to any particular office in a temple to any emoluments or perquisites thereof. SUBBARAYA MUDALIAR *v.* VEDANTA CHARIAR. **14 M. L. J. 171; 28 M. 23 at 24.**

Communities Fluctuating

Inamdar—Dasname Sanyasi and Gosavi Zundivale—Kadim (ancient) haks—Escheat—Corporate body—Duty of the Court, if possible, to find legal origin of existing facts.

The plaintiffs, whose title as Inamdars of a village dated back to 1762, sued on the strength of their title as Inamdars to recover, on account of certain haks, a sum of money which they alleged was due to them and was wrongly taken by the defendant. The defendant alleged that the haks were kadim (ancient), that is, which came into existence prior to the Inam grant of the village to the plaintiff's ancestors, and had escheated to Government. The Court below allowed the claim. On appeal by the defendant:—

Held, confirming the decree, that in order to make out that the Government had become entitled to the haks (Dasname

Communities fluctuating (*Contd.*)

Sanyasi and Gosavi Zundivale) by virtue of an escheat, three things must be established namely, (1) that there was a heritable grant to individuals, (2) that the heirs of those individuals have failed, and (3) that on the happening of these two conditions the haks would escheat Government. The burden of establishing a title by escheat lies on those who assert it. The expressions Dasnama Sanyasi Gosavi Zundivale do not indicate individuals. They indicate a group or community of Sanyasi or Gosavi. The law of the country recognizes fluctuating communities as legal personale capable of owning property, as for instance the caste and the village, and the hakdars in the present case were communities composed of the religious element their name indicate. A corporate body is dissolved by the total loss of all its members, but on such dissolution there is no escheat to the Crown either of its lands or its rent-charges. On the dissolution of the corporation, the cause of the grant fails, and the effect of a dissolution on the corporation's rent-charges is that they become extinguished. As in the case of the death of grantee of an annual payment out of land to last during the term of his life the payment sinks into land on its determination. so where the grantee is a community and the grant is to last during the term of its existence on its dissolution, a similar result follows. Where there has been a well established user extending over a long series of years, it is the duty of the Court, if possible, to find a legal origin to the existing facts. SECRETARY OF STATE *v.* HAIBATRAO HARY, 6 B L R 43=28 B 276.

Community, village.

Parsi Fire Temple—Atash Behram—Parsi Community of Udwada-Trust—Suit—Capacity to hold property. 28. B. 20 Col 1210 P. I.

Commutation

1 Rent in Kind (howli) commuted into rent in money (nakdi)—Court of Wards, power of, to make such commutation—Benefit of estate—6. C. L. J. 727 Col: 177 P. II.

2 Bhowli and Nagdi rent—Reconversion. 6. C. L. J. 369 Col· 178. P. I.

3 *Jurisdiction - Rent Court—Commutation of rent—Rent Act (XXII of 1886), Ss. 36, 39.—*

Held, that a tenant in possession of his holding at the time of the passing of Act XXII of 1886 was a statutory tenant under S. 36 of the Act and his rent could not be enhanced otherwise than under S. 39 of the Act.

Held, also, that a Rent Court had no jurisdiction to commute the rent of a statutory tenant payable in kind to a rent payable in cash.—DURGA SINGH *v.* THE DEPUTY COMMISSIONER, 2 O. C. 254.

Company.

1 Accounts—Decree directing a company to furnish accounts—Transfer of business. 7 B. L R. 1905, P. 107=29 B. 107 col. 22 P. I. Note 29, B. 107 read for 29, B. 197.

2 Acquisition of land for—Owner—Land—Notice of enquiry—Government, power of, to acquire property for a company—Jurisdiction—High Court, power of, to question validity of Land Acquisition proceedings 30, C. 36 Col. 840, P. I.

3 Agreement between company and director how far binding on company—Principal and agent—General authority 10 P. R. 1905, Col. 317, P. I.

4 *Allotment Company—Service of notice on members—Death of member—Company's knowledge of death.*

Where a member has died and his death has not been communicated to the Company, all notices which ought to be served upon him are duly served if they are sent addressed to his registered address, whether they actually come into the hands of his executors or other representatives or not.

The communication to the Company of the fact of a member's death ought to be a formal communication to the Company of the fact by some one authorised to make it as in some way representing the deceased. A mere rumour reaching the ears of an official of the Company or actual information given by some one in no way interested in the matter, will not cause the Company to have knowledge of the fact. TRICUMDAS MILLS CO. *v.* HAJI SABOO SIDICK. 4 B. L R. 215.

5 Appeal to Privy Council—Application for leave to appeal—Appeal against order passed under the Act—Test of pecuniary sufficiency or substantial question of law case otherwise fit for appeal. 27 B. 415 Col. 1289 P I.

6 *Articles of Association—Companies Act (VI of 1882)—Proxy—Articles of Association requiring proxy to be share-holder of the Company and to be named—Person appointed to act sufficiently described but not named—Becoming share-holder before holding of meeting.*

Under the Articles of Association of a Company the share holders were authorized to vote by proxy. It was stated that no person should be appointed or had authority to act as a proxy who was not a share-holder of the Company, and that no person should be allowed to vote or act as a proxy, unless the instrument appointing him should have been deposited at the registered office of the Company not less than forty eight hours before the time for holding the meeting at which the person named in such instrument proposed to vote. One of the share-holders appointed a certain person not

Company (*Contd.*)

by name but as holding a certain position. The person appointed was not a share-holder on the date when the instrument appointing him was executed, but before the meeting in which he claimed to act as proxy he became a share-holder and his name was entered as usual in a register of proxies kept by the Company as the person who would use the proxies at meetings. It was objected that the proxy was invalid for the person appointed was not named in the instrument and was not a share holder on the date when the instrument was executed. The High Court allowed the objection.

Held, by the Privy Council, that the decision of the High Court was not correct. Although the person appointed was not named in the strictest literal sense of the word "named," yet he was sufficiently described for all business purposes in the proxy, and that he was qualified to act as proxy before the meeting took place by becoming a share-holder of the Company. THE BOMBAY-BURMA TRADING CORPORATION *v.* DORABJI CURSETJI SHROFF. **7 B. L. R., 99=29 B. 126.**

7 Bombay Tramways—Agreement by corporation with third persons for funds to effect purchase and for working the tram ways after purchase, validity of—Notice. 28, B. 502 Col. 195 P. II.

8 Concealment of sale—Pre-emption. 27 P. L. R. 1903, Col. 1771, P. I.

9 Contract by. 10, P. R. 1905=100 P. L. R. 1905, Col. 317 P. I.

10 *Contract entered into before a company is formed—Ratification—Liability of Company.*

No contract can bind a company which has been entered into with regard to it when as yet it has no existence. The question of adoption by the company of a contract entered into before it is formed is a question of fact.

Held, that the plaintiff had failed to prove that the defendant company had adopted the contract set up by him so as to be bound by the same and that the plaintiff's claim was therefore invalid. THE GANESH FLOUR MILLS Co., LTD., *v.* PURAN MAL. **129. P. L. R. 1904=2. P. R. 1905.**

11 *Contract with a company—Memorandum and Articles of Association—Commission contract—Contract with promoters.*

The Memorandum and Articles of Association of a Company embody only the social contract, that is, a contract between the share-holders *inter se*, and possibly between the shareholders and the directors, and do not constitute any contract between the Company and its promoters. AHMEDABAD JUBILEE S. & M. CO. *v.* CHHOTALAL CHAGANLAL. **10. B. L. R. 141=3. M. L. T. 197.**

12 *Directors of—Board of Directors—Quorum of three members—Only one member remaining on Board—Powers of the member.*

A Resolution of the Directors of a Company provided that three members should form a quorum at the meeting of the Directors. Of the three Directors, two resigned, leaving only one in charge of the affairs of the Company. The accounts of the Company having been prepared, the question arose as to how and who should pass the accounts. On the Director applying to the Court for directions: *held*, that three courses were open to the Director.—

(1) The Director can get five members of the Company to summon a meeting under S. 78 of the Indian Companies Act, 1882.

(2) The Director himself can call an Extraordinary General Meeting: and his act in doing so would be valid under Art 71.

(3) The Director can move the Court to call a general meeting. SORABJI CURSETJI *v.* THE SCIND AND PUNJAB COTTON PRESS CO., LTD., **8 B. L. R. 478.**

13 Loan or security of deposit—Liquidation—Suit by liquidator for recovery of loan. 28 M. 240 Col. 1445 P. I.

14 In liquidation—Decision by court in the matter of winding up of Company—Parties failure to follow procedure appeal—Limitation—A. W. N. 1905. P. 75—27 A. 409 Col. 744 and 1068. P. I.

15 Limited Company—Defendant—Desolution of—Debts and liability of—Transfer of the properties of the Company to a third party—30 C. 961 Col. 1150 P. I.

16 *Meeting—Voting—Companies Act (XII of 1895)—Proxy—Qualifications of, under Articles of Association.*

The right of a share-holder of a corporation to vote by proxy depends on the contract between himself and his co-shareholders, and where parties have a right depending upon the contract between them and other parties, there all the requisitions of the contract as to the exercise of that right must be followed. *L. R. 23 Ch. D. 14 referred to.*

One of the articles of a company provided: No person shall be appointed or have authority to act as a proxy who is not a share-holder of the company.

Held, that the article required that the prescribed qualification must exist both at the time when the appointment is made and also at the time when the authority to act under it is exercised. *In the matter of* BOMBAY BURMAH TRADING CORPORATION. **4 B. L. R. 953=27 B. 113.**

17 Power of Directors to lend money on equitable mortgage—Bank of Bombay—25 B. 52 Col. 8 P. II.

18 Power of Directors—Rights of Pawnee—Ratification—Lien—57 P. R. 1902 Col. 360 P. I.

19 *Public Company—Powers of Directors and other officers—Presumption.*

Though any one dealing with a Company is bound to satisfy himself that the person with whom he acts as representing the Company is acting within the powers which he might possess under the Articles of Association in this country, he is not bound to see that the formalities or pro-

Company (*Contd*)

ceedings necessary to confer such powers upon him have been observed. If a person dealing with a Company has satisfied himself that such dealings are within the scope of the Company's Articles of Association and could be validly entered into by persons duly empowered on behalf of the Company, and he finds a representative of the Company entering into such dealings on behalf of the Company and acting as if duly empowered, he is not bound to enquire further whether, as a matter of fact such representative of the Company has been so empowered by the Company. He is entitled to infer the fact of the necessary authorization. THE KRISHNA MILLS COMPANY LD. DELHI *v.* GOPI NATH. **81 P. R. 1903=47 P. L. R. 1904.**

20 Principal office of Company—Irregularity cured - Insolvency—Creditors application—5. C. W. N. 91, Col. 1236, P. I.

21 Residence of—Contract by agent—Presumption of personal liability of agent—27, M. 315, Col, 371, P. I.

22 Rules of—Directors of a company—Misappropriation by—Power of Court to make an order under S. 214 of the Companie's Act rendering all the directors jointly liable for misappropriation—Jurisdiction of District Court to wind up a Company—29, C. 688—Col. 745, P. I.

23 *Shareholder's right to inspect and take extracts—Special interest and definite object, necessary—Suit far declaration of right to inspect, in the nature of application for writ of* mandamus*—Conditions on which relief can be given. Bank of Bombay.*

A suit brought against the Bank of Bombay by a shareholder for a declaration that he is entitled to inspect the register of shareholders and to copy and take extracts from such register is, in its nature, though not in its form, somewhat of the character of an application for a writ of *mandamus*, and the principles regulating the issue of that prerogative writ should apply to a great extent to the granting of the relief prayed for in such a suit.

A writ of *mandamus* will not be allowed to issue unless the applicant shows clearly that he has the specific legal right, to enforce which he asks for the interference of the Court, that he has claimed to exercise that right and none other, and that his claim has been refused.

When, therefore, before the suit, the plaintiff claimed an absolute right to inspect and take extracts from the Bank's register of shareholders—to which he was not entitled—and was refused, but in the suit claimed a more qualified or restricted right.

Held, that the suit could not succeed.

The right to inspect the documents of a corporation which at Common Law belongs to every member of such corporation is not an absolute right, but is confined to cases where the member of the corporation has in view some definite right or object of his own and to those documents which would tend to illustrate such right or object.

Where it appeared that the plaintiff had no special interest in any of the matters he complained of, or any interest other than or different from that of each member of the corporation, and had no definite right or object of his own to aid or serve in asking for inspection of the register or right or object which the register would illustrate, but his object was to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs.

Held, that no relief could be granted to the plaintiff 2 B. and Ad. 115 followed. THE BANK OF BOMBAY *v.* SULEMAN SOMJI. **12 C. W. N. 825 (P. C)**

24. *Shares — Transfer of—Evidence Act 1872, Section 115— Estoppel—Company—Company refusing to recognise the purchaser as share-holder after granting pucca receipts.*

The plaintiff purchased, in 1898, three shares of the defendant company incorporated under the Indian Companies Act, 1882. The shares were duly transferred to the plaintiff's name, and the company granted a *pucca* receipt on the strength of which the plaintiff paid his purchase money. The Company subsequently refused to recognize plaintiff as the owner of the three shares on the ground that one of the transfer deeds in the claim of title to each share was forged. The plaintiff contended that the company was estopped from this defence.

Held, by *Jenkins*, C. J., that the *pucca* receipt by itself can give rise to no legal liability and that the grant of it by the company did not estop the company from saying afterwards that the plaintiff could not be recognized as a share-holder on the ground that one of the intermediate transfer deeds was forged.

Held by *Russell*, C. J., that until the certificate is handed back to the purchaser with his name duly entered thereon as the transferee the company is not estopped from saying that the prior transfer being forged is no transfer and that the transfer receipts not having been signed by the company or its chief agent did not impart that certainty which is essential to create the estoppel. L. W. G. RIVETT CARNAC *v.* THE NEW MOFUSSIL COMPANY. **3 B. L. R., 846=26 B. 54.**

25. Shares—Transfer of—Rights of transferees—Estoppel—Hindu Law-Property held by head of mutt. 26 M. 79 Col: 237 P. I.

26 Suit by—Verification of plaint by principal officer. 9 C. W. N. 608 Col: 1433 P. I.

27. Transfer of business to a limited Company—Liability to account. 29 B. 107 Col: 294 P. I.

Companies Act VI of 1882.

1 See Act VI of 1882 Cols. 741 to 750 P. I.

Companies Act VI of 1882 (*Contd*)

2 S. 169—Appeal from order winding up a Company—Limitation—Extention of time—Claim for balance of money due to contractor. 95 P. R. 1908 Col. 1738 P. I.

Companies (Memorandum of Association Act XII of 1895).

1 Ss. 9, 10—Appeal against order passed under the Act—Test of pecuniary sufficiency or substantial question of Law—Case otherwise fit for appeal. 27 B. 415 Col. 1289 P. I.

Company Law—Responsibility of Railway company as carriers. 31 C. 951 Col. 825 P. I.

Compensation.

1 Acquisition of portion of a patni. Division of compensation. 7 C. W. N. 1903 P. 130 Col. 14 P. I.

2 Appointment of compensation money—Rent fixed in perpetuity. Landlord and tenant. 30 C. 801 Col. 847 P. I.

3 Apportionment of compensation money, principal of—Landlord and tenant. 28 C. 146 Col. 857 P. I.

4 Appeal—Attachment before judgment—Compensation for. 24 M. 62, Col. 1223 P. I.

5 *Apportionment of, principal of—Maurasidar—Dur maurasidar—Enhancement—Contract of tenancy—Transfer of Property Act—Dar-maurasi mokarari, what it connotes—Rent, abatement of—Contingency, value of, onus of proof, on whom.*

The Transfer of Property Act gives no authority to a landlord to enhance the rent of his tenant during the term of the lease, whether it be in perpetuity or for a definite term.

The word *maurasidar* does not convey the idea of a right to fixity of rent; *durmaurasi mokarari* implies fixity of rent.

The right of enhancement is not an incident of every contract of tenancy.

In a proceeding for apportionment under the Land Acquisition Act, no abatement of rent can be made without the consent of the parties.

The compensation is to be apportioned between the parties according to the value of the interest which each of them parts with. The zemindar has a right to the fixed rent and the loss he sustained is of so much of his rent. Any other possible injury, such as the chance of the *patnidar* throwing up the land and its being diminished in value by what has been taken by Government, and still remaining, as it did, liable to pay the same revenue; is not appreciable and cannot be taken into account. If there is no abatement of the rent and the *patnidar* continues liable to pay to the zemindar the same rent as he had to pay before, there would be nothing for which the zemindar is to receive compensation. The same rule applies to the case of a lease in perpetuity with fixity of rent. 20 W. R. 370 followed. 7 C. 385 commented on.

The burden of proof is on the zemindar to make out his claim and show as to the value of a particular contingency to him. 28 C. 146 followed. SATI CHUNDER CHATTOPADHYA *v.* RAI JATINDRA NATH CHOWDURY. **7 C. L. J. 284.**

6 On acquisition land—Compensation for severance. 28 C. 685 Col. 858 P. I.

7 Bombay City Improvement Act—Award by tribunal of appeal. 29 B. 519 Col. 224 P. I.

8 *For building—Grant of land in cantonment—Resumption of land—Notice—Condition precedent—Compensation. Payment of.*

A grant of a certain plot of land in a cantonment was sanctioned and made to one *E.* One of the conditions of the grant was as follows:—

"Permission to occupy such ground in a military cantonment confers no proprietary right, it continues the property of the State. It is resumable at the pleasure of Government, but in all practicable cases one month's notice of resumption will be given, and the value of the buildings which may have been erected thereon, as estimated by a committee, will be paid to the owner."

E. erected a bungalow on the land in question and sold the bungalow and all his interests in the land to *H.* The Secretary of State for India in Council brought a suit to recover possession of the property from the defendants, executors of *H.* It was contended on behalf of the defendants that the suit could not be brought as one month's notice given was not a legal one, for it was given to one only of the three executors and that the value of the buildings was neither estimated nor tendered.

Held, (1) that the giving of notice was not a condition precedent, the provision about it being nothing more than a statement of what would be done where practicable for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve.

(2) That even if it be assumed that notice was a condition precedent to the right of resumption, it was clear that the executors on their own showing were joint occupants and notice given to one of them satisfied the provision.

(3) That payment was not made a condition precedent to resumption, though no doubt the right to that payment arose on resumption. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* VAMANRAO NARAYAN. **7 B. L. R. 735.**

9 For building—Removal of buildings during continuance of lease—Rule of common law in India. 27 M. 211 Col. 723 P. I.

10 For building—Landlord and tenant—Landlord's right to eject—Separate notice to quite the land—Tenants right to compensation. 6 C. W. N. 134 Col. 721 P. I.

11 *Damages for death—Jurisdiction of Court—Suit for compensation by son against the murderer of his father Act XIII of 1855.*

The Act XIII of 1855 allows a suit for compensation for the benefit of the wife

Compensation (*Contd.*)

husband, parent and child of a person whose death has been caused by the wrongful act, neglect, or default of any other person if it was such as would (if death had not ensued) have entitled the party injured to sue. *P. R.* 85 *of* 1894, *P. R.* 17 *of* 1898 (*Cr*) *referred to.* MAHI *v.* AMBO. **95 P. L. R. 1905=56 P. R. 1905.**

12 Bengal T. A. S. 155—Ejectment—Suit for—Alternative relief—Limitation—30 C. 1063 Col. 148 P. I.

13 *Demolition of property for—Epidemic Diseases Act* (III of 1897), s. 4—*Words "Done or intended to be done" meaning of—Compensation—Demolition—Plague Regulation A. cl, 2, 4.*

The words "done or intended to be done" in Epidemic Diseases Act, 1890, s. 4, do not include omissions. *Jelliffe* v. *Wallasey Local Board* (9 C. P. 162) explained and distinguished. A Magistrate who omits to pay adequate compensation in respect of property demolished under the Act is personally liable and an action will lie against him in respect thereof even though he may have acted in his administrative capacity as Chairman of the Calcutta Corporation under clause 2 of Plague Regulation A (2), *Calcutta Gazette*, 1900, part 1, page 1144. The Magistrate's decision as to the amount of compensation to be accorded is not final and can be reviewed by the Courts. RAM LALL MISTRY *v.* R. T. GREER. **8 C W. N. 681=31 C. 829.**

14 *Auction sale—Execution sale—Compensation, suit for—Sale in execution of a decree obtained outside the jurisdiction of the Original Side of the High Court—Misdescription of area of property sold—Deficiency in quantity of land.*

An auction-purchaser of a tenure, sold in execution of decree outside the jurisdiction of the Original Side of the High Court, brought a suit against the decree-holder for a refund of part of the purchase money on account of a deficiency in the actual area of land purchased as compared with the area stated in the sale proclamation, and for abatement of rent in respect of such deficiency. It was alleged that the decree holder made false and fraudulent allegations in respect of the area of the property in the sale proclamation, but there was no finding by the Lower Court as to this, nor was there any finding that the plaintiff sustained any loss, and there was no condition in the sale proceedings as to compensation for errors or misdescription. The purchase-money was not in Court, and the decree-holder offered to pay back the auction-purchaser his purchase-money and release him from his purchase, but this was refused.

Held, that although there was a deficiency in area, the auction-purchaser was not entitled to compensation, as he had failed to prove that he had sustained loss by misdescription in the sale proclamation, but he was entitled to an abatement of rent or such deficiency. Kissory Mohan Roy *v*, Kali Charan Ghose (1 C. W. N. 106) distinguished.

Compensation (*Contd*)

Held, per Maclean, C.J., that, in order to enable the auction-purchaser to claim compensation, it was not essential to make out a case of fraud against the decree-holder. Abdullah Khan *v* Abdur Rahaman Beg, (I. L. R. 18 All. 322), dissented from. DOYAL KRISHNA NASHAR *v.* AMRITA LAL DAS **29 C. 370.**

15 *For agricultural land turned into building site—Punjab Tenancy Act (XVI of 1887), Sections 39 (a) and 80, proviso (iii)—Occupancy tenant building shop on land in outskirts of a town—Landlord's right to eject—Compensation—Appeal.*

The defendants were occupancy tenants, under section 6 of the Punjab Tenancy Act, of certain land situated on the Circular Road, which surrounds the City of Lahore. They paid a cash rent of Rs 66-3-6 On a small portion of this land they built a shop and let it at a rental of Rs 20 per annum. The plaintiffs (landlords) sued to eject the defendants, tenants, under section 39 (*a*) of the Punjab Tenancy Act, on the ground that the tenants had used the land comprised in the tenancy in a manner which rendered it unfit for the purpose for which they held it.

The Assistant Collector ordered that the defendants should be ejected, unless they demolished the shop and made the land fit for cultivation.

The Collector, on appeal, directed simply the ejectment in favour of the landlords. The Commissioner rejected the further appeal of the tenants as not admissible, on the ground that the Collector had upheld the order of the Assistant Collector.

Held, that the order of the Commissioner refusing to entertain the appeal was wrong, as the order of the first Court was modified on appeal, and a further appeal was admissible under proviso (*iii*) of section 80 of the Punjab Tenancy Act.

Held, further that when the land of a tenancy has been diverted from its original purpose, the tenant is liable to be ejected under section 39 (*a*) of the Punjab Tenancy Act, but it is, by no means, necessary to eject him, if the right of the landlord can be recognized in some other way. In a case like this an award of compensation, in the form of a share in the rent, would be a sufficient satisfaction to the landlord. KARAM BAKHSH *v.* GHULAM MUHAMMAD. **79 P. L. R. 1903.**

16 Compensation for act done for the benefit of another—Suit for money payable to the plaintiff for money paid for the defendant, 6 O. C. 212, Cols. 528, and 1847, P. I.

17 Compensation for breach of contract —Anomalous mortgage—6, O. C. 167, Col. 346, P. I.

18 Defendant in possession—Right of defendant to claim compensation. Adverse possession of Maliki and Shamlat land—97, P. W. R. 1905, Col. 2053, P. I.

Compensation *(Contd).*

19 *Disturbance or improvement for—Punjab Tenancy Act (XVI of 1887), Sections 69 and 72—Ejectment—Improvements on common land—Partition—Compensation for improvements held by* Ala Lambardar.

After the death of an *Ala Lambardar* a plot of land, made over to him as an emolument of his office, was ordered by a decree to be brought into the partition of the *shamilat deh.* The *Ala Lambardar* and his brother had sunk a well, built a house, and made an enclosure wall on the plot in question.

Held, that the heirs of the *Ala Lambardar*, in possession of the plot, on being dispossessed of so much of it as exceeded their shares, were not entitled to any compensation for disturbance or ejectment. Under the proviso to section 69 of the Tenancy Act, a tenant, who is joint owner of land to which that section applies, is not entitled to any compensation for disturbance or ejectment. The principle underlying that section should be extended to the closely analogous case of a joint owner breaking up common village land without necessarily being a tenant of the community.

But persons who would benefit by the improvements must compensate or agree to compensate, before partition was effected, the heirs of the *Ala Lambardar* for the cost of so much of the same as the heirs would cease to enjoy upon partition.

In estimating the compensation to be awarded for any improvement, the Revenue officer should act upon the principles laid down for tenancy cases by section 72 of the Tenancy Act.—*3 P. R. 1886 (Rev.) followed.* SHERA *v.* ALI BAKHSH. **9. P. R. 1902 = Rev.**

20 Default in payment—Enhanced rate of interest—Penalty—3 O. C. 168 Col. 347 P. I.

21 Ejectment suit for compensation—Subsequent lease in possession. 29 C. 871 Col. 569 P. I.

22 For false imprisonment—17 C. P. L. R 1904 P. 41 Col. 1831 P. I.

23 Goods not delivered—Suit against a Railway Company—108 P. R. 1906—2 P. L. R. 1907—30 P. W. R. 1907 Col. 1836, P. I.

24 *Interest—Penalty—Mahant.*

The mortgage-money due under a simple mortgage was repayable on or before the 11th March 1889 with interest at 1½ per cent per mensem. It was also stipulated in the deed 'if the amount be not repaid within the time fixed, the interest on the amount of loan from after the expiration of the fixed time should be charged at the rate of 5 per cent per mensem up to the date of ultimate recovery.

In a suit on the mortgage-bond it was contended on behalf of the defendant that the stipulation as to interest at 5 per cent after the expiry of the due date was a penal provision not intended to be enforced, and the plaintiff was entitled to have interest at only a reasonable rate.

Held, that, as a stipulation for increased interest from the date of default may be a stipulation by way of penalty and as not only was the increased rate of interest very high but there was some evidence to show that the stipulation was inserted to ensure prompt payment by the debtor the case must be retried on the question of interest. In such a case if the stipulation be not strictly enforceale reasonable compensation should be granted to the plaintiff. *27 Cal. 421, 2 C. W. N. 234 and 333, 17 Bom. 106, 26 Cal., 300, 29 Cal. 43 referred to.* MULLIK ABDUL GUNI *v.* NUND LAUL. **7 C. W. N. 152.**

Land Acquisition Act.

25 Land acquired by government—Principal to be applied in awarding compensation—21 P. R. 1905 Col. 832 P. I.

26 Hypothetical value in determining compensation. 10 B. L. R. 660 Col. 834 P. I.

27 Potential value in fixing compensation—10 B. L. R. 675 Col. 835 P. I.

28 Values realised by sales of neighbouring lands—10 B. L. R. 688 Col. 381 P. I.

29 S. 3—Lessee of a tank with right of fishery whether entitled to compensation 28 C. 152 Col. 838 P. I.

30 S. 11—Apportionment of compensation—7 C. W. N. 528 Col. 846 P. I.

31 S. 11—Apportionment of compensation money—30 C. 801 Col. 847 P. I.

32 S 18—Land acquired by Government compensation how to be determined 32 C. 343 Col. 852 P. I

33 S. 23—Apportionment of compensation money, principal of—28. C. 146, Col. 857, P. I.

34 S. 30,—Lands waste from time immemorial taken up, compensation awarded, 20, M. 371, Col. 861, P. I.

35 S. 30.—Reference by collector as to apportionment of compensation—25. A. 133, —Col. 861, P. I.

36 S. 31,—Land taken up for public purposes—24, A. 189, Col. 862, P. I.

37 Award by tribunal of appeal—Cross objections. 29, B. 514, Col. 223, P. II.

38 Landlord and Estopel—Rule of equity—Compensation to tenant—7, B. L. R. 27, Col. 233, P. I.

39 Landlord and tenant—27, M. 211, Col. 723, 6, C. W. N. 134, Col, 721. P. I. and 28, C. 146, Col. 857, P. I.

40 Landlord and tenant—Confusion of boundaries—5, C. W. N. 845, Col. 233, P, I.

41 *Lease—Lease executed by guardian on behalf of minor—Act XL of 1858, s. 18—Suit by minor to set aside the lease—Negligence—Compensation.*

A minor's mother holding a certificate under Act XL of 1858 executed a perpetual lease in favour of D

Compensation (*Contd.*)

D. obtained a declaratory decree against the minor under the guardianship of the mother upholding the lease. The case was decided under s. 152, Civil Procedure Code, as there was no contest between the parties.

In a suit to set aside the lease on the ground that the lease had been granted without the order of the Civil Court contrary to s. 18 of the Act.

Held, that had the mother defended the suit with due care she must have been successful and therefore the minors were not bound by the decree. If a minor be properly represented by a next friend or guardian for the suit and there be no fraud or collusion on the part of the next friend or guardian or the opposite party and his next friend or guardian be not guilty of gross negligence, a minor is as much bound by the decree in a suit to which he is a party as if he were of full age. It is not every kind of negligence, nor any amount of negligence which would render proceedings otherwise regular and proper, liable to be re-opened. There must be such negligence as lead to the loss of the suit which, if conducted with due care, must have been successful.

Held, also, that the minors did not acquiesce in the construction of a well by D. so as to render them liable to pay compensation. GHULAM AKBAR KHAN *v.* MATHURA. **2 O. C., 233.**

42. Libel—Suit to recover compensation for mental distress and defamation—A. W. N. 1902 P. 96 Col: 1831 P. I.

43. Limitation Act Art. 42—Suit for compensation for wrongful attachment. 24 A. 146 Col: 1836.

44. Limitation Act. Art. 62—Vendor and purchaser—Suit by vendor, for refund of purchase money. 25 B. 593 Col: 1849 P. I.

45. Limitation Act. Art: 28—Illegal distrain of crops. 7 C. W. N. 728 Col: 1811 P. I.

46 Partition—Suit for possession of land as compensation—Jurisdiction of Civil Court—Contract made in course of partition proceedings—Specific performance of contract. 5 O. C. 140 Col. 1889 P. I.

47 Private purchaser—Auction sale—Sale in execution of decree. 29 C. 370. *See Compensation—Auction sale.*

48 *Sale in execution, suit to set aside a, on the ground of fraud—Whether compensation awardable to plaintiff in the alternative—C. P. C. (Travancore S. 238).*

This was a suit to set aside an auction sale of certain property or, in the alternative, to award to the plaintiff the value of the property as damages. The lower Court held that there was no proof of any fraud, in the publication or conduct of the sale, but, instead of dismissing the suit as it ought to have done, proceeded to allow compensation to plaintiff, on the ground that the price realised was so disproportionate to the market-value of the property that the inadequacy of the price was itself evidence of fraud.

Compensation (*Contd.*)

Held, that the mere inadequacy of the price realised at an auction-sale could afford no ground for refusing to confirm the sale and that there was nothing in the present case to hold that the plaintiff was entitled to any compensation. L. R. 3 I. A. 230, 10 I. A. 25 & 8 B. 424, Appr. 21 M. 356, 409. 31 C. 385, 480; 26 C. 424 & 11 T. L. R. 27, R. KESAVAN GOVINDAN *v.* RENGA AIYAN YENKATACHALAM AIYAN. **21 T. L. R, 206.**

49 *Rent Act (XXII of 1886), S. 108, cl. (16) 129, 132—Compensation for revenue paid by* lambardar *on account of joint* lambardar, *suit for—Limitation.*

A suit under clause 16 of S. 108 of the Rent Act for compensation for revenue paid by one lambardar on account of a joint lambardar, as regards limitation, is governed by S 129 of the Act and not by S. 132 of the same Act. It should be brought within one year from the date when the cause of action accrues. RAJA RAM *v.* MUSAMMAT MENDA. **7 O. C. 14.**

50 *Trespasser's right to improvements.*

A trespasser has no right to compensation for improvements on land on which he knowingly trespassed. HEIDOY KRISHNA DOS *v.* PRASANNA KUMARI CHOWDURANI **28 C. 142 at 144.**

See also C. P. C. O. XX R. 12 Col. 1490, 491 P. I.

51 Suit for arrears of rent—Compensation for use and occupation of land making new case for plaintiff not set up in plaint—5 O. C. 222—*See Lease.*

52 For wrongful attachment.—*See S. 95 C. P. C. Col. 1222, 1223 P. I.*

53 For wrongful distraint—Principal of computation—28 C. 364.—*See B. T. A. VIII of 1885 S. 67 No. 139 Col. 123 P. II.*

Compensation for breach of contract.

1 Compensation for breach of contract—Pecuniary compensation,—6 O. C. 167 Col. 346 P. I.

2 *Contract—Document containing proposal of contract—Suit on—Suit for damages—Oral evidence.*

The plaintiffs sued the defendants for damages for breach of contract. The document on which the plaintiffs relied contemplated only the making of a contract in future and left all the terms to be then arranged.

Held, that the suit was not maintainable.

Quære.—Whether the oral arrangement with regard to the terms of the proposed contract would be admissible as evidence under section 91 of the Indian Evidence Act. MAUNG SHWE OH *v.* MAUNG TUN GYAW. **9 W. N. C. 147=32 C. 96 (P. C).**

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Competent jurisdiction—Court of—Cols. 972, 998, 999 to 1003 P. I.

Competent jurisdiction (*Contd.*)

Competition of registered documents.—1 L. B. R. 1900, 1902 P. 293 Col. 488 P. I.

Competition deed.

Composition deed—Insolvent Act (Stat 11 & 12, Vic., c. 21), Section 9—Act of insolvency—Debtor—Trustees.

A conveyance, by a debtor, of all his property, to trustees for his creditors, is an "act of insolvency" within the meaning of Section 9 of the Indian Insolvent Act. *In re* KURSONDAS RAMDAS 3 B. L. R. 905.

2 *Composition deed—Assignment of all property for benefit of creditors—Act of insolvency—Assignment void against Official Assignee—Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21), Ss. 9, 24.*

By a composition deed dated the 7th October, 1901, A and B assigned the whole of their property to trustees for the benefit of such of their creditors as should accept and sign the said deed within two months from the date thereof. This assignment was held (1) to be an act of insolvency under S. 9 of the Indian Insolvent Act (Stat 11 and 12 Vic., c. 21), and on the 11th December 1901, A and B were adjudged insolvents on the application of certain creditors who had not signed the said deed.

Held, that even assuming that the deed of assignment was not voluntary within the meaning of S. 24 of the Indian Insolvent Act, nevertheless the assignment to the trustees was void as against the Official Assignee. MANMOHANDAS *v.* N. C. MACLEOD. I. L. R., 26 B. 765.

Compound Interest.

Mortgage — Redemption — Equity — Compound interest.

The principles of justice, equity and good conscience do not of necessity disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced: in each case the question must be asked whether there has or has not been a hard or unfair bargain on the borrower, but when that is not established against the mortgagee, then the right to redeem still remains, though it is redeeming not on payment of the sum advanced, but of the sum which the parties agreed it was worth the mortgagors' while to pay in order to get a smaller advance when he was in want of money.

The Courts do not lean towards compound interest, they do not award it in the absence of stipulation, but where there is clear agreement for its payment, it is in the absence of disentitling circumstances allowed. HARI LAHU PATIL *v.* RAMJI. 6 B. L. R., 306.=23. B. 371.

Compromise.

1 Account—Suit for settlement of accounts referred to arbitration—Compromise of suit stating that accounts were understood and claim settled—Suit dismissed—Fresh suit based on oral promise that accounts would be settled on filing of compromise in Court. 1. P. R. 1904-41. P. L. R. 1904. Col: 212. P. I.

2 *Administration suit when allowable in an administration suit after the passing of the preliminary decree.—*

A court ought not to sanction a compromise which entirely ignores the claims of some of the defendants, the other parties arranging to take the property and relieving the executors from further accounting and also paying them a certain amount of money. AJOY KUMARI DEBI *v.* MANINDRA NATH CHATTERJEE 32 C. 561.

3 Agents' instructions—Compromise—Ratification of—Procedure to set aside—Presumption. 6 C. W. N. 82 Col. 1303 P. I.

4 Agents' instructions—Compromise by agent—Repudiation by principal before decree. 8 O. C. 197—21 C. 357 Col. 1593 P. I.

5 Arbitrator—Agreement to refer to arbitrator—Adjustment of suit—Agreement not in writing. 7 C. W. N. 180—30 C. 218 Col. 1208 P. I.

6 Arbitrator—Court acting as arbitrator—Appeal. 26 M. 76 Col. 1702 P. I.

7 *Challenging decree passed on the basis of compromise-Estoppel-Compromise of a pending litigation.*

Held, that when a party for valuable consideration absolutely renounced all interest in property and such renunciation was certified by a solemn deed, a compromise presented to the Court in a pending litigation, upon which the Court passed a final decree, such party was estopped from subsequently challenging such compromise. LATAFAT HUSSAIN *v.* BADSHAH HUSSAIN. 8 O C 143.

8 *Construction of compromise—Hindu Law—Joint Hindu Family—Conversion of member of Joint Hindu Family to Muhammadanism. Effect of—Regulation VII of 1832, Section 9—Regulation III of 1803—Deed of Compromise—Female's estate.*

One Raja Ratan Singh became a Muhammadan about 5 years previous to his death, which occurred in 1851. He and his son Daulat Sing formed a joint Hindu family, the son predeceased him a few months earlier in the same year. Soon after the death of Raja Ratan Singh, dissensions arose between Rani Raj Kunwar, his widow, and Rani Sen Kunwar, the widow of his son, Daulat Singh. Apparently, in consequence of the dispute the estate in the British territory of Roheilkhand was taken under its management by the Court of Wards, the two ladies continuing to reside in Lucknow under the supervision of the officials of the King of Oudh, where Rani Raj Kunwar died in November 1858. Rani Sen Kunwar

Compromise (*Contd*).

had predeceased her, dying in November 1857. Rani Sen Kunwar executed a bond for a considerable sum of money in favour of Rai Jai Chand, father-in-law of her daughter Rani Mewa Kunwar.

On the death of these ladies there appeared three claimants (1) Raja Khairati Lal, grandson of Raja Ratan Singh and of Rani Raj Kunwar by their daughter Jiwan Kunwar, (2) Rani Chatar Kuuwar and (3) Rani Mewa Kunwar, daughters of Daulat Singh, son of Raja Ratan Singh who had predeceased him. To avoid litigation that parties entered into a compromise and agreed to divide the property in the following shares; *viz*. 7½ anna to Rani Mewa Kunwar.

Having thus settled their several shares they completed the actual division of the estate accordingly in 1861.

In 1866, Rani Chatar Kunwar died. On her death her husband Awadh Behari Lal took possession of his wife's 4¼ annas claiming it as her *stridhan*. His title was disputed by his sister-in-law Rani Mewa Kunwar, the owner of the other 4¼ annas who claimed to take by *survivorship* the estate left by her sister.

Rani Mewa Kunwar brought a suit against Awadh Behari Lal and obtained a decree and got possession of her sister's 4¼ annas and thus became possessed of 8½ annas. Meanwhile in the year 1865, Rai Jai Chand instituted a suit on the bond executed in his favour by Rani Sen Kunwar.

A final decree in the suit was given in favour of Rai Jai Chund on her confession on the 9th June 1868 against Rani Mewa Kunwar.

Rai Jai Chand took out execution of the decree and in satisfaction thereof by mutual settlement between him and Rani Mewa Kunwar obtained several villages, forming part of the estates. One of these villages now in dispute was sold to the predecessors in title of the defendants in the present suit. The sons of Rani Mewa Kunwar brought the present suit for possession against the defendant contending that on her death which occured on 25th March 1899, her life-interest as the daughter of Raja Daulat Singh was extinguished and all the transfers made by her in her life-time became null and void.

The bond was not produced in the present case nor its non-production explained. It was not shown what was the consideration given for it, nor whether the money it purported to secure was borrowed for purposes which under the Hindu Law would authorize a widow to lay a burden on her husband's estate.

Held, that Raja Rattan Singh should be considered to have become under the Hindu Law "civilly dead" on his conversion to Muhammadanism and that all his property, whether joint, ancestral or self acquired (if any) devolved on his son Daulat Singh and that there was no distinction between joint ancestral and self-acquired property in that respect, that on his father's conversion, Daulat Singh became sole and absolute owner, at least of an undivided moiety of that which had been joint family property.

That Regulation VII of 1832 did not purport to enact or to modify any substantive law; it was an enactment which treated of procedure only; and as no suit was instituted by Daulat Singh against his father, the time never arrived at which the law could be applied to the case.

That as it was impossible that a Hindu and a Muhamadan could be members of a joint Hindu family, as soon as Raja Rattan Singh became a Muhammadan he ceased to belong to the joint family of which up to that time he had been a member; the result of his conversion was to work a complete separation between him and his son. And the joint family being dissolved, Daulat Singh became the sole and absolute owner of at least one half of the joint family property which thenceforward he held as his separate property.

That on Daulat Singh's death the Court of Wards held possession of the estate on behalf of both Rani Raj Kunwar and Rani Sen Kunwar; in fact for the true owner *(in usum jus habentis)*.

That the compromise arrived at between Khairati Lal and Ranis Mewa Kunwar and Chatar Kunwar, being based on the assumption that there was an antecedent title of some kind in the parties, settled that the claim by the Ranis Mewa Kunwar and Chatar Kunwar was that of daughters, reversioners to their father's estate.

That no legal necessity being shown in justification of Rani Sen Kunwar's act in imposing a permanent burden on her husband's estate by the bond executed by her in favour of Rai Jai Chand, Rani Mewa Kunwar was not justified in transferring to the detriment of her sons, the plaintiffs, permanently any portion of the estate she had inherited from her father to satisfy such a claim; though she could transfer her own life-interest in any manner she pleased.

That on her death that interest determined and thereupon the right of Jai Chand and of his assignees to continue to hold any portion of the estate by virtue of Rani Mewa Kunwar's assignment came to an end; and the plaintiffs, sons of Mewa Kunwar were entitled to recover possession of the villages in suit.

That although the findings in the case of Awadh Behari Lall *v.* Rani Mewa Kunwar could not be regarded as being *res-judicata*, the judgments could be used in the present appeal as evidence to the extent pointed out by their Lordships of the Privy Council in the cases of *L. R. 22 I. A. 60; L. R. 24 I. A. 10, 12 All., 1, 5 Bom., L. R. 230.* GOBIND KRISHNA NARAIN *v.* ABDUL QAYYUM. **W. N. A. 1903 p. 137=25 A. 546.**

Compromise (*Contd.*)

9 Compromise by certified guardian of minor adopted son—Appeal—Review—Suit by such guardian to contest adoption. 30 C. 613 Col. 1614 P. I.

10 Construction — Enforcing—Effect of and setting aside, deeds of compromise—Defendant agreeing to execute Kabuliat 7 C. W. N. 758 Col. 1084 P. I.

11 Construction of—Compromise in previous suit. 31 C. 111 Col. 237 P. I.

12 Compromise—Certified guardian not bound to take permission of judge 8 C. L. J. 266 Col. 1621 P. I.

13 *Decree in terms of Compromise—Jurisdiction—Civil and Rent Courts—Suit for profits by under-proprietor*—Res judicata—*Civil Procedure Code (XIV of 1882), s. 13.*

Held, that the decision of a Civil Court on a question of proprietary title to land is binding upon a Rent Court in a subsequent suit between the same parties or their representatives, even though that same question may have been previously determined by a Rent Court in a different manner. When the Court has to choose between two conflicting decisions of Civil and Rent Courts on the question of proprietary title the decision of the former must be accepted as conclusive, provided that the conditions have remained unchanged.

Held, further, that a decree passed in accordance with the terms of a compromise is binding upon the parties to the compromise and constitutes *res judicata*. MUHAMMAD ISMAEL KHAN *v.* ABDUL RAHMAN KHAN. **2 O. C., 28.**

14 Decree passed on non-appealable. 9 O. C. 365 Col. 1597 P. I.

15 *Decree passed on compromise—Execution of decree—Decree for sale of immoveable property, in simple money suit—Immoveable property outside local jurisdiction of Court passing decree, execution against—Jurisdiction—Transfer of simple money decree—Objections as to validity of decree.*

The father of the respondent obtained a decree under a compromise filed in Court by one of the two judgment-debtors, the other being a minor, after the consent of the Court to the compromise had been obtained. It was added in the decree that "in case of default three annas share in a certain *mauza* may be sold according to law." The decree-holder applied for execution of his decree and also for a transfer certificate. Notice under section 248, Civil Procedure Code, was issued to the judgment debtors who objected to execution on the grounds: (1) that the decree was obtained by fraud; (2) that it could not be executed as it had not been made absolute: (3) that G did not file the compromise upon which the decree was based: (4) that the Court had no jurisdiction to pass or execute a decree against the property outside its local jurisdiction.

Held, that the Court had no jurisdiction to pass a decree for the sale of the property to which the application for execution related, as the suit was not one for the sale, but that the decree could be transferred for execution as a simple money-decree

Held, also, that a decree passed on a compromise is valid until set aside in a regular suit instituted for that purpose.

Whether it was passed in a suit in which no guardian *ad litem* for the minor was appointed or on a compromise without the consent of the Court are questions which cannot be considered on an application for execution or by a Court executing the decree. CHEDU *v.* PARAGI. **5 O. C., 9.**

16 *Of doubtful claim—Hindu Law—Joint family—Impartible Raj—Family custom—Self-acquired property—Presumption.*

The suit was one for the partition of a large number of villages situate in the District of Gorukhpur, Gaya and Basti known as the Tamokhi Raj The plaintiffs claimed to be entitled to a share in the estate by right of inheritance according to the ordinary rules of Hindu Law. Formerly the Raj owned property in the District of Saran which was confiscated to government after the battle of Buxar in 1764. This property in 1790 was returned by government to the younger branch of the Raj family. The Gorukhpore property which was then within the dominions of Nawab Wazir of Oudh was ceded to Government in 1801.

Held that the confiscation did not, in any way affect the custom of primogeniture and impartibility in respect of the Gorukpore property, independently of the fact that this property was or was not acquired after the property of Saran was confiscated. In this case, it was not found to have been acquired.

Held, also that it is of the essence of family usages that they should be certain, invariable and continuous, and well-established discontinuance must be held to destory them. Where, however, such a custom has been proved, the onus is upon the party who alleges the discontinuance thereof to prove that fact. Raj Kissen *v.* Ramjoy (I. L. R., 1 Cal. 186) and Surendra Nath *v.* Heeramany (12 M. I. A. 81) referred to. Where family custom governs the devolution of an estate and the owner of such estate acquire separate property, the presumption is that it was his intention that such estate should be incorporated in the family estate unless he alienates it in his life time, or disposes it off by will or in any way leaves behind him any inclination of his desire that it should not be incorporated in the family estate. Laksmipatti *v.* Kandasami, (I. L. R , 16 Mad. 94) and Ramasami *v.* Sundara, (I. L. R. 17 Mad. 422) referred to. Where a compromise was entered into between members of a joint family agreeing to accept *Babui* allowance in lieu of a share in the property, such compromise, if just and legal, would be binding on the minor children of those members. Pitam Singh *v.* Ujagar Singh, (I. L. R., 1 All. 651) and Chanvirapa *v.* Danava (I. L. R., 19 Bom.

Compromise (*Contd.*)

593) referred to. SARABJIT PARTAP BAHADUR SAHI *v.* INDRAJIT PARTAP BAHADUR SAHI. **A. W. N. 1904 P. 244 =23 A. 203.**

17. *Guardian and Ward—Compromise of uncertain rights by guardian on behalf of minor.*

A *bona fide* settlement of a real existing dispute in which the rights of both parties are uncertain to avoid litigation, arrived at by the guardian of minor parties, is binding on them. MALLA REDDI *v.* ASWARATHA REDDI. **15 M. L. J. 494.**

18. *Doubtful right—Whether compromise a transfer of a spes successions—Transfer of Property Act. S. 6 (a)—Widow suing for declaration of her absolute ownership under husband's will—Alleged reversioners entering into razinamah acknolewledging her absolute rights—Subsequent release by such reversioners—Whether release anything more than agreement not to disturb.*

As a right must always be on the one side or the other, the fact that the right is on his side is not by itself sufficient for a party to set aside a compromise entered into by him on the supposition of a doubtful right.

There is nothing illegal in a Hindu widow acquiring full ownership in any property under a will; and a *razinamah* or decree recognising that right is, therefore not illegal.

A Hindu widow brought a suit, as the sole owner of her husband's property under his will, against her husband's brother and some others, who were executors under the will, for a declaration that she had become solely entitled to the possession of the property and for other reliefs. A *razinamah* was entered into by which the suit property was acknowledged to be the absolute property of the widow in accordance with the terms of the will. A decree was passed in accordance with the terms of the *razinamah* and a deed of release was executed by the reversioners. A suit was brought to recover these properties by the son of the testator's brother, as reversioner, alleging that the *razinamah* was invalid for misrepresentation and coercion.

Held, that the acceptance of the release deed was not an acknowledgment of the existance of any right in the releasor, but amounted only to an agreement 2 Sch. and Lefr. p. 468, R; 30 M. 256; 24 M. 265, 26 M. 31 and 28 M. 84, Distinguished, not to disturb the widow in the enjoyment of the property absolutely and that there was nothing to countenance the view that the *razinamah* and the release should be treated as effecting a transfer of only a chance of succession or *spes successionis* to the widow, which was incapable of transfer by virtue of S. 6 (*a*) Transfer of Property Act, and, therefore, illegal and invalid. OLATI PULLIAH CHETTY *v.* E. VARADARAJULU CHETTI, **18 M. L. J. 469.**

Compromise (*Contd.*)

19 Endowment—Hindu Law—Mirasi rights attached to Devastanams—Suit against office holder—Compromise consenting to sale of office and and its emoluments—Decree in terms of compromise—26 M. 31 Col. 1591 P. I.

20 Extraneous matter—A decree passed on a compromise can not be regarded as ultra vires—5 C. W. N. 485. Col. 1601 P. I.

21 By father if binding on the minor sons, not parties to the suit—Benefit of the minors—Compromise decree dealing with property outside the subjects matter of the suit—1 C. L. J. 388 Col. 463 P. I. and Col. 451 P. II.

21 (a) Family dispute—Compromise of—Doubtful rights—Parties—Beneficiary no party—5 C. W. N. 386. Col. 410 P. I.

22 Decree—Compromise beyond relief claimed—Appeal—Procedure. 77 P. R. 1903. Col 1600 P. I.

23 *Guardian and Ward—Power of guardian to enter into compromise on behalf of minor.*

When a state of facts is accepted as the basis of a compromise, parties connot be afterwards allowed to say the real state of things was otherwise. The compromise of a doubtful right entered into by the guardian of a minor who has acted in the interests of the minor is binding on the minor, SUBBA REDDI *v.* KOTAMMA. **14 M. L. J. 442.**

24 By Hindu father disputed claim—Binding affect on the sons. 11 M. L. J. 1901 P. 70 Col. 48 P. I.

25 *By female—Hindu Law—Change of religion—Effect of conversion of a member of a joint Hindu family to Muhammadanism—Regulation No. VII of 1832, s. 9—Compromise—Effect of compromise entered into by a Hindu female with a limited estate.*

Held, that Regulation No. VII of 1832 did not abrogate the Hindu law as to the consequences of apostacy, but merely laid down for the guidance of the Judge a rule under which he might refuse to enforce these consequences. Where, therefore, in a joint Hindu family consisting of a father and one son the father was converted to Muhammadanism in the year 1845, the immediate effect of such conversion was to make the son sole owner of the property which up to that time had belonged jointly to him and his father.

Held, also that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of her deceased husband or father, is not binding on the reversioners, even though it has been followed by a decree of Court, nor is a decree on an arbitration award, one of the parties to the submission having been a Hindu widow, or daughter; but the reversioners can only be bound by a decree made after full contest in a *bona fide* litigation. Imrit Konwur *v.* Roop Narain Singh, 6 C. L. R. 76 Sheo Narain Singh *v.* Khurgo Koery, 10 C. L. R. 337; Jeram Laljee *v.* Veerbai, 5 Bom.. L. R. 885, Sant Kumar *v.* Deo Saran, I. L. R

Compromise (*Contd.*)

8 All., 365, Ram Sarup *v.* Ram Dei, Weekly Notes, 1907, p. 33, and Stapilton *v.* Stapilton, 1 White and Tudor, 230, referred to. GOBIND KRISHNA NARAIN *v.* KHUNNI LAL. **4 A. L. J. 365=A. W. N. 1907 P. 151=29 A. 487.**

26 By Hindu widow in a suit followed by decree—Effect of Reversioners.

Held, that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of a deceased husband or father is not binding, on the reversioners, even though it has been followed by a decree of Court, and that the reversioners can only be bound by a decree made after a full contest. A. W. N. 1907 P. 151 followed. MAHADEI *v.* BALDEO. **5 A. L. J. 43=A. W. N. 1908 P. 16=30 A. 75.**

27 Minors guardian—Representation of minor plaintiff—Certified guardian not appointed—Compromise if for benefit of minors. 8. C. L. J. 31 Col. 1613 P. I.

28 *Minor—Compromiese decree made in a suit for money—Sanction of court—Registration Act (III of 1877), s. 17—Mortgage—Immoveable properties—Petition—Charge on immoveable property—Civil Procedure Code (Act XIV of 1882), s. 375—Transfer of Property Act (IV of 1882), ss. 59 and 100.*

Upon a suit for recovery of money due on *bahikhata* accounts, a compromise was come to, and a petition filed and in accordance with the petition a decree was made to the following effect, *viz*, that the defendants do pay to the plaintiffs a certain sum of money together with interest, in instalments, but in default of payment of two instalments the whole amount, with interest, will be realizable at once. The decree further declared that the immoveable properties specified therein should be hypothecated for the realization of the said money, and that the defendants should not be able to create an incumbrance on the same. A certain sum of money having been realized, the plaintiff brought a suit for the balance under the provisions of the Transfer of Property Act, and prayed for the sale of the properties specified in the schedule to the said decree. On an objection by the defendants that the compromise decree was void for want of registration and non compliance with the provisions of section 59 of the Transfer of Property Act, and was of no effect in so far as it purported to create lien on imoveable property.

Held, that having regard to section 17, cl. (i) of the Indian Registration Act, the compromise decree need not be registered.

Held, also, that as the decree under construction had little resemblance in form to a simple mortgage, and the hypothecation clause created a lien and prohibited further incumbrances, the parties only intended to create a charge, and not a mortgage, on the immoveable properties mentioned in the schedule to the decree, and therefore section 59 of the Transfer of Property Act had no application, and the absence of the formalities required by that section would not bar the relief, which might be obtained by section 100 of the Act.

Held, further, that as the hypothecation of immoveable property in the consent decree was the consideration for the time allowed for payment of the sum decreed by instalments, and as it was an integral and necessary part of the adjustment of the claim in the suit, the hypothecation clause was properly inserted in the consent decree, and the Court did not act against the provisions of section 375 of the Code of Civil Procedure in allowing its insertion. GOBINDA CHANDRA PAL *v.* DWARKA NATH PAL. **7 C. L. J. 492=12 C. W. N. 849=35 C. 837.**

29 Minor—Restriction on alienation—Leave of court must be express—Presumption—Compromise decree when to be set aside—8 C. L. J. 274 Col. 1622 P. I.

30 Minor's guardian—Compromise by father on behalf of his minor son—Withdrawal of suit—Bokhari Sayeds of Chiniot Tehsil. 3 P. R. 1905 Col. 1479 P. I,

31 Minor's guardian—Compromise on behalf of minor. 15 M. L. J. 494. *See No. 17 supra.*

32 Minor—Compromise—Leave of Court. 8 B. L. R. 489—10 C. W. N. 898 Col. 1619 P. I.

33 *Minor—Compromise presented but not decreed—Order to proceed with suit puts an end to such compromise—Procedure in sanctioning compromise on behalf of minors.*

Where a compromise had been presented but no decree had been passed in accordance with its terms and the Court subsequently at the instance of one of the parties, ordered the suit to be proceeded with on the issues framed before the compromise and on other issues, the compromise must be deemed to have been put an end to and the Court cannot, at a subsequent stage, treat the compromise as subsisting and proceed to pass a decree upon it. In sanctioning compromises on behalf of minor, the order should state in terms that the question whether the compromise was for the benefit of the minors was considered. GOBINDASAMI NAIDU *v.* ALAGIRISAMI NAIDU. **I. L. R. 29 M. 104.**

34 Minor's guardian—Married women—Her right to enter into a compromise from the minor defendant—Compromise irregular not illegal, when sanctioned by Court. 29 M. 58 Col. 1619 P. I.

35 Minor—Compromise on behalf of infant—Sanction of court—Compromise if can be set aside. 11 C. W. N. 178—C. 70 (P. C.) Col. 1620 P. I.

36 Minor—Compromise on behalf of minor of execution proceedings—Sanction of court—Power to revoke. 3 B. L. R. 565—26 B. 109 Col. 1521 P. I.

37 Minor's guardian—Compromise by

Compromise (*Contd.*)

certificated guardian of minor adopted son. 30 C. 613 Col. 1614 P. I.

38 *Minor—Compromise on behalf of—Civil Procedure Code (Act XIV of 1882), Ss. 440 and 462—Compromise made without leave of Court—Leave of Court must be express—Suit to set aside decree and compromise—Lease otherwise invalid confirmed by such decree—Acceptance of rent from tenant—Recognition of tenancy.*

Section 462 of the Civil Procedure Code provides that no next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. No exception is made in the case of a certificated guardian. On the other hand, he is expressly referred to in section 462.

A minor can impeach a final decree founded upon a compromise entered into by his guardian without the previous sanction of the Court. 3 Mad., 152; 13 Bom., 137, at p. 146, *referred to.*

In order that a compromise may be binding upon a minor, the leave of the Court must be express, and it must be arrived at upon the exercise of a judicial discretion as to the propriety of the compromise in the interests of the minor. 17 All., 531: 9 Cal., 810, *followed.*

During the plaintiffs' minority her father executed in favour of defendant without title to do so a *mokurari* lease of garden land belonging to the plaintiff. Prior to the execution of the lease, the plaintiff's father-in-law was appointed her guardian under Act VIII of 1890, and on his application the District Judge had given him permission to grant *makurari* leases. The guardian instead of confirming defendant's lease or granting a fresh lease sued him for ejectment. The suit was compromised, and the *Mokurari* lease was confirmed, but no order of the Court was obtained sanctioning the compromise. Subsequently a decree for rent was obtained against the defendant, on the basis of the compromise, and the decretal amount was paid by the defendant to the plaintiff's pleader. The present suit was brought by the plaintiff on attaining majority to eject the defendant, on the ground that the plaintiff was not bound by the compromise-decree.

Held, that the compromise decree was invalid, but its invalidity did not convert the defendant into a trespasser. He was an acknowledged tenant, and could not be lawfully evicted without notice. His induction into the land by the plaintiff's father was *bona fide* so far as the defendant was concerned, and he was subsequently recognized as a tenant by the plaintiff's guardian, who sued him for arrears of rent and accepted the sum decreed. LALA MAJLIS SAHAI *v. Mussammat* NARAIN BIBI. **7 C. W. N. 90.**

39 Compromise of suit under C. P. C.—Suit for partition—Withdrawal of suit—Subsequent suit for partition barred—23 A. 219. *See Act V of 1908. Civ. Pro. Code. O. XXIII. R. I.*

40 Matter outside scope of suit—Compromise how far res judicata. 5 C. L. J. 15 Col. 1598 P. I.

41 Mortgage decree on compromise in respect of partition of claim not secured by the mortgage. Public policy—Col. 1599 P. I.

42 *Petition to set aside sale—Estoppel—Execution of decree—Parties are bound by the compromise made by them.*

The respondent had obtained a decree and in execution of his decree, certain property belonging to the appellant was sold. The sale was confirmed. The decree-holder took possession. Then the judgment-debtor put in an application for the setting aside of the sale. The application was contested. The judgment-debtor put in a compromise petition to which the decree holder consented, and it was agreed that the judgment-debtor should have a certain time to pay up the full decretal amount, and that then the sale should be set aside; but that if he failed, the sale should stand good. The judgment-debtor made default in paying the full decretal amount. The *Munsif* tried the case on the merits and set aside the sale. On appeal the District Judge held that the judgment debtor was bound by his compromise, and that it was not open to him to contest the legality of the sale.

Held, that the order of the District Judge was right—*8 Cal., 455, referred to.* UTTAM CHANDRA KRITHY *v.* KHETRA NATH CHATTOPADHYA. **29 C. 577.**

43 Petition registration—Admissibility—Compromise—27 P. R. 1903 Col. 465 P. I.

44 Probate, grant on consent of parties—Compromise by agent without knowledge of principal—Repudiation by principal. 31 C. 357 Col. 1593 P. I.

45 Registration—Petition of compromise reciting a previous oral agreement for lease 12 C. W. N. 59 Col. 479 P. I.

46 Relief not covered by suit—Decree in terms--Enforceability--30 M. 421 Col. 1599 P. I.

47 Remedy for non-performance of—Compromise of doubtful rights--Suit to enforce compromise by a person not party thereto. 5 C. W. N. 386 Col. 410 P. I.

48 *Suit by reversioner impeaching alienation by widow—Compromise by reversioner in good faith--Whether such reversioner's son can subsequently sue to set aside alienation.*

Where a widow alienated certain property, and the whole of the reversioners then having any apparent rights sued and entered into a compromise in *bona fides*, they and their successors in title are clearly bound by their action; such action can only be attacked, by a more remote or subsequent reversioner, on the ground of *mala fides*. The principle that, in respect of ancestral land, succession is a right derived from the common ancestor, who first acquired the land, is not one which interferes with the ordinary application of the principles of *res judicata*, limitation and the like.

Compromise (*Contd.*)

It is immaterial whether the compromise did or did not have the effect of improving the widow's estate, as regards the property left to her under the compromise. The reversioner's sons are bound by the compromise, whatever its effect might be. 15 P. R. 1903, 97 P. R. 1906 referred to. DEVI DIAL *v.* UTAM DEVI, **37 P R. 1907.**

49. Rights under—Servival of such rights after a Hindu widow's death where her sons have sold their interest—Judgment in terms of award. 5 C. W. N. 242—28 C. 155 Col: 1207 P. I.

50. *Setting a bona fide dispute—Assent of adult members—Binding character of.*

Held, that a compromise setting a *bona fide* dispute between the members of the family to which all the adult members assented at the time was valid and binding upon the family. KUNHUNNI *v.* SRIVALIABHAN. **11 M. L. J. 10.**

See for other facts Col: 1230 P. I.

51. Suit to recover money paid under compromise—Compromise of suit by heirs of obligor. 29 A. 627 Col: 326 P. I.

52 *Suit—Compromise petition—Constituting a lease and filed in a criminal proceedings—Registration if necessary—Evidence—Value of such deed—Admissibility in evidence of such document in a later case.*

An unregistered compromise petition, which was the root of the plaintiff's claim to an increased rent and was filed in previous criminal proceedings, was not incorporated in the order in such proceedings.

Held, it was not admissible in evidence in a later civil suit. Pranal Anni *v.* Lakhsmi Anni, I. L. R. 22 Mad. 508; L. R. 26 I. A. 101; Kali Charan Ghosal *v.* Ram Chandra Mandal. I. L. R. 30 Cal. 783 and Birbhadra Rath *v.* Kalpataru Panda, 1 C. L. J. 388, referred to. BIRAJ MOHINEE DASSEE *v.* KEDAR NATH KARMAKAR. **8. C. L. J. 90=12. C. W. N. 854=35. C. 1010.**

53 *Compromise—Estoppel—A party unsuccessfully suing to set aside a compromise may prefer a claim based on it.*

Under a compromise the defendant undertook to deliver a certain quantity of grain yearly to the plaintiff. The defendant never repudiated the obligation but the plaintiff unsuccessfully sought to set aside the compromise.

On a suit for value of the corn for two years preceding the suit the claim was dismissed on the ground that the compromise not having been accepted by the plaintiff the suit was barred, limitation having begun to run from the date of the compromise.

Held, that the order of dismissal was wrong. If the plaintiff did not choose to enforce the obligation before that did not prevent him from enforcing his right for as many years back as were within the period of limitation, the right was a continuing one and each year a fresh cause of action accrued in favour of the plaintiff. *Bawa* RATTAN DAS *v.* *Bawa* GOPAL DAS. **106 P. L. R. 1904.**

53 Time for dating and signing the judgment—Parties can compromise both before and after judgment is delivered. 67 P. W. R. 1907 Col. 1479 P. I.

54 *Tort feasors—Suit against joint tortfeasors—Compromise between plaintiff and one defendant—Such compromise no bar to a decree against the other defendants.*

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants.

Held that this compromise did not pre, clude the plaintiff from recovering damages against the other defendants. 7 S. and L. 547 distinguished. RAM KUNWAR *v.* SHEIKH ALI HUSAIN. **A. W. N. (1908)-190.**

54 Vakil's authorily—Admissions—Presumption procedure to set aside.—6 C. W. N. 82 Col. 1303 P. I.

55 *Compromise by Trustee—Worship, right to exclusive—Temple of Shiva in Southern India—Right of Shanars or Nadars to worship—Custom—Trustee surrendering decree on appeal—Power of Court to join beneficiaries as co-plaintiffs—Compromise, unlawful—Civil Procedure Code (Act XIV of 1882), Ss. 375, 437—Breach of trust—Introducing new worshippers contrary to usage.*

Where it was proved that men of the "Shanar" or "Nadar" caste were by custom not allowed to worship in a temple dedicated to Shiva in which the customary ceremonies of Hindu worship were carried on.

Held, that arguments directed against the soundness of the doctrine as to the exclusion of the Nadars and showing inconsistencies in the treatment of the Nadars by the worshippers at the temple in other respects were of no avail and could not be entertained.

Where the hereditary trustee of the temple, after a decree had been made in his favour as rapresenting the worshippers at the temple and, pending an appeal by the Shanars, sought to enter into a compromise with them by admitting their right to worship in the temple contrary to the decision of the Court, and it was alleged and not disproved that he did so from a corrupt motive;

Held, that the appellate Court very properly reinforced the cause of the worspippers of the temple by joining certain new plaintiffs.

The principles applicable to the case of a trustee who betrays his trust by surrendering a decree were well stated and applied by the High Court.

In all cases where the Court sees that the trustees are wholly uninterested in the matter and there are parties who are materially interested in the question, it never makes a decree in the absence of those parties who are alone interested in the contest L. R. 3 EQ 368 followed.

Compromise (*Contd.*)

It is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so he is guilty of a breach of trust and still more so if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it 3 Merivale 353=17 Revised Reports 101 followed. SANKARA LINGA NADAN *v.* RAJA RAJESWARA DORAI. **12 C. W. N. 946=4 M. L. T. 101=10 B. L. R. 781=31 M. 236=8 C. L. J. 230 (P. C.)**

56 *Widow getting absolute estate under a compromise in a partition suit—Regulation XXV. of 1802.*

It is open to parties effecting a partition to agree, as among themselves, as one of the terms of a compromise, that a widow of a deceased member of the family should take the property assigned to her as full owner, and not for life only; and though an agreement in these terms might not be binding, and might even be a fraud on members of the family not parties to the compromise, it would stand good as between the parties. It must, however, appear clearly from the instrument, by which effect is given to the compromise, that it was the intention of the parties to enlarge the estate which the widow would ordinarily take. This is, of course, a question of construction of the document, but the document must be construed with reference to the situation of the parties and their rights at the time the deed was executed 6 M. I. A. 1, 8 C. L. R. 57, 11 A. 296 referred to.

Two persons sued another for partition of certain property alleged by them to belong to a joint family of which they and he were members, but which according to him formed part of his and his adoptive father's share of that property after division. One of the plaintiffs died pending the suit, and his widow was brought on the record as his representative. The matter in controversy was settled out of Court by a compromise, under which the defendant gave to the widow and the surviving plaintiff certain land in equal shares, in consideration of their withdrawing the suit with powers of gift, sale, etc.

Held, Per Miller, J.—That, under the circumstances, the widow took an absolute estate in the property given her.

Per Wallis, J. (*contra*)—The widow took only an estate for her life. Held also that the words "you shall enjoy the said lands with the rights of gift, sale, etc." are words of common form borrowed from Reg. XXV of 1802, and were probably inserted, rather for the purpose of making it clear that the transferor had ceased to have any interest in the property transferred, than for the purpose of describing the interests, which the widow and the other donee were intended respectively to take. 8 C L R 57 referred to. SAMBASITA AIYAR *v.* YISWAM AIYAR, **17 M L J 243=2 M L T 316=30 M 356.**

57 *Suit for sale on a mortgage—Compromise by which mortgagee accepted a simple money decree—Second suit for sale barred. Resjudicata S. 11 C. P. C. V. of 1908.*

A suit for sale on a mortgage was compromised on the terms that the mortgagee should accept a simple money decree for the amount of the mortgage debt, and such a decree was accordingly passed. This decree not being satisfied, the mortgagee again sued for sale of the mortgaged property.

Held that the suit was barred 33 C. 849 followed, 26 A 223 A. W. N. 1905 P. 152 Distinguished. PIARI LAL *v.* NAND RAM. **A. W. N. (1908) 265.**

Compromise decree.

1. Condition—Scope of decree passed on compromise—Review. 5 C. W. N. 485 Col. 1601 P. I.

2. Condition—Consent decree—Effect of breach of the terms of the decree on the part of plaintiff—5 C. W. N. 536—28 C. 367 Col. 337 P. I.

3 Condition restraining alienations in decree—Sale in execution of decree of such interest.

Held, that, where a decree of a Settlement Court was based on a compromise which contained restrictions as to alienation, such conditions were void and inoperative. 4 O. C. 163 followed.

Held, further that, where such a decree stood in favour of the judgment-debtor, his right was transferable and could be attached and sold in execution of decree against him. GAYA DIN SINGH *v.* SYED MUMTAZ HUSSAIN. **10 O. C 136.**

4 Construction of—Landlord and tenant—Interest—Rent—Compromise—Under proprietor—Liability of, for interest. 3 C. W. N. 521—26 A. 299—7 O. 116 (P. C.) Col. 337 P. I.

5 Decree passed on compromise. 5 O. C. 9 and 35 C 837.—*See compromise No 15 and 28.*

6 Execution of decree—Parties—Seperate suit barred. 5 B. L. R. 1036, Col. 1078, P. I.

7 Extraneous properties—Compromise decree, its effect on—5 C. L. J. 611, Col. 468, P. I.

8 Non-appealable decree passed on compromise. 9 O. C. 365, Col. 1557, P. I.

9 Pre-emption—Rival claimants—Right of claimants suing subsequently to defeat claimant suing first by obtaining consent decree during pending of the first suit. 20 P. R 1908, Col. 1915, P. I.

10 *Setting aside of, on ground of fraud of mistake.*

Although a person, under the mistaken belief that he had been sued upon a genuine note executed by him, consented to a decree for the amount sued for, the circumstances that that person neglected to exercise due care and satisfy himself that the note sued on was not genuine, does not deprive him of his right to set aside the compromise decree, if it is found that he was inveigled into the compromise by the fraud of the other

Compromise decree (*Contd.*)

party. 2 S. M. L. C. 409 distinguished; A. C. 1895, P. 273, compared. RAGHAYACHARIAR *v.* THIRUVENKATATAMI IYENGAR. 17 M. L. J. 82.

11 Terms of compromise decree. 2 O. C. 28. *See Compromise No. 13.*

12 *Transfer of Property Act, S. 89, decree not in accordance with—Agreement of parties, enforcement of—Execution—Application under S. 89 whether necessary—Court's jurisdiction—cursus curiæ—Civil Procedure Code S. 284—Attachment before sale.*

The rights of the parties as between themselves having been settled by an agreement and the agreement not being void, it is for the Court to determine in what way justice should be done to the parties. L. R. 5 P. C. App. 516, 2 I. A. 219=15 B. L. R. 383=24, W. R. 193 referred to.

By a *solenama* (deed of compromise), the defendant agreed that a certain sum of money found to be due to the plaintiff should be paid in instalments up to a certain year, the instalments being specified in the *solenama*. He further agreed that the mortgage property should be sold in default of payment. The Court directed that the decree be drawn up in terms of the *solenama*. The *solenama* was treated as a part of the decree and the decree stated that the amount should be payable in certain years, and that, on failure to pay any one instalment, the whole amount would become due, and the mortgaged property would, in the meantime, remain hypothecated and that, on failure to pay the money covered by the instalments, the mortgaged property should be sold for realization of the amount.

Held, that the agreement of the parties has been expressed in proper form, though the form is not strictly in accordance with the Transfer of Property Act. There is no law which says that the decree should not be in such a form. The decree is a valid one, and the mortgage property should be sold to satisfy the decretal amount. Whether an order under S. 89 of the Transfer of Property Act is necessary or not, the Court has general jurisdiction to direct a sale of the property, either under S. 284 of the Civil Procedure Code, or under S. 89 of the Transfer of Porperty Act or under the two sections together. Such execution accords with the *cursus curiæ*.

S. 89 of the Transfer of Porperty Act contemplates a certain state of things, but where such a state of things does not exist, that section does not exclude other ways of enforcing a decree, if such a decree is otherwise valid in law.

Held further, having regard to the form of the decree, it is not necessary that there should be an attachment before sale. ABIR PARAMANIK *v.* JAHAR MAHAMAD MONDOL. 6 C. L. J. 95=11 C. W. N. 879=34 C. 886.

13 *Unregistered—Effect of, although the compromise is unregistered—Suit based on right of Jalkar.*

Compromise decree (*Contd.*)

The plaintiffs brought a suit against the defendants, claiming damages from them for fish, which they had wrongfully caught in a Jalkar The claim was fixed at Rs. 200. Before the case was disposed of, both the parties came to a compromise, under which it was agreed that the plaintiffs should recover the sum of Rs. 60 only as compensation, and that the plaintiffs would give, and the defendants would accept, a permanent lease of the fishery at a fixed rent of Rs. 413 a year. A decree was passed on the basis of the compromise.

Held, that, in execution of the decree itself, the amount agreed to be paid as damages could alone be recovered from the defendants The Court executing that decree would not be empowered under it to compel the defendants to execute a Kabuliat in favour of the plaintiffs, or to accept a lease on the terms agreed to. But, as the *solenama* embodied the agreement entered into by the two parties, on the basis of which both parties entered into compromise in that case, and as the agreement on the defendants' part to take the permanent lease at the rental fixed must be taken to have formed one of the grounds, which induced the plaintiffs to accept as damages a sum less than the amount claimed in the suit, the defendants must be held to be bound by that agreement embodied in the *solenama*, and that no objection could be taken to the admissibility of the *solenama* on the ground of its being unregistered. JASIMUDDIN BISWAS *v.* BHUBAN JELINI. 34 C. 456.

14 When can be set aside—Execution of decree—Consent decree. 7 B. L. R. 659 Cols. 142 P. I.

Comptroller General.

Fund in Court—Secretary of State and Court officers, if trustees—Forget endorsement on Government promissory notes. 9 C. W. N. 443—32 C. 799 Col. 540 P. I.

Computation of time.

Sanction to build plan—No order within six weeks—Right to build—Time for Commissioners to pass orders. 5 C. W. N. 42 Col. 86 P. II.

Computation of time for limitation.—*See Limitation Act IX of 1908 Col. 1717 to 2023 P. I.*

Concealment of sale.

1 Suit for pre-emption—Fraud—Notice. 27 P. L. R. 1903 Col. 1771 P. I.

2 Fraudulent concealment of plaintiff's right to sue—Pre-emption suit—Burden of proof. 34 P. R. 1904 Col. 1771 P. I.

3 Custom—Pre emption—Transfer by husband to wife—Fraudulent concealment of rights—Shamilat land. 86 P. R, 1902 Col. 1773 P. I.

Concubine.

Alienation by father-Hindu Law-Maintenance—Right of concubine to—Fathers power to alienate joint property to his concubine. 3 B. L. R. 647 Col. 2125 P. I.

Concurrent decisions on facts.

Appeal to Privy Council—Leave granted where no substantial question of law was involved. 25 M. 215 (P. C.) Col. 1296 P. I.

Conditions of a mortgage bond.

Day fixed for payment—Post diem interest. Where the conditions of a mortgage bond indicate the expectation of the parties that the transaction will not be closed when the day fixed for payment arrives an agreement for the payment of *post diem* interest must be assumed. 25 I. A. 9, 25 C. 246, 20 M. 149, 20 M. 371, 1 C. P. L. R. 154, referred to. RUPCHAND *v.* PANNALAL AND DHANNALAL. **14 C. P. L R. 1901 P. 49.**

Conditions, breach of.

1 Payment of rent—Relief against forfeiture for non-payment of rent, though stipulation for payment contained in compromise decree NAGAPPARAS *v* VENKATA RAO. **24 M. 265.** *See Landlord and Tenant.*

2 Alienation—Permanent lease with covenant against alienation—Suit to evict alienee. PARAMESHRI *v.* VITTAPPA SHANBAGA. **26 M. 157** *See Land lord and Tenant.*

3 Reclamation—Lease—Condition—Condition binding tenant to reclaim land—SHAMRAO PANDURANG *v.* SECRETARY OF STATE FOR INDIA. **25 B. 32**—*See Landlord and Tenant.*

Conditional decree.

Conditional decree for foreclosure mortgage money made payable by instalment.—PANDURANG *v.* RAM CHANDRA VENKATESH. **4 N. L. R. 54**—*See Mortgage (Foreclosure).*

Conditional injunction.

Drains—Municipal Committee's powers—Conditional injunction. 78 P. R. 1901 Col. 454 P. I.

Conditional sale.

1 *Construction—Sale—Conditional sale of movable property—Effect of non-payment of debt within time limited.*

The owner of an elephant, to secure repayment of a small sum of money which he had borrowed, executed a bond by which he agreed that if the debt with interest was not repaid within a time specified the elephant should become the property of the creditor. The elephant was handed over to the creditor. After the time limited in the bond had expired, the elephant was sold as the property of the debtor for arrears of Government revenue due by the debtor. The creditor then sued to recover the money he had lent.

Held, that the suit was not maintainable. Under the terms of the bond the elephant had become the property of the creditor and the debt was extinguished.—UDIT NARAIN MISAR *v.* SHEO NARAIN KURMI. **4 A. L. J., 340=A. W. N., 1907 P. 93.**

2 Agreement for conditional sale. Hire. 6 B. L. R. 871 Col. 2085 P. I.

3 Oral evidence when admissible to prove that a conveyance is a mortgage by way of conditional sale—28 C. 256 and 28 C. 289 Col. 204 P. I.

Conduct.

1 *Deaf-mute — Evidence of — Deaf-mute, Signs made by, how far admissible in evidence —Statement embodied in Police report or made to another person in Police enquiry, admissibility of, in evidence—Conduct Evidence Act (I of 1872), Ss. 8, 33, 118 and 119.*

In a criminal case there was a deaf-mute witness for the prosecution. The question was whether his gesticulations at the place where the body of the murdered man was found, during the Police enquiry and subsequently in the Sessions Court were evidence against the prisoner, and if so, what was their value. The Sessions Judge was satisfied that the witness could not understand the questions that were put to him and for the most part could not make his meaning intelligible.

Held, that he was not a competent witness. The signs made by him if regarded as conduct were not admissible as evidence against the prisoner under s 8 of the Evidence Act. If the signs made by him were regarded as statements they were equally inadmissible under s. 32.

Held, also, that statements embodied in first reports to the Police or statements made by a witness to another person in the course of a Police enquiry are not ordinarily admissible in proof of the facts stated, though they may be admissible to rebut the suggestion of recent fabrication of a case or they may be admissible under s. 32 of the Evidence Act. SAMAIDIN *v.* KING-EMPEROR. **5 O. C. 246.**

2 *Mahomedan Law—Legitimacy—Declaration made by father of his son's legitimacy—Admission by one defendant how far binding on other defendants—Conduct, admission not amounting to.*

The plaintiff brought a suit in which he claimed possession of a share in certain property left by his father. Some of the defendants admitted the plaintiff's legitimacy and his right of inheritance while the others denied the fact. The plaintiff relied on the admission made by some of the defendants and a declaration made by his father that the plaintiff was his heir and representative.

Conduct (*Contd.*)

Held, that the admission was not conduct but an admission pure and simple, and as such was not evidence against the other defendants.

Held, further, that the declaration made by the plaintiff's father was not, by itself, sufficient and satisfactory evidence of his legitimacy. The term '*burkhurdar*' means "happy, enjoying long life and prosperity, receiving a daily allowance glorifying, boasting." The term is specially applied to male children. It may be used with reference to an illegitimate child as well as a legitimate as it is a term of affection. It does not necessarily import that the person to whom it is applied is legitimate. FAKHR-UD-DIN HAIDER *v.* KAMR-UD DIN. **I O. C. S. 49.**

3 Conduct of parties—Evidence—Construction of—Always and for ever—Perpetual grant—Limited interest—Award.

The words 'always and for ever' in a will or award do not *per se* extend the interest given beyond the life of the person who is named as donee. They are not inconsistent with limiting the interest given, but the circumstances under which the instrument is made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the Court to presume that the grant was perpetual. *L. R.*, 12. *I. A.*, 159 *at p.* 163 *and* 205, *at p.* 214, *referred to.* AZIZ-UN NISSA *v.* TASSADUQ HUSSAIN **V. W. N.' Cal., 1901, p. 569. =23. A. 324. (P. C.).**

Confession of judgment

What amounts to confession of judgment. Judge prohibited from receiving private communication from a party to suit—Max Mink *v.* Shankar Dass. 116. P. W. R. 1908. *See Resjudicata.*

Confirmation of auction sale.

1 *Sale by Registrar—Misrepresentations—Recision of sale—Compensation. Confirmation of auction sale Abstract of title—Misrepresentation as to interest sold.*

The purchaser applied to be discharged from the purchase of a dwelling house sold by the Registrar of the Court on the ground that the vendor was entitled to eight-twelfths of the house, whereas, according to the abstract of title, it was represented to him that he was purchasing the entire sixteen-anna share of the house and premises. It was found that the statement in the abstract of title was misleading, though it was not inserted in it fraudulently or intentionally.

Held, that under such circumstances it is open to the purchaser to raise objection to the completion of the sale, though he has accepted the title so far as acceptance can be inferred from raising no objection or requisition, and from paying the balance of the purchase money into Court without

Confirmation of auction sale (*Contd.*)

reserving any right to object to the title, and notwithsanding the rule of Court which declares that upon confirmation of sale and payment of the purchase money a purchaser is to be deemed to have accepted the title.

Held, also that owing to misrepresentation the matter was not one for compensation, and the Court must either enforce the contract or rescind the sale. It would be impossible to compensate a purchaser in respect of such a material misstatement in the case of a purchase of a dwelling house. In the case of land occupied for agricultural or such like purposes a deficiency in area, if it were not a deficiency of very great extent, would not entitle the purchaser to rescind his contract, but would be a proper subject of compensation; but to say that a purchaser, who believed that he was the purchaser of an entire dwelling house and then discovers that what he is purchasing is not the entire but only an undivided share of such house, is to accept the undivided portion with compensation in respect of the remaining shares under his contract, is a very different matter and is wholly unreasonable and contrary to fairness and justice.

The Court referred the matter to the Registrar to enquire and report whether a title could be made by the vendor to the entire house. Further hearing of the application adjourned until the receipt of the report.—*Kay's Rep.*, 52 *(1153)*; *Kay and Johnson*, *286 (1855)*; *2 Cox, 394. (1794)*; *L. R., 13, Eq. 196 (1872)*; *12 Ch. Div., 131 (1879), referred to.* UPENDRA NATH MITTER *v.* OBHOY KALI DASSEE. **V. W. N. C. 1901, p. 593.**

2 Confirmation of auction sale—Auction sale—Application to set it aside on ground of fraud—Rejection of application—Confirmation between rejection and hearing on appeal—Effect of—6 C. W. N. 283 Col. 1109 P. I.

Confiscation.

Confiscation of Raj by Government—Effect on Babuana grants to Junior members—Restoration—Right acquired during confiscation.

When the question was whether a grant of lands originally made for the maintenance of younger members of the family was resumable for alleged breach of condition of the grant and it appeared that subsequent to the grant the parent estate was confiscated by Government and Government settled with the grantees the land held by them:—

Held, that this constituted a new settlement and when subsequently Government restored the estate to the grantor's heir the transaction did not operate to recreate the maintenance grant with the conditions. When Government confiscated the estate,

Confiscation (*Contd.*)

all rights of the grantor as well of the persons holding lands in the estate lapsed. The subsequent restoration of the estate did not destroy rights acquired whilst the estate was under forfeiture. 7 C. W. N. 57, 29 C. 828, ref. to—RAJA NAOPAT SINGH DEO *v.* KASIRAM SINGH DEO. **11 C. W. N. 655.**

Conflict of decisions.

Among the High or Chief Courts—Duty of Subordinate Courts.

A subordinate Court in the Punjab is bound in all cases to follow the rulings of the Chief Court, irrespectively of any conflict of authority that there may be between those rulings and the decisions of other High Courts, and of any views which the subordinate Court may itself entertain as to the equities of the case with which it is dealing. KASU *v.* ATAR SINGH, **142 P. W. R. 1908=103 P. R. 1908 (F. B.)**

Conflict of Laws.

1 *Conflict of laws—Laws in a foreign State—Burden of proof lies on him who alleges they are different from British laws—Presumption in absence of proof—Trustee and* cestui que trust*—Confidential relationship.*

It lies on him who asserts it to prove that the law of the foreign State differs from ours, and in the absence of such proof it must be held that no difference exists except possibly so far as the law here rests on the specific Acts of the Legislature.

Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show, to the satisfaction of the Court, that the person by whom the benefits have been conferred had competent and independent advice in conferring them. This applies to the case of trustee and *cestui qui trust.*—RAGHUNATH MULCHAND *v.* VARJIVANDAS MADANJI. **8 B. L. R. 525=30 B. 578.**

2 *Conflict of Law and Lex loci.*

The law as to ownership of land and other incidents relating to land is not the personal law of the owner but the law of its site.

Held, that incidents relating to land in Zanzibar were determined by the Muhomedan law which is the law of the place and not by the English law. SECRETARY OF STATE *v.* CHARLES PILLINGWORTH & Co. **26 B. 1.**

3 *Conflict of Law—Jurisdiction over non-resident foreigner—-Foreigner residing in country subject to the same soveriegn—English Courts—Jurisdiction of—Over subjects in India—Rules of Supreme Court—Order XI Rule I (e).*

As a general rule, a Court can exercise jurisdiction over a foreigner only if he is resident within the limits of its territorial jurisdiction.

Though the natives of India are foreigners, they owe allegiance to the common Sovereign of England and British India and are subject to the Supreme Legislative authority in the British Empire.

An Act of parliament does not apply to India unless India is expressly included in its operation, but that is based upon convenience of legislation and not upon any want of authority in Parliament to legislate for India. If, therefore, the Supreme Legislature in the British Empire authorises an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner by reason of the cause of action arising within it jurisdiction as is the case where Order XI, Rule I (*e*) under the Judicature Acts applies, and the foreigner is a native of British India he cannot treat the judgment passed as a nullity merely because he did not reside within the jurisdiction of the Court which passed it.

A foreign judgment is not binding on a defendant who had no personal notice of the suit. 15 W. R., 500 (1871); 11 Bom., 241 (1886); 13 Mad., 496 (1890)

It may be proved in a suit based on a foreign judgment that the foreign Court was not competent to pass the judgment.

The plaintiff cannot recover more than appears on the face of the judgment sued upon. The English Statute as to judgments carrying interest does not apply to India, nor does the Indian Statute as to interest assist the plaintiff. MOAZIM HOSSEIN KHAN BAHADUR *v.* RAPHEAL ROBINSON. **5 W. N., C., 741=28 C. 641.**

Confusion.

Confusion of property—Redemption—Restoration of entire property—Mortgagee—Right and duty of—RAMCHANDRA *v.* MUKUND. **3 B. L. R. 152**—*See Mortgage—Redemption.*

Conjugal rights.

1 Suit for restitution of Conjugal rights whether triable by munsiff—Jurisdiction 8. C. W. N. 705—31 C. 849 Col. 762 P. I.

2 *Restitution of Court's power to impose conditions in decree—Marriage.*

A Court is not empowered to impose conditions in a decree for restitution of conjugal rights. MOTILAL MAHASUKHBHAI *v.* BAI CHANCHAL. **4 B. L. R. 107.**

3 *Restitution of—Husband and wife—Decree for restitution of conjugal rights. Conditions in.*

A Court passing a decree for restitution of conjugal rights in favour of husband, may well grant assistance only upon the terms of the husband securing the wife in the enjoyment of her personal safety and her other legal rights. When there was no ground for

Conjugal rights *(Contd.)*

thinking that the wife's personal safety was in danger in any way, the High Court set aside the condition which imposed on the husband the duty of providing his wife with a separate house and a separate maintenance. CHIMAN LAL VRIJBHUKHANDAS *v.* BAI NARMADA. **4 B. L. R. 820.**

4 Restitution of—Hindu Law—Marriage—Wife—Suit for enforcement of—Residence of wife at her parental house—28. C. 751. Col. 282. P. I.

5 *Restitution of Hindu Law—Husband and wife—Suit for—Cruelty. What amounts to—Power of Court to refuse restitution—Danger—Apprehension of—Gross breach of marital obligations—Conduct of parties.*

Per Mookerjee, J.—Although a Hindu husband is entitled to maintain a suit for restitution of conjugal rights there are cases in which the Courts will not grant him any relief. 11 *Moo. I. A. 551 (615) referred to.*

Per Harington, J.—Although it may be open to argument whether the imposition on a high caste Brahmin (Hindu) lady of the society of a low caste prostitute is such a gross breach of marital obligation as to justify the Court in refusing restitution, the Court is not bound to send such a high caste Hindu lady to reside in a house in which her husband keeps a low caste prostitute.

The Court is not bound to order a wife to return to her husband, when there is reasonable ground for apprehending that a return to her husband will imperil her safety.

Per Mookerjee, J.—The Hindu Law does not differ materially from the English Law on the question of what is legal cruelty; the principles upon which relief ought to be granted or refused in cases of restitution of conjugal rights are substantially identical under both the Hindu and the English Laws. 1 *Bom.* 164, and 13 *All.* 126 (160) *referred to.*

Legal cruelty of the husband is a sufficient reason for refusing restitution of conjugal rights; it is not sufficient to prove cruelty in a popular or wide sense of the term, but it is necessary to show that the conduct complained of was such as to cause danger or a reasonable apprehension of danger to life, limb, or health, which is obviously far more comprehensive in scope than mere physical violence. *A. C.* 395 (1897) and 1 *Hogg Cong.* 35, 36 (1790), 4 *S. W.* and *T.* 135 (1865) 72 *L. T.* 295 (1895), 14 *W. R.* 451, 8 *All.*, 78 *referred to.* 5 *Cal.*, 500 *distinguished.*

Where a Hindu husband had transferred his favours to a concubine, habitually ill-treated his wife, a woman of high caste and family, grossly insulted her religious feelings by making his concubine, a woman of low caste, live in the house as a member of his family, and subsequently drove his wife out of the family residence at the instance of the concubine, and lived separate from her for twenty-six years.

Held, that such conduct of the husband constituted "a grave, weighty and serious matrimonial offence" and amounted to cruelty within the meaning of the law.

Even if such conduct of the husband constituted grave matrimonial offence short of cruelty, it was of such a character as to disentitle him to any assistance from a Court of justice, equity and good conscience, (1895) A C 384 and 4 All H C R 109, and (1897) A C 395, and 13 All 126 (160) referred to. DULAR KOER *v.* DWARKA NATH MISSER. **1 C L J 283=9 C W N 510.**

6 *Restitution of—Hindu Law—Plaintiff's being out of caste is no defence to suit for.*

The plaintiff sued for restitution of conjugal rights in respect of his wife, a minor under the guardianship of her mother. The defendant's principal plea was that the plaintiff was out of caste. The Court of first instance disallowed this objection and passed a decree in plaintiff's favour. The appellate Court found that the plaintiff had been out-casted passed a conditional decree, directing that the plaintiff should first obtain restoration to caste as a condition precedent to his obtaining a decree for restitution of his conjugal right.

Held, on appeal to the High Court, that as to bar a suit brought by a Hindu for restitution of conjugal rights, the defendant must set up some defence of a matrimonial nature such as would support a decree for judicial separation, the fact of plaintiff being out of caste was no defence to the suit and no condition should have been made to the decree. 8 All., 78 and 13 All., 126 referred to. SAHADUR *v.* RAJWANTA. **1 A. L. J. 433=W. N., A., 1904. p. 173= 27 A. 96.**

7 Restitution of—Suit for—25 B. 644 Col. 1802 P. I.

8 Restitution of—Suit for—Limitation—Minor wife—Demand and refusal—34 C. 79 Col. 1803 P. I.

9 *Restitution of—Limitation Act (XV of 1877), Sch. II, Art. 35—Applicability to Hindus—Suits for starting point of limitation for.*

A suit brought by a Hindu or Mahomedan husband against his wife for restitution of conjugal rights is barred under art. 35, sch. II, of the Limitation Act if brought more than two years after the time when he demanded restitution and was refused. *Dhanjibhoy Bomanji* v. *Hirabai*, (I. L. R., 25 Bom. 646), followed. *Binda* v. *Kaunsilia*, (I. L. R., 13 All. 126), dissented from.—SARAVANAI PERUMAL PILLAI *v.* POOVAYI, **28 M. 436.**

10 Restitution of—Hindu Law—Husband and wife—Cause of action. 28. C. 37 Col: 353. P. II.

Consent

1 Hindu Law—Adoption by widow—Consent of sapinda—Exercise of discretion—Authority of husband to wife, Subrahmanyam. *v.* Venkamma 26. M. 627 *See Hindu Law.*

2 Muhammadan Law—Will—Bequest of more than one third of. Consent of heirs

Consent (*Contd*).

after attachment—Daulat Ram Khushal Chand *v.* Abdul Kayum Nurudin. 26 B. 497 *See Muhammadan Law—Will.*

3 Appeal to the King in Council—Application to appeal—Necessary Conditions—Sancion—Judicial discretion. 23 A. 227 Col: 1292 P. I.

4 *Consent, effect of on jurisdiction—Insolvency Act (Statute 41 and 42 Vic., C. 42), Sections 7, 21, 28, 29, 31—Insolvency proceedings—Sale by official assignee—Jurisdiction of Court to sanction sale.*

The insolvent Court, acting under the Indian Insolvency Act, has no power to sanction the sale by the Official Assignee of the estate and effects of the insolvent. *In re* BHUKHANDAS LALLUBHAI. **7 B. L. R. 954.**

5 Reference to High Court when plea of jurisdiction not raised in Court. 25 A. 135 Col. 1687 P. I.

6 Consent, want of—Alienation of half by husband. Joint property. 1 L. B. R. 1900—1902 P. 184 Col. 1645 P. I.

7 Consent—Jurisdiction—Suit not liable without leave of court—Leave of Court not obtained—27 P. R. 1903 Col. 1056 P. I.

Consent decree.

See Compromise decree.

Consequential Relief.

1 Declaratory title without consequential relief—1 L. B. R. 1900—1902 P. 1 Col. 138 P. I.

2 Consequential relief—Cancellation of document. 2 L. B. R. 266 Col. 107 P. I.

Consideration.

1 *Absence of in sale deed.—Voluntary deed happening of an event—Consideration, non-payment of.*

A Hindu widow executed a voluntary deed in favour of *A*. The widow retained the deed herself—but the execution of the deed was duly communicated to *A*; and the tenant attorned to *A*. *A* died and the lands were conveyed by *A*'s mother who was *A*'s heir to the defendant. The District Court on appeal found that no consideration passed from *A* for the sale, and that the deed was intended to be operative only in the event of *A* outliving the widow.

Held:—Chief Justice.—If the parties intended title to pass, the fact that no consideration was paid did not prevent title from passing.

Held also that under the circumstances the title passed to A.

Per *Miller* J :—It is not enough for the plaintiff to succeed to show merely that she did not intend a present transfer, but it is necessary for her to show that it was agreed between her and the transferee that the transfer should be revokable or should be suspended or postponed until the happening of a given event. AMIRTHAMMAL *v.* PONNUSAMI PILLAI. **17 M. L. J. 386.**

2 *Absence of consideration for the making fo the note—Rights of a* bona fide *holder in due course for consideration and without notice of want of consideration.*

Notwithstanding the fact that a promissory note was executed without consideration, a *bona fide* holder in due course for consideration, and without notice of any want of consideration for the making of the note, is entitled to a decree on the note. SANTHANA GOPAULASAWMI ODAYAR *v.* SUNDARASAWMY ODAYAR. **1 M. L. T. 393.**

3 *Adoption—Natural father giving son for adoption for a consideration—Hindu Law.*

The mere fact that the real father of the boy given by him in adoption has received a consideration for doing so from the adoptive father does not invalidate the adoption. MURUGAPPA CHETTY *v.* NAGAPPA CHETTY. **M. L. J., 1906, p. 22 = 29 M. 161.**

4 Burden of proof—Receipt of consideration admitted in bond but denied by executant—27 A. 71 Col. 224 P. I.

5 Benami transaction—Right of suit by—Mortgage—Conveyance without consideration, test of, 12 C. W. N. 409 Col. 25 P. II.

6 Barred debt—Agreement to pay a Barred debt—Express contract—Consideration valid—5 A. L. J. 274 Col. 293 P. I.

7 Burden of proof—Undue influence—Unconscionable transaction—Pro—Note. 5 O. C. 307 Col. 263 P. I.

8 *Conveyance, registered and delivered, if operative—Not paid—Effect of.*

If A executes a conveyance in favour of B, and the document is registered and delivered, it is not necessarily operative; if it is proved that the consideration agreed upon has not been paid, and the deed shows that the intention of the parties was that there should be immediate payment of the consideration-money, title does not vest till the condition is fulfilled. SARAT CHANDRA NASKAR *v.* HARI PADA MISTRI. **4 C. L. J. 338.**

9 Failure of—Misjoinder of parties—Dismissal of suit Champerty—Maintenance. KARIM HUSAIN KHAN *v.* ACHAL RAM. **2 O. C. 149.** *See Misjoinder.*

10 *Copy of Koran is a valid* Hiba bil ewaz *—Registration—Consideration, what is sufficient—Koran, copy of—Transfer of property in lieu of dower-debt—Whether gift or sale.*

A transfer of immoveable property by a Mahomedan to his wife purporting to be "made in consideration of a dower debt of Rs. 49" and "on account of right of inheritance," was held to be a sale and as such goverend by the provisions of S. 54 of the Transfer of Property Act.

It was wrongly described as a *hiba bil ewaz.*

A copy of a Koran is a valid consideration for a *hiba bil ewaz.*

Consideration (*Contd*).

Semble:—S. 129 of the Transfer of Property Act excepts only gifts without consideration from the operation of the Chapter on Gifts. ABBAS ALI SHIKDAR *v.* KARIM BAKSH SHIKDAR. **13 C. W. N. 160.**

11 Difference between consideration and value of property—Fraudulent transfers—Onus of proof of fraud. 17 M. L. J. 11 Col 584 P. I.

12 Doctrine of, explained and discussed Promissory note executed by minor. 16 M. L. J. 422 Col: 251. P. I.

13 Evidence as to payment of—Property—Exchanged—Cash payment recited in sale deed—Whether evidence of actual transaction. 4 A. L. J. 441=A. W. N. 1907 P 181 Col: 213 P. I.

14 Executed Contrat defective under Municipalities Act not binding though performed in part 27 A. 592 Col: 320. P. I.

15 Executed and executory—Failure of consideration—Specific performance, suit for —Ekar. 31. C. 584 Col: 248. P. I.

16 False recital as to—Champerty—Right of purchaser from rightful heir to sue trespasser for possession of estate—Sale consideration not wholly paid. 27 A. 271 (P. C.) Col. 385 P. II.

17 *Failure of—Of contract—Futile attempts to rescind agreement—Right to specific performance—Failure of consideration.*

It cannot be laid down as an abstract proposition that there is any necessary inconsistency in a person, who has unsuccessfully tried to rescind an agreement, afterwards claiming performance of it.

In a suit between a person claiming an estate by virtue of an alleged adoption and another person disputing the truth and validity of such adoption, a compromise was entered into, whereby the latter admitted the adoption and agreed to refrain from questioning the truth and validity of the adoption of the former; the object of the former in entering into the compromise was to obtain a clear admission of his title to the estate from the latter and to secure himself from attacks from that quarter. The latter, however, contrary to the terms of the compromise repudiated the validity of the adoption and tried to rescind the agreement of compromise in a subsequent litigation, but without success. The second party claimed, in a subsequent suit, to enforce the terms of the compromise.

Held, under the circumstances, that the principal consideration for the compromise being an abstention, on the second party's part from questioning the legality of the adoption of the first party, and there having been a failure on the part of the second party to keep up to the terms of the compromise and the conduct of the second party having been at variance with, and having amounted to a subversion of, the relation intended to be established by the compromise, there was such a failure of consideration for the agreement of compromise as to disentitle the second party to a specific performance of the same. SRISA CHANDRA ROY *v.* ROY BANOMALI RAI BAHADUR. **2 A. L. J. 31 (P. C.)**

Consideration (*Contd*).

18 Failure of—Evidence—Oral evidence as to contents of documents—Fraud—Want a failure of consideration—Mortgage—Sale deed. 8 B. L. R. 287 Col. 217, P. I.

19 Failure of—Assignment of mortgage over immoveable property by unregistered document—Suit by assignee against assignor within three years of receipt of mortgage money. 25 M. 396 Col. 1849 P. I.

20 Failure of—Contract—Mortgage suit to recover mortgage money—New obligation —Limitation. A. W. N. 1906 P. 88—3 A. L. J. 228 Col. 1878 P. I.

21 Forbearance to sue in respect of a disputed claim—Contract of suretyship. 31 C. 242 Col. 353 P. I.

22 Fraudulent transfer of moveable property to the prejudice of creditor—Consideration in part discharge of debts. 30 M. 6 Col. 582 P. I.

23 *Hypothecation bond—Mortgage—Bond —Construction of—Document—Lease of even date to husband of mortgagee—Liability of mortgagor.*

First defendant and his brother (since deceased) executed an instrument of hypothecation to A, the wife of seventh defendant, on consideration that A should pay a creditor of the executants a sum which was due by them to him. The document provided that interest should be paid to A in the following manner:—She was to be paid by her husband the rent payable by her husband to the executants under a lease recited as having been granted to the husband that day. The principal sum was to be repayable within 17 years. The lease was for a term of 28 years, and it, in its turn, referred to the instrument of hypothecation, and provided that the rent payable under it should be paid by the seventh defendant to A (his wife), and that after the debt to A under the hypothecation bond had been cleared, the rent should be paid to the lessors (the executants of the hypothecation bond, namely, first defendant and his deceased brother). On a suit being brought by the transferees of A's interest in the hypothecation bond—

Held, that the first defendant and the sons of the deceased brother were not liable to the claim. The simultaneous execution of the hypothecation and the lease, the facts that the term of the latter covered the whole period fixed in the hypothecation bond for repayment of the principal, the relationship between the hypothecation creditor and the lessee, (which pointed to their interest being practically identical), and the specific reference in each instrument to the appropriation of the rent to the interest, showed that the transaction between the parties was of a tripartite character, intended to relieve the

Consideration *(Contd.)*

obligors from any responsibility in respect of interest, and to entitle the obligee to look for liquidation of interest solely to the source pointed out. CHENNAPATNAM GOPAL ROW *v.* TADAKAMALLA NARASIMHA ROW. **27 M 86**.

24 Illusory—Promise to forbear from suing on an award for a certain time—Consideration of payment of portion of amount. 31 C. 274 Col. 344 P. I.

25 *Immoral and illegal contract — Immoral contract—Executed or executory transaction—Consideration—Future illicit co-habitation—Particeps criminis.*

When the consideration for an agreement is illicit co-habitation, whether the transaction be executory or executed, the agreement is void on grounds of public policy. It is liable to be set aside even at the instance of a *particeps criminis* But transactions intended to be gifts if amounting to completed transfers of property cannot be so impeached.

The question, whether what is transferred has in truth been transferred by way of gift or not, must depend on the actual intention of the parties and the facts of the particular case.

Held, that the assignment of a mortgage by the plaintiff to the defendant for the purpose of future illicit co-habitation those made ostensibly for money consideration was void and must be set aside at the suit of the plaintiff even if partial effect had been given to the illegal consideration. THASI MUTHUKANNU *v.* SHUNMUGAVELU PILLAI. **15 M. L. J. 286=28. M. 413**.

26 Immoral and illegal consideration, plea of—Failure to prove—Co-habitation as consideration.—13 M. L. J. 7. Col. 278 P. I.

27 Inadequacy of—Alienation by Hindu father—Validity of—4 B. L. R. 587 Col. 2123 P. I.

27 (a) Inadequacy of consideration—Family compromise—28 P. L. R. 1905—49 P. R. 1905.

28 Inadequacy of consideration—Voidable contract—Undue influence 25 B. 126 Col. 257 P. I.

29 Mortgagor and mortgagee—Suit for money paid upon an existing consideration which afterwards fails—8 O. C. 166 Col. 1879 P. I.

30 Mortgagor and mortgagee—Failure of plaintiff to prove as against transferee that the consideration entered in the bond was correct. 25 A. 159. Col. 341 P. I.

31 *Non-payment—Effect of conveyance registered and delivered, if operative—Agreement to sell—Not enforceable—Limitation.*

If A executes a conveyance in favour of B by way of *mokarari*, and the document is registered and delivered, it is operative, even though it is proved that the consideration agreed upon has not been paid Its validity cannot be questioned by a third party.

A agreed to sell property to X and, subsequently, conveyed it to B, who took with notice of the prior contract. X obtained a decree for specific performance against A, but did not make B party to the suit; X then sued B to recover possession.

Held, that X had no enforceable title as against B, because at the date of the institution of the suit, his equitable right had been barred by limitation. MANOGI SINGH *v.* SARAT LAL MAHTO, **4 C. L. J. 334**.

32 *Non-payment of consideration agreed, effect of.*

Failure or delay in payment of full consideration, either to the mortgagor or to a prior incumbrancer, after such payment has been demanded by mortgagor, avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration, in the absence of a specific contract postponing payment, it being immaterial whether the failure or the delay has or has not caused inconvenience or loss to the mortgagor. In the absence of express stipulation postponing payment, it will be presumed that payment is intended to be made immediately or within reasonable time, according to the circumstances of each case. —16 P. R. 1884, *Diss;* 153 P. R. 1882, 27 P. R. 1886, 100 P. R. 1889, 103 P. R. 1906, *referred to.* GOKAL CHAND *v.* RAHMAN **59 P. R. 1907 (F. B.)**

33 Partly true and partly to defeat creditors—Consideration for transfer separable, if whole transfer void. 7 C. L. J. 583—12 C. W. 761 Col. 585 P. I.

34 Partly unlawful—Whole agreement void under S. 24—Contract Act 10 B. L. R 553—32 B. 449 Col. 286 P. I.

35 *Partition—Agreement not to separate—Consideration—Suit for partition against co-sharers and manager—Enquiry by commission if the plaintiff has omitted to include in his plaint any joint property.*

Co-sharers can agree among themselves not to divide their joint properties for a limited period. But the agreement must be for consideration.

A suit may properly lie against co-sharers and the manager of joint property for its partition and taking of accounts.

In such a suit if the defendants plead that the plaintiff has omitted to include some joint properties in his plaint, a Commissioner ought to be appointed to enquire and report whether there are any such properties omitted SRIMOHAN THAKUR *v.* W. O. MAC GREGOR. **28 C. 769**.

36 Part payment of consideration—Fraudulent conveyance. 8 B. L. R. 110 Col. 682 P. I.

37 *Part payment of consideration—Custom—Alienation by father—Alienation by childless male proprietor—Sale—Part of consideration fictitious—Necessity*—Kalals *of Alawalpur town in Jallandar District.*

The plaintiff, a minor, sued for a de-

Consideration *(Contd.)*

claration that a sale of ancestral property effected by his father and uncle was invalid as against his right for having been made without necessity. It was found that a part of the consideration entered in the sale-deed was fictitious and was entered to defeat pre-emptors, that the rest of the consideration consisted of just antecedent debts and was not for short of the value of the property.

Held, that the suit must be dismissed. DEVI CHAND *v.* GURCHARN SINGH. **127 P. L. R. 1906.**

38 Plea of failure by stranger—Champerty—Right of purchaser from rightful heir to sue trespasser for possession of estate—Sale consideration not wholly paid 27 A 271 Col. 385 P. II.

39 *Plea of failure who can raise—Mortgage—Construction of deed—Redemption—Sale deed.*

A usufructuary mortgage deed ran thus: "I (mortgagor) shall pay back the said amount within three years from this day and redeem the usufructuary mortgage deed. If I fail to pay at the prescribed time you shall receive the money from me in any *Ani* month and restore the said properities to me."

Held that the mortgagor has the right to redeem at any time on or before the expiry of three years; and that the last clause only meant that the mortgagor cannot recover possession in *any* year earlier than June or July, as, if he did so, he would be depriving the mortgagee of the crops grown by him in the year.

Held, also, the fact that a sale deed was executed with the object of depriving the next heir of the vendor of the property sold, cannot make the sale a sham transaction, and the question whether the consideration passed or not was not material in a suit by the vendee for redemption. CHINNASAMI REDDIER *v.* KRISHNA REDDY. **16 M. L. J. 146.**

40 *Promise without consideration—Acknowledgment on an account stated—Fresh contract —Cause of action.*

A naked promise to pay what a person is already under an obligation to pay is without consideration, and therefore does not constitute a fresh contract, breach of which would be the foundation of a cause of action.

An acknowledgment on an account stated does not in itself constitute a fresh contract. Shanker *v.* Mukta, I. L. R. 22 Bom., 513, and Ganga Prasad *v.* Ram Dayal, I. L. R. 23 All., 502, followed. KANKANI AND TWO OTHERS *v.* MAUNG PO YIN. **1 L. B. R. 1900-1902 P. 1. 90.**

41 *For Pronote—Wagering contract—Gambling transaction—Consideration for promissory notes sued upon—Indian Contract Act, s. 30.*

Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay and receive money between one another according as the market price of the goods should vary from the contract price at a given time, that is not a commercial transaction but a wager on the rise or fall of the market.

Where therefore the dealings which formed the consideration for certain promissory notes sued on were not for genuine purchases of rice, but only for payment of money by one party or the other according to the changes and chances of the market.

Held, that such dealings were wagering contracts within the meaning of the Indian Contract Act, and the consideration for which the promissory notes were given was a gambling transaction. KONG YEE LONE & Co. *v.* LOWJEE NANGE. **1 L. B. R. 1900-1902 P. 107.**

42 Public policy—Part consideration opposed to Public Policy—Whole agreement void. 3 L. B. R. 1906 P. 42 Col. 283 P. I.

43 Refund of purchase-money—Sale in execution—Warranty of title—Failure of consideration—Suit after confirmation of sale. 3 A. L. J. 819 Col. 1560 P. I.

44 *Suit on hundi—Decree for money due on different consideration to that stated in hundi—Validity—Contract Act S. 54.*

Where the suit is on the *hundi* alone, and it is shown that the consideration for the *hundi* failed S. 54 of the Act requires the Court to dismiss the suit. The Court has no right to give a decree for money due on a different consideration to that stated in the *hundi*. SAMI AYIA THEVAN *v.* RENGALYENGER. **3 M. L. T. 405.**

Consignor and consignee.

Goods, loss of—Bailee—Suit for compensation. 7 C. W. N. 370—30 C. 257 Col. 822 P. I

Consolidating Act Code.

See Code Col. 460 P. II.

Consolidation of Appeals.

Previous order on the matter—Construction and effect of—Practice. 49 C. 140 Col. 124 P. I.

Conspiracy.

When a cause of Action—Suit for damages —Overt act—Giving false evidence in pursuance of a conspiracy.

Per Candy, J.—Conspiracy to do certain acts gives a right of action only where the acts agreed to be done, would, had they been without a foreconcert, have involved a *civil injury* to the plaintiff; and were injury only, but not an injury for which compensation could be recovered in a civil action ensued, no suit will lie, Per *Tyabji*, J:—A mere conspiracy to injure a man without an overt act resulting in the injury does not furnish any cause of action; and giving false evidence in pursuance of the conspiracy is not such an overt act as to give rise to a civil action. TEMPLETON *v.* LAURIE. **29 B. 380.**

Construction.

1. Of Acts.
2. Of Articles of Association.
3. Of compromise decree.
4. Of contract.
5. Of decree.
6. Of deeds.
7. Of gifts.
8. Of grants.
9. Of Hindu Law.
10. Of Kabuliat.
11. Of Lease.
12. Of Mortgage deed.
13. Of order.
14. Of Power of attorney.
15. Of statutes.
16. Of wajib-ul-arz.
17. Of wills.
18. Of words.

1 Construction of Acts.

Meaning of the words.

1 Absence of a contract to the contrary--Reference of--Mortgage--Discharge of post of mortgaged property--Subsequent mortgage. 7 B. L. R. 191 Col. 641 P. I.

2 Against the same judgment-debtor--Rateable distribution of assets, 8 O. C. 86 Col. 1188 P. I.

3 *Abkari Act (I of 1886, Mad.) S. 28--Sale for arrears of abkari arrears--Effect on prior incumbrances--Limitation.*

A sale of immoveable property for arrears of *abkari* revenue under section 28 of Art. I of 1886 operates subject to encumbrances created prior to the sale. 7 Mad., 474, 25 Mad. 572, 26 Mad., 230, *followed.*

Where lands subject to mortgage are sold under S. 23 of Act I of 1886, the mortgagee's suit to enforce his mortgage right against the purchaser does not fall within Art. 12 of schedule II of the Limitation Act, when the plaint contains no prayer for setting aside the sale. IBRAHIM KHAN SAHIB *v.* RANGASAMI NAICKEN. **28 M. 420.**

4 Amending acts affect legal proceedings commenced under repealed provisions--Record of right. 12 C. W. N. 987 Col. 137 P. I.

5 Burden imposed by enactments how construed--Proviso- -Mortgage exemptions in construction of Acts imposing burden. 29 B. 203 Col. 879 P. I.

6 Canon of construction--Execution of decree against legal representative--Transfer of decree--Powers of Court passing decree. 28 M. 466, Col. 1118 P. I.

7 Cause of action --Limitation--Suit against--Corporation of Calcutta--"Acrual of the right to sue". 32 C. 277 Col. 174 P. I.

8 Claim--Suit--Accounts -'Claim', interpretation of. 7 B. L. R. 688 Col. 209 P. II.

9 Conclusive proof. Oath. 8 B. L. R. 19 Col. 386 P. II.

10 Civil Procedure Code--Parties Exclusion of a section of community from entering temple--Suit by members of community to establish their rights to it. 9 C. W. N. 594 Col. 1221 P. I.

11 Civil Procedure Code-Sale by inferior Court of property attached by a superior court--Jurisdiction. 6 C. L. J. 130--34 C. 836 Col. 1165 P. I.

12 *Days--Municipality--District Municipalities Act (Mad. Act IV of 1884), s. 55--'Day', what is--Circumstances which determine whether particular days are to be reckoned or omitted.*

The word 'day' in s. 55 of the Madras District Municipalities Act means a duration of 24 hours and the period of 60 days for which the person must have 'held office, within the limits' must be held to be 60 entire and unbroken periods, in law, of 24 hours each. It will depend upon the circumstances whether fractions of a day are to be omitted or to be counted as whole days and the cause and character and duration of absence from Municipal limits will determine whether particular days are to be reckoned or omitted. MUNICIPAL COUNCIL OF CUDDALORE *v.* SUBRAHMANIA AYYAR. **29 M. 326; 16 M. L. J. 101.**

13 Date of issuing notice--Execution of decree--Limitation--10 C. W. N. 303 Col. 2020 P. I.

14 Disturbance of easements--Meaning of disturbance--Injunction to prevent disturbance--7 B. L. R. 825 Col. 739 P. 1.

15 *Dwell in Art 12 of the Letters patent--Meaning of the word. Cause of action--part of--Foreigners--Jurisdiction of High Court--Jurisdiction over--Will--Executor. Jurisdiction of Court over--Adverse title by executor--Esotppel--Presumption.*

The presence of a foreigner within the local limits of a Court's jurisdiction confers jurisdiction on Court against the foreigner without reference to the length of his stay. The jurisdiction springs up as the result of allegiance existing at the time of the commencement of the action and not of any subsequent process in it.

Save in exceptional cases expressly provided for by the Statute, *e. g.*, Section 22 of the Limitation Act and Section 32 of the Civil Procedure Code, a suit is commenced by the presentation of the plaint.

Jurisdiction over a foreigner present is independent of actual service of process on him within the territory.

Held, that the High Court had jurisdiction under clause 12 of the Letters Patent on the ground that the defendant was at the time of the commencement of the suit *dwelling* within the ordinary original jurisdiction of the Court and also on the ground that part of the cause of action accrued within those limits, leave having been obtained as required by the section.

The term 'dwells' in clause 12 of the Letters Patent does not import any permanency of residence.

In a suit against an executor for due administration of the estate the fact of the

Construction of acts (*Con'd.*)

defendant's undertaking given to Court when he applied for and obtained probate to administer the estate is a part of the cause of action in the suit.

The tribunal from which executor takes out probate has jurisdiction over the executor though he may be a foreigner.

When the Court has jurisdiction to make a grant of probate it has power to decide whether the Will is a valid testamentary disposition

Held, that the defendant having with full knowledge of all the circumstances bearing on his rights as the testator's son, accepted the office of executor, obtained probate and, under its authority, collected assets and otherwise so acted as to cause the plaintiffs to alter their position, was estopped from impeaching the Will.

A proprietor of foreign immoveables, or person interested in such, may be compelled by the English Court if it has jurisdiction over him to dispose of his property or interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort: and that obligation will not be measured by the *lex situs* of the foreign immoveables to which it relates, but in accordance with the rules of Private International Law on obligations arising from, or as from, contract or tort. If indeed where the law of the country where the land is situate should not permit, or enable the defendants to do what the Court would otherwise think it right to decree, it would be useless and unjust to direct him to do the act, but when there is no such impediment, the Courts in this country in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules and are not influenced by any consideration of what the effect of such contract might be in the country where the lands are situate or of the manner in which the Courts of such country might deal with such equities. S. SRINIVASAMOORTHY *v.* N. T. VENKATA VARADA AIYANGAR. **10 M. L. T. 71=16 M. L. J. 238=29 M. 239.**

16 Direction of the Court is necessary for the administration and such further or other relief in S. 92 C. P. Code V of 1908—Meaning of construction. 32 C. 789 Col. 1212 P. I.

17 Fails to present—Written statement—Compliance with order requiring written statement to be filed—Dismissal of suit—Appeal Costs—Court fees—Refund of Court fee. 16 M. L. J. 30 Col. 122 P. I.

18 Hearing of appeal—Rules under—Meaning of—Rules 8—Power of the High Court under. 28 M. 404 Col 389 P. I.

19 House—Government desiring to acquire a portion only of property, the owner wishing that the whole should be acquired. 9 O. C. 311 Col. 864 P. I.

20 Illustrations—The nearest reversioner concurring in alienation by a Hindu widow

Construction of acts (*Contd.*)

--Right of remote reversioners to sue. 28 M. 57 Col. 445 P. I.

21 Interruption—Meaning of—Easment obstruction. 73 P. R. 1905 Col. 1806 P. I.

22. Land acquisition — Compensation award—Notice by Collector to be given "immediately" — Limitation — Document — Statute. Construction of 7 B. L. R. 679 Col: 848 P. I.

23. Letter of enactments—Delivery of possession. Stay of, order for--Order staying proceedings—Effect of, pending appeal--33 C. 927 Col: 1266 P. I.

24. Legatee in S. 22 of Act I. of 1869 (Oudh Estates)--Meaning of--Talukdar--Right to surrender—Re-grant—Appeal—New case—2 C. L. J. 194—8 O. C. 317—27 A. 634 (P. C.) *See Act I. of 1869 (Oudh Estates) S. 22.*

25. *Limitation Act (XIV of 1859), Sections I (15) and XVIII--Mortgage--Redemption--Limitation.*

The plaintiff brought a suit on 7th of June 1899, for the redemption of an alleged usufructuary mortgage executed on the 14th of August 1781 for a term of 70 years.

Held, that the suit was barred by limitation under sections I (15) and XVIII of Act No. XIV of 1859. 13 B. L. R , 177; L. R., 27 I. A., 103, referred to. MUHAMMAD AKBAR HUSAIN KHAN *v.* IZZAT-UN-NISSA. **3 A. L. J., 113=W. N., A., 1906, P. 23=28 A. 333.**

26. Statute of limitation—Female trustee—Title, extinguishment of, effect of—LILABATI MISRAIN *v.* BISHAN CHOBEY. **6 C. L. J. 621.** *See Estopel.*

27 Where language used is of doubtful import—Statute — IJATULLA BHUNJAN *v.* CHAUDRA MOHAN BENERJI **34, 954.** *See Valuation of suit.*

28 Legislatures words—Right in a case to be determined by a reference to Legislature's word—Those words should be used for the purpose of the issues. 6. B. L R. 731=32. B 356. Col: 373. P. I.

29 Later statutes Time at which rent is payable—Suit for breach of contract. 5. C. W. N. 521=23. A. 299. P. C. Col: 337. P. I.

30 May be presumed to have been made with such intent as aforesaid, meaning of —S. 53 of T. P. A—7. B. L. R. 267. Col: 581. P. I.

31 New plaintiff--Benamidar- Substitution of plaintiff after expiry of period of limitation—9. C. W. N. 883. Col: 1796. P. I.

32 Not resident—Recognised agent—Jurisdiction of Court—28 A. 135—Col: 1429 P. I.

33 Object—"Actionable claim"—"Beneficial interest in moveable property." 10. C. W. N. 755 Col: 284. P. I.

34 *Oudh Estate Act I of 1869 Ss. 8, 11, 14, 15 and 22, cl. (b), Construction of--Grant of Talukdari estate under primogeniture* sanad *--Grantee's name entered in Lists I and II after her death, effect of--Succession to the estate after death of last transferee--Mahome*

Construction of Act (*Contd.*)

dan Law, applicability of--Setting up of new case on appeal.

The summary settlement of the Maniarpur estate was made with one Bibi Sughra and she received what is known as a primogeniture *sanad*, whereby, on intestacy, the estate was to descend to the nearest male heir according to the rule of primogeniture. She devised the estate in favour of her youngest brother, though she had an elder brother and an elder brother's son. Sometime after her death, Act I of 1869 becoming law, her name was entered in Lists I and II prepared under section 8. Her devisee gave in turn the whole of the estate to his wife, Ilahi Khanam and the latter having died intestate, her daughters succeeded to the estate. The youngest of the four brothers of Ilahi Khanam contested the claim of her daughters to succeed her to the estate and brought a suit for the recovery of the estate from them. The Subordinate Judge, who tried the case, gave a decree in favour of plaintiff, on the ground that section 14 of the Act was applicable to the case and the estate continued to be governed by the Act.

Held, on appeal, the transfers in this case were governed by section 15 of the Act and the devolution of the estate on the death of the last transferee is governed by the ordinary Mahomedan Law 7 O. C. 248 P. C. relied on.

Held, also, that the Subordinate Judge was right in holding that the estate was not taken out of the operation of the Act by the fact that Sughra's name was entered after her death. 10 C. 511 (P. C.) 20 C. 649 (P. C.), 18 C. 111 (P. C.) and 7 O. C. 254 (P. C.) relied on.

Held, further, that the contention on behalf of the plaintiff that succession to the estate must be governed by the terms of the *sanad*, which provided that the estate shall descend to the nearest male heir according to the rule of primogeniture, cannot prevail, since it was raised for the first time on appeal and it was not covered by the pleadings in the lower Courts. 18 C. 1 (P. C.) relied on 5 I. A. 1 (P. C.) and select case No. 222 of 1892 referred to. MUSAMMAT UMUTAL-FATIMA *v.* ASGHAR ALI KHAN. **8 O. C. 45.**

35 *Punjab pre-emption--Act II. 1905 S. 2 (3)—Applicability of Act to a claim to pre-emption created by the provisions of the Act itself.*

According to S. 2 (3) of the Punjab Pre-emption Act, 1905, the Act is intended to apply to every claim to the "right of pre-emption, whether that right has accrued before or after its commencement," and the words "whether that right has accrued before or after the commencement" only amplify this meaning. A right created by the Act may also be held to have accrued after the commencement of the Act. ABAS ALI SHAH *v.* SHER ZAMAN. **22 P. R. 1908=48 P. W. R. 1908=122 P. L. R 1908.**

Construction of Act (*Contd.*)

36 Persons—Application for probate of the will of a Hindu widow—Husband's reversioner's objection that widow had no power to dispose of husbands property by will invalid. 1 C. L. J. 258 Col. 526 P. I.

37 Persons—Reference as regards sufficiency of compensation—Power of the court to decide question of *locus standi.* 10 C. W. N. 195 Col. 851 P. I.

38 Persons—Sale by judgment-debtor after auction but before confirmation—Purchaser entitled to apply under S. 310 A. 17 M. L. J. 127 Col. 1173 P. I.

39 Protected interest—Sale for arrears of rent—Rights and liabilities of purchaser—Incumbrance, annulment of—Notice is annual incumbrance. 9 C. W. N. 303 Col. 149 P. II.

39 (a) Purporting—Suit for damages against public officer—Dismissal in toto of claim--Damages for separate acts. 9 O C 275. *See Amendment of plaint.*

40 Presumption—Suit on mortgage bond to enforce payment of amount due by sale of mortgage property. 11 C. W. N. 1005 (P. C.) Col. 1935 P. I.

41 Remedial measure must be liberally construed so as to advance the remedy—Possessory Suit--Landlord and tenant--Trespasser--Possesser dispossessing the tenant during the duration of tenancy. 32 B. 46 Col. 226 P II.

42 Relation—Meaning of "relative" in S 3. Inquiry into lunacy, who could apply —Order by District Judge—Appeal. 94. P. R. 1906 Col: 65. P. I.

43 Relation—Execution of decree—Restitution of property sold pending appeal to Privy Council. 28 A. 337 Col. 1687. P. I.

44 Representative—Execution of decree—Sale—Sale of putni—Auction purchaser bound by subsequent decree against original putnidar—Landlord and tenant. 9. C. W. N. 824 Col. 1094. P. I.

45 Representative—Tort—Death caused by wrongful act—Suit by deceased representatives for compensation--Limitation—Joint claimants. Meaning of—Some of the beneficiaries being minors. Effect of—15 M. L. J. 363 Col: 62 P. I.

46 "Representatives"—Meaning of—Execution of decree--Transferee of judgement debtors objection. 8. O. C. 370 Col: 1107 P. 1.

47 *Retrospective effect—Insolvency Act (11 and 12 Vic. C. 42), Section 7--Insolvency--After-acquired property--Acts. Construction of.*

An Act is not to be deemed to be reretrospective which takes away or impairs any vested right acquired under existing laws.

The words of section 7 of the Indian Insolvency Act, vesting the debtor's property in the Official Assignee, cover the after-acquired property of the insolvent. N. C. MACLEOD *v.* B. B. & C. I. RAILWAY Co. **7. B. L R. 618.**

Construction of Act (*Contd*).

48 Right which the plaintiff claims to the property in dispute, meaning of. 3 C. L. J. 381 Col. 445 P. II.

Note. 3 C. L. J. 381 read for 8 C. L. J. 381.

49 Relaxing or avoiding Indian Statute Law by applying principles of equity—Evidence to vary or contradict terms of document—Evidence of acts and conduct of parties. 3 N. L. R. 19 Col. 213 P. I.

50 *Rules framed by municipality—Surat city Municipality—Rules in the year 1905 Rules 1 (a), 4 (a), (f), (3), (5), 7 Water supply by the municipality—Notice to cut off the water supply—Waste—Domestic purpose—Legitimate house-hold purposes—Use of water by* bona fide *occupiers of a house.*

The plaintiff, an owner and occupier of a house in Surat, brought a suit against the Surat City Municipality for an injunction restraining the Municipality from cutting off the water-supply which had been provided for him under certain rules in force in the year 1898.

The municipality as defendants contended that under the rules which they had made in the year 1905, they were entitled to cut off the water connection with the plaintiff's house because he allowed the water to run to waste, inasmuch as it was used by families of tenants who were not of the family of the plaintiff.

Held, that under the rules framed by the Surat City Municipality in the year 1905, so long as the plaintiff occupied a house not inhabited by more than three families (rule 7), he was entitled to the water-supply which he had enjoyed.

Held, further, that the application of the words "run to waste" in rule 4, clause *(f)* (3) depended upon the construction of the definition of "domestic purposes" in rule 1 (2). The definition of "domestic purposes" meant nothing more or less than legitimate household purposes. The user for legitimate house-hold purposes by more than one family in the house was not waste within the meaning of the definition. SURAT CITY MUNICIPALITY *v.* TYABJI. **10 B L R 622=32 B 460.**

51 Revenue sale—Law Act—Houses and tank built by incumbrancer—Suit to avoid incumbrance—12 C. W. N. 1029 Col. 1924, P. I.

52 Same matter—Parties—Joinder of defendants—Relief in the alternative. 29 M. 50 Col. 1379 P. I.

53 *Stamp Act—Construction of—Maxim—*Utmagis valeat quam pereat— *Promissory note—Bond—Attestations.*

Effect should be given to the maxim *ut magis valeat quam pereat* in any difficulty under the Stamp Act; so that, where there is a reasonable doubt whether a paper is subject to stamp at all, the Court should decide strictly against the Exchequer and beneficially in favour of the subject. The principle loses force where the question is, not so much whether a paper is liable to stamp, as whether it is liable to stamp, in one character or another; and it has no application at all where the words of the Statute directly cover the case. The sphere within which the maxim can be usefully applied under the stamp law is limited to cases of general expression.

Stamp objections are the care of the Court, and when they are raised, it is for the Court to decide whether they ought to be sustained, without any regard to the ground, as being the sole and only possible ground upon which the objection may have been taken.

Under the Stamp Act, 1899, a promissory note, unless it is payable to order or bearer, is to be deemed a bond if attested. R. D. SETHNA *v.* MIRZA MAHOMED SHIRAZI. **9 B. L. R., 1034.**

54 Substantial question of law—Appeal to findings of fact—59 P. R. 1905 Col. 1288 P. I.

55 Suit and plaintiff in O. II R. 2 C. P. C. (V of 1908), Meaning of the word—Subsequent suit for such portion—1 C. L. J. 364 =32 C. 654 Col. 1418 P. I.

56 The word suit in Act XXIII of 1871 (Pensions) does not include execution proceedings. Joint family property—7 B. L. R. 659 Col. 142 P. I.

57 Sufficient cause—Meaning of the word of—Limitation Act section 4 (IX of 1908), 3 C. L. J. 545=33 C. 1323 Col. 1316 P. I.

58 *Subdivision—Meaning of—Pre-emption —Suit for—Oudh Laws Act. (XVIII of 1876) Ss. 8 and 9.*

In a suit for pre-emption, the village in dispute consisted of four parts known as *tarafs* A, B, C and D; these *tarafs* were entered in the *khewat* in the column headed "name of *thok* or *patti*." Separate lands were assigned to each *taraf*; every share lay wholly in one *taraf*; the revenue of each share was separately entered in the *khewat* and the Revenue payable by each *taraf* was known.

Held, that each *taraf* was a sub-division of the *mahal*.

The word "sub-division" in S. 8 of the Act includes a part made by a division of a town or a city and is not confined to a part made by division of part of a city into sumaller parts, and the word "sub-division" in S. 9 of the Act means not only a part made by division of a part of a *mahal*, but also a part made by division of a *mahal* 7 O. C. 129 referred to. HON'BLE RAJA TASADUQ RASUL KHAN *v.* JANKI SARAN. **9 O.C. 211.**

59 Such debts and liabilities—Appeal—Competency to contract—Suit by purchaser. 33 C. 1065 Col 59 P. II.

60 Statutes interfering with private rights, construction of. 4 N. L. R. 45 Col. 367 P. II.

61 Statutes—Construction of—Directory and not mandatory. 1 S. L. R. 155 Col. 1219 P. I.

62 *Statutes old and new—Interpretation of*

Construction of Act (*Contd.*)

statute--Reference to repealed statute 28 and 29, vict. C. 15, S. 3--High Court--Jurisdiction over Sambalpur District--Extension of High Court's jurisdiction to place not within jurisdiction of any High Court, if ultra vires.

Under S. 3 of 28 & 29 Vict., C. 15, the Governor-General in Council can extend the jurisdiction of a High Court or any portion of its jurisdiction to a place not originally within the jurisdiction of any High Court.

The proclamation whereby the Calcutta High Court was authorised to exercise jurisdiction over the Sambalpur District when it was transferred from the Central Provinces to Bengal, was not *ultra vires*.

The repealed provisions of Ss. 18, 24 & 25 Vict. C, 105, were referred to as throwing light on the construction of S. 3 of 28 and 29 Vict. C. 15.

Construction of Statutes by reference to repealed Statutes when permissible, discussed by Mookerjee, J. BALESWAR BAGARTI *v.* BHAGARATHI DAS. **12 C. W. N. 657.**

63. Total interest—Claimable under Sonthal Pergunnahs--Usury laws (Reg. III of 1872) S. 6 as amended by Reg. II of 1893 S. 24--Total interest decreed and intermediate adjustment of account, meaning of—Total interest recoverable. RAM CHANDRA MARWARI *v.* RANI KESHOBATI KUMARI. **1 C. L. J. 182.** *See Interest.*

64. Transfer of Property Act S. 95—Joint mortgage bond in ordinary form—Payment by one mortgagor and redemption of whole property mortgaged—Charge on property of co-mortgagors 28 A. 482 (P. C.) Col. 704 P. I.

65. Undivided family, meaning of—Muhamadans. 9 O. C. 156 Col: 831 P. I.

66. Value of the matter in dispute--Privy Council, Appeal to. 60 P. R. 1905 Col. 1288 P. I.

67. *Village--Punjab Laws Act (I IV. of 1872), s. 10—Custom--Pre-emption.*

Held that under s. 10 of the Punjab Laws Act, in a *chak* in the Chenab Valley, no custom of pre-emption could be presumed to exist when the *chak* can hardly be called a village and its inhabitants a village community. Where *chaks* have been created recenly, it is impossible that a Custom of pre-emption can spring up. RAM NARAIN SINGH *v.* SEWAK RAM. **21 P. R. 1906.**

68. "Wrongfully in possession". Meaning of--Possession in execution of a decree, subsequently set aside--Right to sue for mesne profits when accrues. 3 C. L. J. 182 Col: 1883 P. I.

2--Construction of Articles of Association.

1 Articles of Association -Proxy--Articles of Association requiring proxy to be share holder of the company and to be named. 29 B. 126 Col. 471 P. II.

2 *Rules—Custom of Trade—Bombay Cotton Trade Association Contract—Illegal contract—*

Construction of Articles of association (*Contd*).

Agreement to pay differences--Closing of contract—Rules in restraint of legal proceedings.

One of the rules of the Bombay Cotton Trade Association runs: 'If, before the maturity of any contract, either party thereto shall suspend payment or become bankrupt or insolvent the other party or parties to such contract shall be bound to forthwith close the contract and when the contract is thus closed, the measure of damages shall be the difference between the market price current at the time of closing for similar goods for delivery at the time named in the contract so closed, and the rate named in the contract. Such market price shall be ascertained either by re-purchase or re-sale or shall at the option of the party closing the contract be that fixed by the daily quotation commitee subject to the right of appeal to the Board of Directors on payment of the usual appeal-fee of Rs. 50 or that quoted by the Board at their usual monthly meetings. The damages ascertained as aforesaid shall become at once payable to or by the party closing the same.

Held, on a construction of the above rule, that to close the contract is to pay differences and nothing else, and that is a contract by way of wager and void, and none the less because it is agreed that under circumstances the contract is to do that to which no exception can be taken. CHAPSEY PURBUT *v.* MESSRS GILL AND CO. **7 B. L. R. 805.**

3 Construction of compromise.

1 *Succession--Impartible estate--Estate devised to widow of owner--Suit by reversioner --Compromise--Estate taken by reversioner.*

The owner of an impartible estate to which the rule of primogeniture applied died leaving a will which purported to give the whole estate absolutely to his widow. After the death of the testator the next reversioner sued to recover the estate and pleaded that the will set up by the widow was invalid. The parties to this suit entered into a compromise, the main provisions of the compromise being that the widow should be the "gaddi nashin" during her life and should give the plaintiff a monthly allowance, and that after the death of the widow the plaintiff or any representative (*kaem mokam*) who might be living should be the absolute owner of all the movable and immovable properties possessed by the testator and should occupy the "gaddi." The plaintiff reversioner predeceased the widow.

Held on suit by the widow of this reversioner to recover the estate as against certain other members of her husband's family who were in possession, that the effect of the compromise was that a vested interest in the estate in the character of an impartible estate was, subject to the life interest of the widow, limited to the plaintiff reversioner and that upon his death the estate descended to his heir according to

Construction of compromise. (*Contd*).

the rule of primogeniture and not to his widow.

Rani Mewa Kuwar *v.* Rani Hulas Kuwar, L. R., 1 I. A., 157, Gobind Krishna Narain *v.* Abdul Qayyum, I. L. R., 25 All., 546, Bachcho Kunwar *v.* Dharam Das, I. L. R., 28 All., 347, and Ram Shanker Lal *v.* Ganesh Prasad, I. L. R., 29 All., 451, referred to. Abdul Wahid Khan *v.* Nuran Bibi, I. L. R., 11 Calc., 597, distinguished. HARPAL SINGH *v.* LEKH-RAJ KUNWAR. **5 A. L. J. 425=A. W. N. 1908 P. 165=30 A. 406.**

4. Construction of Contract.

See construction of deed.

5. Construction of Decree.

1 Admission—Mortgage decree need not reverse rights admitted by all parties—Decree must be constructed with reference to pleadings. 29 M. 84 Col. 662 P. I.

2 *Ambiguous decree—Rule of construction.*

It is an elementary principle of construction that, when an order of a Court, the terms of which are ambiguous, have to be interpreted, such construction must, if possible, be adopted as will make the order an order in accordance with law, and not an order such as the Court making it has no power to pass. 19 A. 174 followed. BROJO LAL RAI CHOWDHURY *v.* TARA PRASANNA BHATTACHARJI. **3 C. L J. 188,**

3 *Appeal dismissed or accepted "with costs"—Meaning of.*

Where the words of a decree are open to doubt, that construction must be placed on the words used, which does not impose a liability on the judgment-debtor, which is not in express and specific terms imposed upon him. If, therefore, an appeal is dismissed or accepted "with costs," *simpliciter*, the proper interpretation of the words "with costs" is that the costs of the appellate Court alone are awarded, and not the costs of the lower Court. 45 P. R. 1877 F; 19 W. R. 152 distinguished. BAKSHI RAM *v.* GUMANO. **18 P. R. 1907=50 P. L. R. 1907=102 P. W. R. 1907.**

4 Appellate Courts decree—Pre-emption decree—Powers of, when dismissing appeal by vendee—Decree. Interpretation of. 48 P. R. 1906 Col. 1493 P. I.

5 *Decree—Suit for income of land—Direction in the decree for future annual payments, not prayed for—Decree merely declaratory—Separate suit for the future income, maintainability of—Suit for the recovery of the income of certain trust lands for three years.*

Judgment was given for the plaintiffs for the income of the three years but the decree as drawn up directed the defendants to make such annual payments towards the income in future also.

Held, though the decree had been so drawn up as to appear, at first sight, to be

Construction of Decree (*Contd*).

an executable decree for future mesne profits, also, yet as there had been no prayer in the plaint for such a decree, 12 M. 183 R. and D. and no date was fixed therein for the payment of such future profits in each year, the decree must be regarded as merely declaratory of the plaintiff's right and not as capable of being executed each year for the future mesne profits, to recover which a separate suit was therefore maintainable 7 M. 80 R. and F. DORASAWMY BOUSH PACKIRI *v.* N. IDANGAPIRANTHAN. **1 M. L. T. 69.**

6 *Decretal amount directed to be paid by defendant from future wages—Intention of parties to be considered.*

Where the defendant is directed by the decree to pay future wages at a certain rate "till date of payment." the decree is not declaratory, but one capable of execution. 7 M. 80, 12 M. 183 and L. P. A. 13 of 1906 R.

In deciding the question whether a decree is declaratory or capable of execution, the intention of the parties must be taken into consideration. L. P. A. 13 of 1906, F. THAMARASSERI RAMA NAMBIASAN *v.* NEELAKANDAN NAMBUDRI, **4 M. L. T. 330.**

7 *Duty of court executing—Construction of, in accordance with law—Foreclosure decree,—Meaning of the expression "till payment" in—Future interest, provision in decree for payment of.*

A Court executing a decree, the terms of which are ambiguous, should, where it is possible, put such a construction upon it as would make it in accordance with law. So, a foreclosure-decree, which provides for payment of "future interest...till payment", would be construed in accordance with law, if the expression "till payment" be construed as meaning "till the date fixed for payment," and not as "till actual payment." 21 A. 361 F; 26 C. 39; 23 A. 181; 24 C. 766; 21 M. 364 referred to. JAMNADAS *v.* BHANGI, **1 N. L. R. 43.**

8 Executing Courts—Power to refer to judgment for interpretation. 60 P. W. R. 1908 Col. 1486 P. I.

9 Formal order not drawn up—Construc-of order—Real intention. 5 C. L. J. 25, Col. 436 P. II.

10 Imposing a condition—Application by legal representative without being brought on record—Decree—Construction. 31 M. 77, Col. 2018 P. I.

6 Construction of deeds.

1 Acknowledgment and pronote—Memorandum of loan. 27 A. 84 Col. 887 P. I.

2 *Ambiguity of language. Deed of trust. Construction of—"Heirs," meaning of—Heirs general—Construction placed on earlier documents.*

In 1839, the then King of Oudh executed a deed of trust, by which he settled a sum of money for the benefit of persons connected with his family and for other

Construction of deeds *(Contd.)*

purposes. The deed also provided for the payment of pensions to the 'heirs' of the pensioners upon their death. It was contended that the word "heirs" must be construed as heirs who were also descendants.

Held, that upon the construction of the deed of trust, that the title to the pensions descended to the heirs general of the original pensioners, and was not limited to the heirs who were also descendants.

The Judicial Committee, upon a construction of a deed of trust previously executed by the same executant, had held that in the document then under consideration, the word "heirs" must be understood as meaning "heirs" who were also descendants; and it was contended in this case that the same construction should be given to the word heirs as used in the present document.

Held, that the contention was not valid, for the document now in question did not embody or refer to the earlier document; the two doc ments were not in any sense parts of one transaction and were not even contemporaneous documents, and the decision on the earlier document did not afford a precedent for the interpretation of the later one, since the language of the two documents was entirely dissimilar. NURJAHAN BEGAM *v.* FAGHFUR MIRZA. **7 B. L. R. 850=3 A. L. J. 64=9 C. W. N. 817=15 M. L. J. 327=8 O. C. 270=2 C. L. J. 57=27 A. 383 (P. C).**

3 *Absolute sale or gift in favour of temple—Power to appoint manager of land—Deed in donor's custody—Effect—Construction of deed—Subsequent conduct of parties.*

Where a deed is in terms an absolute sale or gift in favour of the temple, the fact that the donor is permitted to retain the instrument cannot be taken as sufficient to show that he also retained the ownership of the land. And where the deed is clear, the evidence of the subsequent conduct of the parties, many years after its execution, cannot assist in construing its language or terms. A person making over the land absolutely to the temple has no power to give any other person any right of management of it. KRISHNA PILLAI *v.* ARUNACHELLA CHETTIAR. **18 M. L. J. 304.**

4 Always for ever—Surrounding circumstances—Conduct of parties. 23 A. 324—5 C. W. 569.—*See Conduct No.* 3.

5 Appellation given by parties how far a test in determining the nature—Suit for declaration. 6 B. L. R. 648—29 B. 19 Col. 425 P. I.

See also Nagindas v. *Kara. 6 B. L. R. 630*

6 *Charge—Liberal construction. Transfer of property Act (IV of 1882), Sec. 100—Documents executed in the Mofussil—Contracts of the people of India—Regard to be had to all the circumstances of a transaction—Intention to make land security for payment of debt—Charge.*

Construction of deeds *(Contd.)*

Document executed in the Mofussil come within the statement of the Privy Council in Hunoomanpersaud Panday *v.* Mussumat Babooee Munraj Koonweree (1856) 6 Moo. I. A. 411, that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be regarded so much as the real meaning of the parties which the transaction discloses."

Where having regard to all the circumstances of a transaction there remains no doubt that the documents are sufficient and do show an intention to make the land security for the payment of the debt mentioned therein, the documents create a charge. JANARDAN *v.* ANANT. **10 B L R 575 =32 B 386.**

7 *Clog on equity of redemption—Consolidation of securities—Covenant in subsequent simple mortgage-deed not to redeem prior usufructuary mortgage withount paying the subsequent advance—Interpretation of deed. Mortgage.*

Where a person made a prior usufructuary mortgage of certain property in favour of three persons for Rs. 1,000 and subsequently made a simple mortgage of the same property in favour of those persons for Rs. 1,500 *(i. e.,* Rs. 500 plus Rs. 1,000 due on a prior simple bond*)* stipulating in the latter deed that the mortgagor would not redeem the property unless he paid "the said amounts" (*i. e.*, the sums secured by the second mortgage) with interest and the suit was brought for redemption of the usufructuary mortgage only—

Held, that the condition in the latter bond did not evidence an intention to consolidate the amount thereof with that of the earlier one, and the plaintiffs were not precluded from redeeming the usufructuary mortgage only.

Section 61 of the Transfer of Property Act has no application to the case because that section refers to mortgages on different properties. BHARTU *v.* DALIP. **3 A L J 678=W N A 1906, p 278.**

8 *Claim on wrong construction of document —Essence of a negotiable instrument in good faith—Good faith, meaning of—Estoppel effecting the holder of negotiable instrument—Practice—Will—Testator—Income given for life, but property liable to be devised by the donee—Effect of the power.*

The holder of a negotiable instrument has power to give title to any person honestly acquiring it, and it is the very essence of a negotiable instrument that the person in possession of it may be treated as having authority to deal with it—be he agent or otherwise—unless something is known to the contrary.

Mere negligence does not invalidate the title of a person taking a negotiable instrument in good faith and for value. If there be anything which excites suspicion that

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there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him, and puts the suspicions aside without further inquiry.

If the holder of negotiable instruments give them to another with authority to that other to raise money upon them for his own purposes, he is estopped from setting up his right to the negotiable instruments adversely to those who have lent money on the security of the instruments and the faith of the authority of the owner. 3 B. & C., 45, at p 47; A. C. 201; and L. R., 10 C. P., 354, 363 followed.

Where a party relies on a document in support of his claim or defence, the mere fact that he, in support of that claim or defence, puts a wrong construction, it is no reasonable ground for depriving him of the right he has on a proper construction of the document. P. J.. 187, followed.

Where a testator gives by his will income of certain property to a certain person for life, with a power to give the property by a will to whomsoever that person pleased, such person takes a life-interest in the income of the property; and anyone, who takes under the latter's will, takes the property from the first testator. The only requisite condition for a legal and valid exercise of the power to give property by will is, that the donee taking under the will executed in exercise of the power should be a person who was in existence actually or in contemplation of law at the time of the first testator's death.—21 *Bom.*. 709, *followed*. RAGHAVJI VIZPAL *v.* NARANDAS PARMANANDAS. **8 B. L. R. 921.**

9. *Considerations in.*

In construing expressions in deeds, a consideration is necessary of the entire contents of the deed and such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. It is an improtant rule of construction that a passage is best interpreted by reference to what precedes and what follows it. 22 A. 149, 2 N. L. R. 57, 5 M. I. A. 526 referred to.. DHONDU PANDIT *v.* MAHANT DAULATPURI. **3 N. L. R. 97.**

10. Conveyance -- Composition deed -- Trustees under the deed, 28 B. 364 Col: 480 P. I.

11. Contingent deed — Execution—Registration— When a registered deed begins to operate— Priority—Non payment of consideration in full—Mortgage. 29 B. 46 Col: 476 P. I.

12 *Covenant for quiet enjoyment —Landlord and Tenant-Assignment of lease—Damages for dispossession.*

O, the lessee for a term of an occupancy holding, sold his rights under the lease to A, covenanting that in case of dispossession within the period covered by the lease, he should be liable for damages. Within the said period, A was ejected from the holding.

Held, A was entitled to recover damages from O, and that the measure of damages would be the loss which he would sustain by the deprivation of the enjoyment of the land for the unexpired term of the lease. ALI HASSAN *v.* ORI LAL. **3 A. L. J. 501.**

13 *Description of property in document --False particulars may be ignored.*

When there is sufficient description set forth of the premises in a document, by giving the particular name of the field or otherwise, a false description added thereto may be rejected. SANTAYA DEVAPA *v.* SAVITRI. **4 B. L. R. 871**

14 *Duty of court--Construction of document —Mortgage by conditional sale—Redemption.*

A Court is bound to consider the terms of a deed in accordance with the view as to its true meaning which the Court may entertain. Any improper construction put upon it by a party cannot be allowed to prejudice his rights, whatever they are upon its true construction.

Where a certain property was mortgaged by way of conditional sale for a period of nine years, and it was agreed that the sale would be cancelled on payment of the amount of the consideration money in nine years.

Held, that the agreement of the parties was that the loan was to be left outstanding for a period of nine years, and that, within that period, the mortgagee could not foreclose the mortgage, nor could the mortgagors redeem it. HUSANI BEGUM *v.* COLLECTOR OF CAWNPORE. **4. A. L. J. 375=A. W. N. 1907 P. 153=29 A. 471,**

See for other facts. 115, 1938 P. I. 450 P. II.

15 Evidence Act S. 92—Written instrument-Sale deed or mortgage—Representation that a sale-deed would not be enforced as a sale deed—Construction of documunt 8 B. L. R. 761 Col: 208 P. I.

16. Evidence Act S. 92—Evidence to vary written instrument—Execution of Sale-deed —Subsequent redemption—Suit on footing that the sale was in fact a mortgage. 25 M. 7 Col: 205 P. I.

17 *Gift—Co-sharers—Construction of deed of gift--Joint tenancy.*

Where in a deed of gift in favour of two persons, there are no words indicating an intention that the donees are to take as tenants-in-common.

Held that the conveyance in such a case constituted a joint tenancy. MANKAMMA KUNWAR *v.* BALKISHAN DAS. **A. W. N. 1905 P. 170.**

18 *Gift—Mahomedan Law—Inheritance—Gulfrosh city Arains of Lahore and Amritsar.*

Held, that, *Gulfrosh*, *i. e.*, flower selling city Arains of Lahore and Amritsar are governed by Mahomedan Law and not

Construction of deeds (*Contd.*)

by customs of the Punjab agriculturists, in matters of inheritance and alienation.

Held, also, that where a deed of gift begins with numerous conditions limiting rights of the donee, the 1st being that the donee would keep the property for life, but it ends by declaring that the donor or his heirs would have no claim or title to the gifted property, it is a deed of gift conferring absolute ownership on the donee 25. P. R. 1882 ref.

Held, further, that as the deed of gift in dispute was executed in 1870 and no effort was made in time to challenge it, the claim was also barred by limitation. MUSSAMMAT TALIA BIBI *v.* MEHR BAKHSH, **72. P. W. R. 1908.**

19 *Gift—Grant—Construction of—Mention of a person as heir of grantee confers no interest on such person.*

Where a deed of grant to a widow, recites that she has no other heirs than her daughter, and that the lands shall belong to such daughter at her death, the grant is not to be construed as a grant to the widow and her daughter. The grant is absolute and to the widow alone, the daughter taking no interest under it.--RENGASAWMY NAICKEN *v.* GANGAMMAL, **29 Mad 300.**

20 *Gift*--Ayautika—*Estate of inheritance —Life estate with remainder over—Mesne profits*

C, a Hindu, executed a deed of gift in favour of his sister D, by which he gave her a Zemindari for her maintenance, and, after laying down that she was to get her name registered and enjoy possession during her life-time, provided as follows :—

" On your death, your husband, sons, grandsons and other heirs in succession will continue to enjoy and possess. The power to dispose of by gift or sale will successively vest in your husband, sons, grandsons and others, "

Held, that the effect of the deed was not to confer upon D, a life-estate, with the remainder to her husband, but it conferred upon her an heritable estate, so as to make the property Ayautika Siridhan to which her unmarried daughter was entitled to succeed on her death in preference to her husband.

Held, furher, that though some of the heirs were named, they were to succeed as heirs, and the enumeration must be taken to be an inaccurate one and in wrong order.

Held, further, that when a person who was the natural guardian of an infant got his name regsitered by an untrue representation that he and not the infant was entitled to the estate, his possession must be taken to have been adverse to that of the infant, and the latter, upon attaining majority, is entitled to mesne profits from the date of the registration of the name and not merely for three years preceding

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the suit. BASANTA KUMARI DEBI *v.* KAMIKSHYA KUMARI DEBI, **2 C. L. J. 238. (P. C.).**

21 *Gift—Maintenance—Duration of—Construction of agreement.*

Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity ; but *prima facie* they are limited to the life either of grantor or grantee. KARIM NENSEY *v.* HEINRICHS. **28 I. A. 198=6 C. W. N. 1=3 B. L. R. 472 =25 B. 563.**

211 (a) *Gift.*

Where a person executes a document in favor of another in the nature of a power of attorney and usufructuary mortgagee at the same time enjoining the mortgage, to hand over the lands after the discharge of his debt to a third person in respect of whom the document purported to constitute the mortgagee a guardian:—

Held, that the document cannot be construed as gift to the said person. GUNAIYAN *v.* KAMAKSHI AYYAR. **26 M. 330 at 344.**

22 *Gift to daughter—Gift to a female—Restricted right to alienate.*

Held, that it depends upon the terms of a deed of gift whether the donee, a female, acquired an absolute title or merely a life estate thereby. Upon construction of the deed of gift in dispute, *held*, that it gave by implication a heritable estate with the power of alienation. 10 *All.*, 495 and 9 *Cal.*, 830, *referred to.* THAKUR SINGH *v.* NOKHE SINGH. **W. N. A. 1901 P. 84=23 A. 309.**

23 *Gift to sister—Hindu Law—Gift to female—Estoppel.*

Held, upon the construction of the deed of gift in favour of the plaintiffs' mother that she obtained an absolute right to the land gifted and not merely the right to receive the produce thereof.

Held, that the plaintiffs having ratified an absolute gift of property by their father in their mother's favor were not entitled to plead that their father had no right to assign the property. BOMMALI MUSILIGADU *v.* MADUGULA NANNIGADU. **15 M. L. J. 492.**

24 *Gift to wife—Hidu Law—Alienation by widow—Mitakshara--Property given or devised to wife by husband.*

Held, that under the Hindu Law, in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate unless such power is conferred in express terms. Jeewun Panda *v.* Mussummat Sona (N. W. P. H. C. Rep., 1869, p. 66) ; Moulvie Mahomed Shumsool Hooda *v.* Shewukram (L. R. 2 I. A. 7) ; Janki *v.* Bhairon, (I. L. R. 19 All. 133) ; and Lalit Mohan Singh Ray *v.* Chukkun Lal Ray (I. L. R. 24 Cal. 834), referred to. SURAJMANI *v.* RABI NATH. **A. W. N. 1903 P. 66=25 A. 351.**

25 *Gift to wife—Hindu Law—Power of*

Construction of deeds (*Contd.*)

donee to alienate.

In a deed of gift to his wife, the donor a Hindu, after reciting that he was in possession, as proprietor, of shares in certain villages declared that he, of his own free will, transferred the shares, of which he was proprietor, to his wife and "put her in proprietary (*malikana*) possession, authorising her to retain possession of the same as proprietor (*malik*) together with land revenue, miscellaneous items etc." Then followed the provision.—"In case of proper necessity, she, as my representative, is at liberty in every respect to transfer the property by sale or mortgage either in my life-time or after my death. No objection taken by any person shall be held as fit to be allowed in this respect.

Held, that the provision in the deed of gift that in case of proper necessity, the donee should be at liberty to transfer the property either by sale or mortgage, can mean nothing else than that she should not transfer the property unless a legal necessity arose for doing so. It is well established by authorities that ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property. JAMNA DAS *v.* RAMAUTAR PANDE. **A. W. N. 1904 P. 278=1 A. L. J. 759=27 A. 364.**

26 *Grant of land by Government to three members of joint family and a stranger—Joint tenants—Tenants in common.*

In 1866 the Government in recognition of loyal service granted five villages to *J.*, *C. N.* and *P.* The grantee *P.* was a stranger to the family of which the other three grantees were members, and he got his share in the grant partitioned shortly afterwards. In 1874 *J. C.* and *N.'s* widow sold their shares to one Nur Ahmad from whom the defendants derived title. *N.'s* widow died in 1899. In 1901 the sons of *C.* and *G.*, a nephew of *J.*, and *N.*, brought a suit against the defendants to recover *N.'s* share in the property alleging that *N.'s* widow had no power to alienate more than her life-interest in the property.

Held that the grant to the four grantees being upon its true construction a grant to them as joint tenants and not as tenants in common, the sale impugned was a valid transfer, for on the death of *N.* his share lapsed to the other grantees, and *G.* acquired no interest whatever in the property. GOBIND PRASAD *v.* INAYAT KHAN. **W. N. A. 1904 p. 269=27 A. 310.**

27 Grant—Burden of proof—Inamdar—Hills included in the boundaries of Inamdars village—Claim against government—Adverse possession. 28 M. 69—*See Col. 2055 P. I.*

28 *Grant for maintenance—'proprietor' For ever.'*

There seems to be no doubt that in the case of a grant for maintenance the words 'proprietor' and 'for ever' will not *per se*

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create an inheritable estate. RAMESHAR BAKHSH SINGH *v.* ARJUN SINGH. **23 A., 194 P. C.**

29 Grant for maintenance—Annulty to A—Hamesha'—Surrounding circumstance—Conduct. 23 A. 324—*See Conduct No. 3.*

30 *Grant for maintenance—Hindu widow to use property as she likes—Provision that after her death what remains should go to A—Effect and validity of the provision.*

Where under a family agreement a Hindu widow is given power to use the property of her husband as she pleases both on her own behalf and for charities, she obtains an absolute estate in it. Any provision that after her death, somebody else, not her legal heir, should get the property is void and does not cut down the state.—24 Ch. D. 616 foll. JUMNABHAI *v.* DHARSEY. **4 B. L. R. 303.**

31 *Hindu Law—Partition between father and sons—Stipulation that father and junior wife should "hold and enjoy" the father's share—Effect—Construction of gift to wives under Hindu law.*

The general rule of Hindu law with regard to the construction of gift by Hindus in favour of their wives is that the wife should not be deemed to take an absolute estate unless it is clear that this was the intention of the donor. By a deed of partition, entered into between a father and his sons by a senior wife after a recital that the junior wife had no issue up to date, it was declared that the father and his junior wife should hold and enjoy certain of the family properties perpetually from that day forward from generation to generation with powers of alienation by sale, gift, mortgage or otherwise:

Held that the parties intended that the junior wife should acquire an estate in the properties. The fact that she may not have been a co-parcener was immaterial. It was competent for the co-parceners who were entitled to participate in the partition to agree that the share of one of the co-parceners should be held jointly or in common with a party who otherwise would not have been entitled to participate in the partition. Jageswar Narain Deo *v.* Ram Chandra Dutt (I. L. R., 23 Cal. 670), followed. Seshayya *v.* Narasamma (I. L. R., 22 Mad. 337), distinguished.

Held, also that the junior wife took as a tenant-in-common with her husband and that, after the death of the latter, she was entitled to a moiety of the property.—MUTHU MEENAKSHI AMMAL *v.* CHENDRA SEKHARA AYYAR, **27 M 498.**

32 Hindu Law—Partition—No misjoinder—Plaintiff claiming a share as a member of joint family and other share as heir of another member. 28 C. 785 Col. 1425 P. I.

33 *Hindu Law—Partition—Requisites for Partition—Deed defining and alloting shares—Effect on deed of subsequent conduct of the*

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parties—Effect of deed as regards minor members of the joint family—Re-union of member after once separating himself.

An *ikrarnama* executed by the members of a joint family, some of whom were minors, stated in unambiguous terms that defined shares in the whole joint property had been allotted to the several co-parceners, and also gave liberty to any of the parties to it "either to live together as a member of the joint family as before or to separate his own business":

Held that the effect of the deed was to cause a separation in estate and interest between all the co-parceners. The clause giving the parties the option of being joint or separate was not inconsistent with a separation in estate. It conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bonds, or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it, which was, on the principle of the case of Appovier *v.* Rama Subba Aiyan, (11 M. I. A. 75), determined by the allotment to them of defined shares by the *ikrarnama*. The legal effect of the *ikrarnama* could not be controlled or altered by evidence of the subsequent conduct of the parties; but such conduct in this case was not inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition.

Held, also, that the *ikrarnama* was binding on the minors. It followed from the admitted right of any co-parcener to claim partition that a valid agreement for partition could be made during the minority of one or more of the co-parceners. If it was unfair or prejudicial to their interests the minors could by proper proceedings, on attaining majority set it aside so far as it concerned themselves. BALKISHEN DAS *v.* RAM NARAIN SAHU, **30 I A 139= C W N 758=30 C 738.**

34 Hindu Law—Partition—Suit for possession—Defendant claiming title under a document executed by plaintiff's father. 6 C. W. N. 863 Col: 1665 P. I.

35 *Heading — Mortgage—Construction of deed—Mortgage or lease—Land transferred for ten years—Profits to go in liquidation of debt—Suit for redemption brought before expiration of term—Transfer of Property Act (IV of 1882), s. 58 (d), and 98—Dekkan Agriculturists' Relief Act (XVII of 1879). ss. 3 (z) and 15 A.*

By a deed dated the 2nd November 1893, it was provided that in consideration of a debt of Rs. 240 due by the plaintiff (an agriculturist) to the defendant, the latter was to take possession of certain land for ten years and appropriate the income thereof in liquidation of the debt, and that after the expiry of the said period, the right to the land was to cease. The deed was headed "mortgage deed with possession regarding land." Before the expiration of the ten years, the plaintiff brought this suit for redemption and possession, alleging the transaction to be a mortgage.

Held that it was a mortgage and that the plaintiff was entitled to redeem even before the expiration of the mortgage term of ten years. TUKARAM BIN MAIRAL *v.* RAMCHAND MALUKCHAND. **3. B. L. R. 778 —26 B. 252.**

36. Intention of parties—Evidence—Oral evidence as to contents of documents—Fraud —Want or failure of consideration—Mortgage—Sale deed. 8 B. L. R. 287 Col: 287 P. I.

37 Intention of parties—A trustee who has been removed can sue for declaration of his right of trusteeship. 9 B. L. R. 514 Col: 442 P. I.

38 *Lease—Construction of document.*

In a suit for ejectment, the plaintiff produced a document in support of his case which ran thus :—" I take the shop on rent of Rs. 50 per annum without any limit of time for ever * * * I shall pay the rent month by month rateably to P. * * * On non-payment of rent, a right to eject the tenants shall at once accrue to the owner of the shop." The Court of first instance found the document to be a *kerayanama* and refused to admit it in evidence on the ground that it was insufficiently stamped and not registered and then dismissed the suit without going into any other evidence.

Held that the document was admissible in evidence, inasmuch as, strictly speaking, it was neither an agreement nor a lease nor a counterpart of lease but a mere statement of the intention of the writer.

Held also that the Court was still more in error in refusing to accept other evidence because it considered the document inadmissible. BENI *v.* PURAN DAS. **27 A 190.**

39 Lease--Fishery-Jurisdiction--Revenue Court--Rent of tank, suit for--Fishery, right of. 31 C. 937 Col. 27 P. II.

40 Lease--Grant "as a zamindari village"--Form of suit--Jurisdiction of Civil and Revenue Courts--Oudh Rent Act 25 A. 1. (P. C.) Col. 421 P. I.

41 Lease--Landlord and tenant--Agreement to lease providing for renewal of lease--Option of lessor--Arbitrators--Valuators 30 C. 831 Col. 1209 P. I.

42 *Lease--Document. Construction of--* Istemrari Mokurari--*Grant--Impartible estate.*

The proprietor of an impartible estate granted to his wife certain villages in *istemrari mokurari* reserving an annual rent. The deed contained the following 'I, the declarent, or any representatives, have or shall have no claim or right or dispute thereto (grantee's possession and occupation

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and appropriation of the produce) except the aforesaid rent.'

Held, that the words *istemrari mokurari* in a *patta* do not *per se* convey an estate of inheritance and the grant did not create a permanent and heritable tenure. AGIN BINDH UPADHYA *v.* MOHAN BIKRAM SHAH. **30 C 20.**

43 *Lease—Contract—Contract to share right to get lease—Registration—Necessity for.*

A contract by which a person agrees to give a two-thirds share in a lease to obtain which he has entered into a contract with a third party does not require registration. MOHENDRA NATH MOOKERJEE *v.* KALI PROSAD JOHURI. **30 C. 265 at 279, 280.**

44 Lease—Estoppel—Matter of law—Landlord and tenant—Mukurari Istemrari. 30 C. 883 Col. 153 P. I.

45 *Lease*—Malabar Law—*Kanom for fixed period—Kanomdar to enjoy portion of produce for interest—Anomalous mortgage—Forfeiture not entitled by disclaimer of mortgagor's title by kanomdar—Suit to recover the land prior to expiration of period—Maintainability.*

By the terms of a kanom deed, a term of 59 years was provided for its redemption, the amount was Rs. 500, and the kanomdar was to enjoy a portion of the produce for interest of the kanom and to pay the balance of the produce annually to the mortgagor—the jenmi. Prior to the expiration of the term, the kanomdar disclaimed the title of the jenmi, who thereupon brought the present suit, claiming the right to do so by reason of the disclaimer.

Held that the transaction was anomalous mortgage under the Transfer of Property Act, and not a lease, and the disclaimer of the jenmi's title by the kanomdar would not entail a forefeiture so as to enable the jenmi to sue for redemption of the mortgage before the expiration of the 59 years. The suit was therefore premature. RAMAN NAIR *v.* VASUDEVAN NAMBOODRIPAD. **27 M. 26.**

46 Lease—Where personal quality of a party a material ingredient. 7 C. W. N. 229 =30 C. 265 Col. 403 P. I.

47 Lease from the mortgagor in possession—Precarious title of the lessee—Paramount title of the mortgagee against mortgagor and lessee. 6 B. L. R. 995. *See Col. 628 and O. XXII R. 10—S. 372 C. P. C.*

48 Lease—Specific performance, suit for—Covenant for renewal of lease—Time, whether or not of the essence of the contract. 27 A. 696 Col. 407 P. I.

48 a. *Limitation—"On demand".*

On construction of a deed, *held* that the words "on demand" were intended to import a condition of a precedent demand for the purpose of limitation. VYTHILINGA NADAN NARAYANASAMI AYYAN. **13 M. L. J. 364.**

49 *Maintenance deed, construction of "Putra Putradi santan," meaning of—Intention.*

Construction of deeds (*Contd*)

In construing a deed, the question is, not what the parties to a deed may have intended to do by entering into the deed, but what is the meaning of the words used in that deed. 9 H. L. C. 114 (146) F; 3 C. L J. 224 (234), 5 C. L. J. 208 (215) - 34 C. 358 (367), R.

The words "*putra putradi santan*" (sons, gradsons and the like issue) have a defined and well-ascertained meaning and mean all the heirs, male and female, though the two heirs expressly mentioned are the first two of the male heirs. 8 I. A. 46 (62)—7 C. 304 (315), 5 I. A. 138 (147)—4 C. 23 (27)—2 C. L. R. 339 (343); 24 I. A. 76 (88)—24 C. 834 (849) R.

The word '*santan*' means issue both male and female. 7 W. R. 320, 24 W. R. 268 R.

In a deed of maintenance, the grantor used the following words: "Upon your death, your sons, grandsons and the like issue, that is, your male successors in the descending line shall continue to get the same."

Held, that the words "your male successors in the descending line" are not explanatory, but are used in a restrictive sense to exclude female heirs.

Held, on a construction of the deed, that, upon the death of the wife leaving a daughter, no right to the maintenance allowance accrued to the husband. KISHORI MOHAN SANYAL *v.* SHIB CHANDRA LAHIRI. **7 C. L. J. 291.**

50 Mortgage—Requisites of tender seeking possession—Redemption. 10 B. L. R. 203 Col. 650 P. I.

51 Mortgagee to receive malikana as interest and a certain rate within a fixed time or to get actual possession in case of default—17 P. W. R. 1903 Col. 1943 P. I.

52 *Mortgage—Deed, construction of—Interest—Possession—Liability of mortgagee in possession to account for rents and profits.*

The defendants were in possession of two shops under a mortgage from the plaintiffs. The plaintiffs sought to recover possession alleging that the mortgage debt had been satisfied by the rents and profits of the shops. The defendants pleaded, *inter alia*, that they were not liable under the terms of the mortgage to render an account of the rent realized. The material portion of the mortgage was in the following terms. "We have borrowed nine hundred and fifty-one (951) rupees in cash of the Nana Shahi coin on account thereof and paid the same to Punno and Chunnu of Saugor. Interest shall be paid on this money at Re. 1 per cent. Rupees 9-3-6 shall be paid for every month as the sum remaining after deduction, the promised time being five years. Should we pay the money within five years, we shall get the shops. We shall pay the expenses relating to the two shops. Should they be paid by the mortgagees, we shall pay them the same together with interest without any objection."

Held, on a construction of the mortgage, (STANLEY, C. J. and BLAIR J., *dissentiente*),

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that there being no contract to the contrary, the mortgagees, if they got possession, which they did, were bound to account for the rents and profits received by them whilst in such possession. There was no agreement that the mortgagees should take the rents and profits without accounting in addition to the stipulated interest. MADARI *v.* BALDEO PRASAD. 27 A. 351.

53 Mortgage or sale—Real agreement between parties whether embodied in document or not. 8 B. L. R. 619 Col. 207 P. 1.

54 Mortgage—Condition of a mortgage bond—Privy Council—Second appeal—14 C. P. L. R. 1901 P. 49. *See Condition.*

55 *Mortgage—Suit for redemption—Possession on default of payment of interest, stipulation for—Interest—Construction of mortgage deed.*

This was a suit for redemption of a mortgage deed, the material portions of which were as follows:—

"That I will pay interest...year after year, and, should there be a default in payment of interest for any year, the mortgagee can at once take possession of the mortgaged property. That whatever profits may be left after payment of the Government Revenue, etc., will be appropriated by the mortgagee in lieu of the interest. That whenever—the principal sum and the remaining interest, the mortgaged property will be redeemed."

The mortgagee did not take possession until several years after the first default.

Held, that the mortgagee was entitled to get interest for the period he was out of possession. 10 O. C. 29 and 19 A. 39 R; 17 B. 425 and 9 O. C. 144 distinguished. RAM DIN *v.* RAM PRASAD. 11 O. C. 323.

56 *Mortgage—Construction—Unconditional promise to pay, if implies personal liability—Transfer of Property Act S. 90.*

If a person promises to pay a certain sum of money with interest, and hypothecates certain property as security, without any express covenant that he would be personally liable, or without stating any mode of payment, he is personally liable, and a decree under s. 90 of the Transfer of Property Act should be passed in such a case against the mortgagor, if the sale-proceeds of the mortgaged property do not satisfy the entire debt and the right to have such a decree is not time barred. 4 C. L. J. 246 appr.: 10 C. 740; 16 C. 540, R. RAM KISHORE GIR *v.* SURAJDEO PERSHAD SINGH. 13 C. W. N. 183.

57 Mortgage—Hypothecation bond—Lease of even date husband of mortgagee—Interest—Liability of mortgagor—27 M. 86—*See Consideration No. 23.*

58 *Mortgage—Mortgage with possession for a term certain—Mortgagee unable to obtain possession of part of the property mortgaged and consequently failing to recoup money advanced—Suit by mortgagor on expiry of term to recover possession.*

The plaintiff representing himself to have absolute proprietary right in certain villages, and in consideration of advances which had been made to him by the defendant, executed what purported to be a mortgage of the villages with possession to the defendant for 14 years, the deed providing that, on "the expiration of the term the mortgagor shall come into possession of the mortgaged villages without settlement of account, that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate which, after the expiration of the term of this mortgage-deed, shall be returned to the mortgagor without his paying the mortgage money secured under this document". When the term had expired, the mortgagee refused to give up possession of such of the villages as he had been able to get possession of on the ground that owing to the misrepresentation of the mortgagor he had not received the full benefit purported to be given him by the mortgage, and had consequently been unable to recoup himself the money he had advanced, and he claimed the right to hold the property until he had so recouped himself. In a suit by the mortgagor to recover possession, the above ground was held by both the lower Courts to be well founded; and it was contended that the plaintiff, having broken his part of the contract by failing to give the defendant possession of the entirety of the premises comprised in the mortgage, ought not to be allowed to enforce the contract against the mortgagee.

Held by the Judicial Committee that the plaintiff was entitled to rely and was relying on his proprietary right, and, in the absence of any stipulation express or implied in the mortgage deed depriving him of the right to recover possession, he was entitled to succeed. NIDHA SAH *v.* MURLI DHAR. 7 C. W. N. 289=5 B. L. R. 111 =5 C. W. N. 289=30 I. A. 54=25 A. 115 (P. C.)

59 *Mortgage—Bond and rental agreement executed on same date and identical in many terms—Effect—One and the same transaction—Obligations to be gathered from both—"Damdupat" Rule—Inapplicability to cases governed by Transfer of Property Act.*

By an instrument described as a "possessory mortgage debt bond" which recited that the house described in it was put in the possession of the mortgagee, the mortgagors undertook to clear the mortgage debt by paying Rs. 65-10-0 before the 25th of each month, namely, Rs. 35 for principal and Rs. 30-10 for interest, and authorised the mortgagee to let the house, and credit the rent towards the aforesaid principal and interest. The bond further provided that in case the rent derivable from the house should fall short of the amount payable every month, the mortgagors would themselves pay them on the due dates and that, in default, they would pay compound in-

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terest. In case the amounts payable should not be paid for five months, the mortgagees were to recover the debt from the mortgagors. On the same day, the mortgagors, by a separate agreement, rented the house from the mortgagees at a rental of Rs. 30-10-0 per mensem, payable by the 25th of each month with compound interest on the amount of rent; in default at the same rate as that payable under the mortgage bond in case of interest being in default. The lessees also agreed to vacate and deliver up the house to the lessors or to those who obtained an order from the lessors, within thirty days of being required so to do. Default having been made, the mortgagees sued for the amount due and in default, for sale of the mortgaged property:

Held, that the two instruments were executed as parts of one and the same transaction and that the intention was that the rights and obligations of the parties were to be gathered from the provisions of both. Taking the two together, it was clear that the transaction was one entirely of mortgage, with an express covenant to pay the principal and interest in instalments and conferring a power on the mortgagee to take possession of the property mortgaged and apply the usufruct in the discharge of the interest and principal. Jaggeewundas *v.* Ramdas, (2 M. I. A. 487), followed. Also that the clause in the rental agreement as to delivery of the house when required, left no room for doubt that the arrangement was one not binding the mortgagee to enter into possession and liquidate his debt by usufruct; and the express covenant to pay precluded the mortgage from being taken as a purely usufructuary mortgage as defined by the transfer of Property Act.

Held, further, that the "Damdupat Rule" is inapplicable to cases of mortgage governed by the Transfer of Property Act. *Ram Kanye* v. *Cally Churn*, (I. L. R. 21 Cal. 841), referred to, MADHWA SIDHANTA ONAHINI *v.* VENKATARAMEN JULU NAIDU. **26 M. 662.**

60 *Mortgage-deed—Construction of—" Our entire right and income."*

Where the interests which the mortgagor possessed in the village at the time of the mortgage were two-fold one, right to the payment of the *Kattubadi*, and the other, his right as simple mortgagee under the *Payaks*, the *Inamdars* of the village, *held*, upon construction of the mortgage-deed that the former right alone belonged to him *qua zamindar*, and was an incident of the *zamindari* tenure and would be comprised in the expression " with our entire right and income " occurring in the mortgage-deed.

The latter right, as mortgagee, he did not possess *qua zamindar*, and it was not an incident of the *zamindari* tenure and was not included in the expression.—25 *L. J.* (*N. S.*) 7, *Ch.* 795 *referred to*, NALAM BHEEMARAJU *v.* KUNJA BEHARI GAJENDRA DEVA. **M. L. J. 1901 P. 327=25 M. 42.**

Construction of deeds *(Contd.)*

61 Mortgage. 26 B. 252. *See No. 35 supra.*

62 Mortgage—Interest in land—Right to redeem immoveable property mortgaged—Registration—Documents. 27 M. 348 Col. 202 P. I.

63 Nomenclature—"Anyother written grant"—"Treaty"—Name given by parties to document—Injunction 29. B. 19 Col: 201. P. II.

64 *Operative part of a deed, large and generat words in, may be controlled by the recitals.*

It is an important canon of construction that the clear words of conveyance in a deed cannot be controlled by the words of recital in it. So, where a deed contains a clear description of a particular property, but a contradictory recital, on doubts arising whether the recital or the conveyance is wrong, it ought to be held that the operative part is to stand, notwithstanding the fact that the recital would lead to a contrary conclusion. The exception to the above rule, however, always obtain, *viz*:—large and general words are not within the description of " clear words of conveyance, " which, according to the rule, cannot be controlled by the recital portions. Thus where there are large and general words amply sufficient to cover everything, in releases for instance, the recitals would clearly bind down the effect of those general words. 25 L. J Ch. 795 F. SETH NARASINGHDAS MOHKUM CHAND *v.* SETH TARA CHAND MOHKUM CHAND. **2 N. L. R. 57.**

65 Partition—Liable—Stamp Act—Account—3. B. L. R. 132 Col: 890. P. I.

66 Pro-note—Bond—Promissory note—Stamp Act S. 2 (5) b.—Document. 6. B. L. R. 841 Col: 871 P. I.

62 Pro-note—Instrument admissible in evidence on payment of duty and penalty—Unconditional undertaking to pay money. 27 M. 1 Col. 882 P. I.

63 Pro-note—Objection as to document—admitted in evidence—Negotiable promissory note. 12 M. L. J. 1902 P. 351 Col. 882 P. I.

64 Pro-note—Acknowledgment—Bond—Memorandam of loan. 27 A. 84 Col. 887 P. I.

65 *Power of attorney, construction of—Daughter's estate—Mortgage—Execution sale—Whether whole or limited estate passed—Depends on the question whether mortgage was executed for a purpose binding on the inheritance.*

Where an act, purporting to be done under a power of attorney, is challenged as being in excess of the authority conferred by the power, it is necessary to show that, on a fair consideration of the whole instrument, the authority in question is to be found within its four corners, either in express terms or by necessary implication. (1893) A. C. 170 F.

Where, in a power of attorney, it was provided that S., as a general agent, might sign for his principal, in his own pen, all

Construction of deeds *(Contd.)*

deeds of mortgage and simple bonds and that he might get the same attested by witness on his own admission, and might admit the execution thereof in the office of the Registrar.

Held, that the only authority conferred on the agent was that he should be in a position to sign for the principal the mortgage and simple bonds. This did not authorise the agent into a mortgage transaction without the knowledge of the principal.

When a mortgage was executed on behalf of a Hindu daughter, and the language used in the mortgage suit, in the course of execution proceedings, in the order for the confirmation of the sale, and in the sale certificate, is consistent with either view namely, either that the whole estate or that the limited and restricted estate passed the question what passed at the execution sale, depends upon the question whether the mortgage was executed for purpose which would make it binding upon the inheritence. ROY RADHA KISSEN *v.* NAURATAN LALL, **6 C L J 499.**

66. Partnership—Death of a partner—Liability of his estate—Heir not liable unless he assents and substitutes himself in the place of the decesaed 8 B. L. R. 8 Col: 380 P. I.

67. *Sale—Document—Mortgage, whether sale followed by agreement to reconvey amounts to—Contract creating personal right not transferable.*

Three brothers sold certain properties by a duly executed sale-deed. The vendee, more than two months after the sale, executed an agreement in favour of one of them in the following terms:—"You shall, on 29th January 1901, without obtaining from others and by your own earnings, pay me the sum of Rs. 350 and obtain the right of purchase from me in respect of the lands sold. If you do not pay the amount on that date, you shall have no right whatever." The plaintiff having obtained the assignment of the right under the agreement, sued to recover possession on payment of the amount alleging that the sale-deed and agreement taken together amounted to a mortgage:

Held that the sale-deed and agreement not being between the same parties and being independent transactions could not be construed as constituting a mortgage. Satul Pershad *v.* Luchmi Pershad Singh, (L. R., 10 I. A. 129), followed.

Held also, that the right conferred by the agreement was personal and not transferable.—UTHANDI MUDALI *v.* RAGAVACHARI, **16 M L J 106=29 M 307.**

68 *Sale—Document deed—Vendee described as guardian of a certain minor—Benamidar—Right of benamidar to sue or appeal in his own name.*

Where property, which had belonged to the members of one family and has been sold by them, was reconveyed by the purchasers to the representatives of the same family, it was *held* that a description of one of the vendees parties to the reconveyance as "Musammat Inayat Fatima, guardian of her son, Mahmud-ul-Hasan," was to be construed as importing a conveyance, not to the guardian in her own right, but to her son. A *benamidar* can sue or appeal in his own name on behalf of the beneficial owner. Nand Kishore Lal *v.* Amad Ata (I. L. R., 18 All. 69) and Yad Ram *v.* Umrao Singh, (I. L. R., 21 All. 380), followed. BACHCHA *v.* GAJADHAR LAL. **28 A. 44.**

69 Sale—Charge—Document—Mortgage—Transfer of Property Act. 3 A. L. J. 220 Col. 716 P. I.

70 Sale—Vendee described as guardian of a minor—Benamidar—Right of benamidar to sue or appeal in his own name. A. W. N. 1905 P. 173 Col. 24 P. II.

70 (a) *Sale, construction of—Estate vested in different capacities.*

When a person having several estates and interests in a nomination of land joints in conveying all his estate and interests in the lands to a purchaser, every estate and interest vested in him will pass by that conveyance, although not vested in him in the character in which he becomes party to the conveyance. SOOLEMAN *v.* RAHIMTULU, **6 B. L. R. 300.**

71 Sale—Resjudicata—Decision in former suit—Parties in subsequent suit all claiming under one party only in former suit. 30 C. 556. Col: 558. P. I.

72 *Sale or mortgage—Debt payable at a fixed date and creditor to enjoy property absolutely on default.*

A lessee lent money to his lessor who executed a deed in his favour which contained a term to the effect that on failure of payment of principal and interest on a fixed date cretain land should be considered as sold. On a suit by the representatives of the lessor to recover back the land alleging that the deed was a mortgage—.

Held, that as by the contract between the parties the property was to be enjoyed by the lessee as absolute owner if the lessor failed to pay the money on the date fixed in the deed there was no mortgage and a suit for redemption did not lie. BUTCHIRAJU *v.* RAMALINGAMURTY. **14 M. L. J. 337.**

73 Security bond—Guarantee, revoction of—Surety—Liability of surety to a firm which has undergone charge in its constitution—Cause of action. 23 C. 597 Col: 380 P. I.

74 *Settlement—Deed of trust, Construction of—"Heirs." Meaning of—Heir general—Construction placed on earlier documents.*

In 1839, the then King of Oudh executed a deed of trust, by which he settled a sum of money for the benefit of persons connected with his family and for other purposes. The deed also provided for the payment of pensions to the 'heirs' of the

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pensioners upon their death. It was contended that the word "heirs" must be construed as heirs who were also descendants.

Held, upon the construction of the deed of trust, that the title to the pensions descended to the heirs general of the original pensioners, and was not limited to the heirs who were also descendants.

The Judicial Committee, upon a construction of a deed of trust previously executed by the same executant, had held that in the document then under consideration, the word "heirs" must be understood as meaning "heirs" who were also descendants; and it was contended in this case that the same construction should be given to the word 'heirs' as used in the present document.

Held that the contention was not valid, for the document now in question did not embody or refer to the earlier document; the two documents were not in any sense parts of one transaction and were not even contemporaneous documents, and the decision on the earlier document did not afford a precedent for the interpretation of the latter one, since the language of the two documents was entirely dissimilar NURJAHAN BEGAM (HIDAR HUSAIN KHAN) *v.* FAGHFUR MIRZA. **7. B. L. R. 850=15. M. L. J. 327=9. C. W. N. 8=32. I. A. 135=27 A. 383 (P. C.)**

75 Settlement—Registration—Document collateral to permanent lease of immoveable property—Trust. 25 M. 603 (P. C.) *See Col. 210 P. I.*

76 Settlement—Gift—Charitable gift—Gift for Baj Rogger and Mooktad ceremonies—Invalidity of gift—Charity. 7 B. L. R. 324 Col. 1753 P. I.

77 *Testator bequeathing "money" to legatees, construction of document—General personal estate.*

Where a testator after clearly indicating an intention to exclude entirely certain of his relations from succession to his property, proceeded to bequeathe his "money" to two legatees, with directions as to its disposal, it was *held* that the intention of the testator being apparently, from a persual of the whole will, to bequeathe all his personal property to the legatees, it was not necessary to construe the term used in its strict limited signification, but the whole of the testator's personal estate passed. 25 Ch. D. 154 R. CHEDA LAL *v.* GOBIND RAM, **A. W. N. (1908), 205.**

78 Transaction evidence by the deed—Nature of the transaction which the parties contemplated—Evidence. KRISHNA BAI *v.* RAMA BALA. **8 B. L. R. 764.** *See Mortgage (General).*

79 Trust deed—Settlement on great grand children by way of remainder, if valid under Hindu Law 1 M. L. J. 227 Col. 544 P. 1.

80 *Usufructuary mortgage—Covenant for payment of mortgage debt on demand—Document. Construction of—Mortgage.*

Construction of deeds (*Contd.*)

A mortgage, which is otherwise a usufructuary martgage pure and simple, is not altered in its nature by the insertion in it of a purely personal covenant on the part of the mortgagor to pay the mortgage-debt on demand, and does not give the mortgagee a right of sale on default of payment of debt. 21 All. 4 distinguished. 14 Mad. 232, 17 Mad. 131 dissented from. KASHI RAM *v.* SARDAR SINGH. **A. W. N., 1905 P. 226.**

81 Wakf *nominally for pious purposes, but really for maintenance of a particular family.*

In a suit for possession the plaintiff was the cousin on the father's side of one M, the deceased owner of the property in dispute, while the defendants were the sons of her first cousin on the mother's side. It was alleged in the plaint that the plaintiff had been manager of the property of M until 1807, when the defendant's father was appointed to look after her property; that on his death his sons, the defendants, continued to act on behalf of M; and that during her life-time she executed certain deeds one of which was a deed of *Wakf* dated the 5th February, 1901. The following were the material portions of the deed. "............I desire that with the property owned and possessed by me some benevolent work may always be carried on, so that it may bring me good name in this world and salvation in the other, and the property may also remain safe. Therefore ....I have executed a perpetual deed of endowment, without the power of revocation, in respect of half the village.........I have got the *Wakf* lawfully enforced through an agent and allotted the income of the said property to the expenses of the *Imambara*...........I have now endowed for ever the property for the *Imambara* in Sitapure, and no body can become the proprietor thereof.........I have subjected the property to the rules relating to *Wakf*, and, having made (the defendants) trustees of this endowed property I have put them into possession thereof as such, because these very men are my near, nay nearest relations ....So the said trustees will ever remain the trustees............and it will be proper for them to spend whatever expenses may be incurred in connection with the *Imambara* out of the endowed property during the time of their trusteeship; and it is the duty of every one of them to incur expenses of *majalis* (religious meetings) detailed below. This is always to be kept in view that whoever may be appointed trustee after the said trustees will be from the family of these very trustees; no one belonging to another family can become a trustee. The said trustees will themselves nominate trustees to succeed them and likewise every trustee will make arrangement to have effect after him..." The an-

Construction of deeds (*Contd*).

nual income of the property exceeded Rs. 1,000, a very small portion of which was sufficient to meet the expenses of the *majalis*.

Held, that, in the deed, the appropriation was *nominally* for a pious purpose, and substantially to provide maintenance for the defendants and their descendants, and, therefor, under the Mahomedan Law the *wafk* was void and of no effect. 17 C. 498; 22 C. 619; 30 C. 666 and 23 B 725 R. HAKIM MUHAMMAD SHARIF *v.* ZAKIR HUSAIN. **11 O. C. 48.**

82 *Wajib-ul-arz—Pre-emption—Absence of reference to custom in subsequent—Construction of document—Rules of Board of Revenue of Settlement of Gorakhpur District (1888).*

The absence of any reference in a *Wajib-ul-arz* prepared subsequent to the passing of Rules of the Board of Revenue for the settlement of Gorakhpur and Basti Districts issued in 1888 is not proof of the desuetude of a custom which previously existed and was recorded in a previous *Wajib-ul-arz.*

The provisions as regards pre-emption in the *Wajib ul-arz* of 1833 of village Bankati, District Gorakhpur, ran as follows:—"If any one amongst us wish to transfer the whole or part of his share, he must first inform all the others. If they can take for the price fixed, well and good; otherwise they may sell or mortgage to any one they like from whom they can get the proper price." But the *Wajib-ul-arz* of 1860 of the same village stated that $1\frac{1}{4}$ *bighas* of the village had been mortgaged and it provided further:—"In future, we the co-sharers have power to transfer our respective shares or lands, but on this condition that whoever sells, mortgages, or grants a lease of a share, we shall ask all the co-sharers to buy it. If none of them buys or takes a mortgage or lease then the vendor has power to transfer it to whomsoever he likes."

Held, that it was intended in the *Wajib-ul-arz* of 1860 to record the custom as it existed and it was mentioned in the *Wajib-ul-arz* of 1833. The entry in the *Wajib-ul-arz* of 1860 could not be considered in the nature of a contract. *W. N. All. 1897, p. 3 followed.* SEWAK SINGH *v.* GIRJA PANDE. **2 A L J 6=A W N 1905 P 16.**

83 *Wajib-ul-arz—Suit for—Custom recorded in the settlement* wajib ul-arz—*Partition of village into two different* mahals—Wajib-ul-arz *prepared at the time of partition recovering the right of—Right of a share-holder in one* mahal *to pre-empt the share sold in another—Construction of* wajib-ul arz.

The settlement *wajib ul-arz* of a village provided that any co-sharer, who wishes to sell his share, must sell it first to sharers descended from a common ancestor, next to *hissidar* in the *patti*, and on their refusal, to *shurkayandeh*, that is, co-sharers in the village. Twelve years after the settlement, the village was divided into two *mahals* by perfect partition, and the *wajib-ul-arz*, perpared at the time of partition, taintained the custom regarding the right of pre-emption as recorded in the settlement *wajib-ul-arz.* The plaintiff, a sharer of one *mahal*, claims, on the basis of the settlement *wajib-ul-arz*, to pre-empt a share sold in the other *mahal* to a stranger. The question in dispute was, whether, after a partition of a village, a sharer of one *mahal* can claim to pre-empt a share sold in another *mahal* when a right of pre-emption is given under the new *wajib-ul-arz* to the co-sharers of the village.

Held, that the *wajib ul-arz* contemplates share-holders in an unbroken village, and not persons, who, to all intents and purposes, are strangers to the *mahals* in which the property is situated. It contemplates only one class of share-holders in the village *viz.*, those who are co-sharers. The plaintiff not being a co-sharer, is not such a share-holder in the village, as is contemplated by the settlement *wajib-ul-arz.* Hence his suit for pre-emption fails. 22 A. 1 (F. B.) and I. A. L. J. 33 F. MATHRA PRASAD *v.* NEM CHAND. **2 A. L. J. 261.**

84 Wajib-ul-arz. *Interpretation of—Priority of right not stated.*

Where a *Wajib-ul-arz* is silent as to the question of priority and simply gives the right of pre-emption to a number of persons without specifying any order in which they shall be entitled to pre-empt—

Held, that it would be wrong to interpret the *Wajib-ul-arz* as giving a preferential right to any person named therein. 23 All., 42 distinguished. HATTI *v.* KUNNA. **A. W. N. 1906 P. 101.**

85 Wajib-ul-arz—Adoption—Suit for possession of immoveable property plaintiff claiming as adopted son, his title as such having been denied more than six years before suit. 24 A. 195 Col. 1908 P. I.

86 Zouja and Bai—Evidence—Burden of proof—Alienation by a Hindu widow—Meaning of. A. W. N. 1905 P. 214 Col. 294 P. II.

87 Grants—Secondary evidence—Judgments not inter partes, admissibility of—Boards letter—Recognition—Notice to quit. 7 C. L J. 90 Col. 160 P. I.

88 *Grant of—Royal share.*

A grant which purports to be a grant of the royal share of the revenue given in commutation of a cash payable as a *palanquin* allowance must be construed strictly in favour of the crown and is *prima facie* a grant only of the revenue. 10 W. R. 13 =11 M. I. A. 295; 6 B. H. C. A. C. 191, 4 B. H. C. A.C. 1 (7), refd. BALWANT RAMCHANDRA NATU *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **7 B. L. R. 497=29 B. 480.**

89 Grant of village—Construction of—Grant by government of village upon pay-

Construction of deeds (*Contd.*)

ment of quit rent—Grant of Land Revenue. 28 A. 104 Col. 144 P. I.

90 *Grant—Construction of—Forfeiture—Right to re-enter.*

T granted a *miras taluq* to his widowed daughter at a rent, for her life, and on her death to her adopted son if she adopted one, for life and after him to his sons, grandsons, &c., by right of inheritance, in the male line but without any power of alienating the property. In case the grantee adopted no son or her adopted son died without any heir in the male line, the property was to revert to the grantor or his representative. It was also provided that the property could not be attached or sold for any debt incurred by the grantee or her adopted son, grandson, &c. In case of attachment or sale, it would be void and the property would come into the *khas* possession of the grantor or his representative.

Held, the grant did not create an absolute estate in the daughter. At the same time the grantor had no right to re enter in case of a voluntary alienation. That right was limited to case of attachment or sale.

When therefore the grantee made a gift of the property of her adopted son, *held*, the gift was void, but the grantor or his representative could not obtain *khas* possession of the property. DHARANI KANTA LAHIRI CHAUDHURI *v.* SHIBA SUNDARI DEBYA. **8 C. L. J. 183.**

91 *Grant of reservation of minerals—Interpretation of grant—Rights of grantor to have egress and ingress and to work mines.*

A reservation of minerals does not necessarily include every substance which can be got from underneath the surface of the earth for the purpose of profit. The words 'mines' and 'minerals' in any particular grant must be given the meaning which, judged from the whole of the deed, the parties may be taken to have intended 13 App. Cas. 357 and (1872) L. R. 7 Ch. App. 699.

When a grantor of a land has reserved to himself the right to underground coal and limestone, he is entitled to egress and ingress for the purpose of reasonably working the mine, but he is bound to do no more damage to the surface than is absolutely necessary, to protect the grantee's right of support and to compensate him for any injury to the surface of the soil. GANDOO MAHATA *v.* NILMONEE SINGH DEO BAHADUR. **1 C. L. J. 526.**

92 *Government Kist—Enhancement—Whether mortgagor or mortgagee bound to pay—S. 76, Transfer of Property Act—"Contract to the contrary".*

Where the question was whether the amount of enhancement in the Government kist was to be paid by the mortgagor or the mortgagee and turned on the construction of the *kanom* or mortgage deed, which contained these terms :—" In consideration of an advance of Rs. 79,580, the mortgagee is to hold possession, for 12 years, of land yiedling *a pattam* of 80 paras of paddy and Rs 40 and is to pay *a purappad* of 12 paras of paddy and 12 fanams and 50 coconut leaves having deducted interest and Government revenue : "

Held, that there was nothing in the deed to throw on the mortgagor the burden of providing the enhancement in the Government revenue, there being no contract to the contrary within the meaning of S. 76 of the Transfer of Property Act, and that the law required the mortgagee to bear the burden if he was not relieved of it by his contract. 14 N. L. J. 488 referred to by the Editor. M. TUPPAN NAMBUDRI *v.* V. P. CHINNA PARI KUTTI. **18 M. L. J. 31.**

Construction of Hindu Law.

1 *Disqualified heir—Widow of the disqualified heir—Exclusion from inheritance—Rule as to construction of Hindu Law texts.*

The wife or widow of a disqualified Hindu does not become incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she is herself free from any of the defects which exclude a person from inheritance under Hindu law.

It is a canon of interpretation in Hindu law that a special text forming an exception to a general text should be construed strictly and applied only to the cases falling clearly within it.

Per Curiam—According to a well-known rule of interpretation in Hindu Law, when there is a collocation of two texts, dealing with the same subject, and in the first of them two words or expressions occur, of which only one is repeated in the second text, the other word or expression must be excluded as not applying to cases falling within that second text. GANGU *v.* CHANDRABHAGABAI. **10 B. L. R. 149=32 B 275.**

Construction of Kabuliat.

1 *Landlord and tenant—Ejectment suit—Permanent tenancy—Recognition by landlord—Evidence—Presumption.*

The plaintiff, a mutwalli, alleged that defendants were his tenants-at-will and sought to eject them. The defendants pleaded that they had permanent rights of occupancy. The case of the defendants rested upon a series of transmissions of the property by sale and mortgage which went back as far as 1826, and the continuous possession of his predecessors in title at an unaltered rent. The plaintiff relied on a kabuliyat of 1830 which mentioned that the executant of the kabuliyat had, under a bill of sale, purchased the holding of the predecessor of the executant's vendors.

Held, that in the absence of evidence to the contrary the defendants had made out their case. The kabuliyat negatived the plaintiff's case for it recognized the existing

Construction of Kabuliat *(Contd.)*

right of the executant over which the mutwalli had no control. The fact that the landlord to whom the kabuliyat was given had only the limited rights of a mutwalli, did not affect the tenant's title, which already existed independently of the mutwalli and which the mutwalli recognised. UPENDRA KRISHNA MANDAL *v.* ISMAIL KHAN MAHOMED. **8 W. N. C. 889=32 C. 41 P. C.**

2 Of Kabuliat and pattah—Presumption as to tenancy being permanent—Long continuous possession on payment of unchanged rent. 32 C. 51 Col: 292 P. II.

3 Of kabuliat-Enhancement of rent—Fair and equitable rent--9 C. W. N. 334 Col. 29 P. II.

Construction of lease.

1 *Specific performance—Landlord and Tenant—Lease Covenant for renewal--Time for renewal of lease not mentioned—Time whether or not of the essence of contract.*

The plaintiff brought a suit for the specific performance of a covenant for renewal contained in two leases. The provisions of each of the leases in regard to renewal were as follows—:" After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of 20 years, on the terms and in consideration of payment of the rent mentioned in the lease." And there was no provision that the lessee should intimate his desire to obtain renewal within any particular time.

Held, on the construction of the leases, that the time was not of the essence of the contract, and that the right of the plaintiff to renew the leases was not forfeited simply because he had omitted to give notice for renewal before the expiry of the terms of the original leases. JAGGI LAL *v.* SIR W. E. COOPER. **W. N. A., 1905, p. 154.**

2 *Of lease--*

At the first Regular Settlement in Oudh S. claimed under-proprietary rights in a village, and on his claim being dismissed, he obtained a lease of it from the *taluqdar* in 1866. In 1877, S. sued to contest his liability to ejectment by notice, and a compromise with the *talukdar* was embodied in a lease dated 8th June 1877. This lease provided that S would remain in possession of the village on payment of rent and the *talukdar* promised that S. should never be ejected so long as he paid what was due from him and remained obedient. S. died in 1898. In a suit after S's death against the sons and representatives of S

Held, that the lease of 1877 was for S's life only, and that the *talukdar* became entitled to possession on his death. (S. C. No. 291) dist.; Bilasamani Dasi *v.* Raja Sheo pershad Singh, 8 Cal. 664, P. C.; Lekhraj Roy *v.* Kanhya Singh, 3 Cal. 210, P. C., referred

Construction of lease *(Contd.)*

to; Sreemuttee Anundomohoy Dassee *v.* John Doe, 8 Moo. I. A. 43; Tulshi Pershad Singh *v.* Ramnarain Singh, 12 Cal. 117; Rajaram *v.* Narasinga, 15 Mad. 199; Gaya *v.* Ramjiawan Rom, 8 All. 569; Gangabai *v* Kalapa Dari Mukrya, 9 Bom. 419; Ramabai Saheb *v.* Babanji, 15 Bom. 704; Muhammad Abdul Majid *v.* Fatima Bibi, 8 All. 39 (P. C.); Aziz-un-nisa *v.* Tassadduq Husain Khan, 28 I. A. 65; referred to. MADHO SINGH *v.* THE DEPUTY COMMISSIONER OF BARA BANKI. **8 O. C., 61.**

3 Of Lease—Lease containing inconsistent with the Agra Tenancy Act—Landlord and Tenant—Ejectment—Tarasingh. *v.* Khushal Kunwar—A. W. N. 1906. P. 110=28. A. 610 —*See N W P Tenancy Act II of 1901 Ss 56, 57 (a).*

4 Of Lease—Patnidar contractin to pay Government Revenue. Default by Patnidar —Payment Zemindar—33. C. 140. (P. C.). Col. 90. P. II.

Construction of order.

1 Construction for purposes of execution. Decree when to be interpreted in light of judgment. KASIMALI *v.* MANAKCHAND. **5 O C 35.**

See Decree.

Construction of Oudh Estates Act.

1 *Oudh Estates Act (I of 1869), S. 14, 15, 22—Construction "Person who would have succeeded according to the provisions of the Act"—Descent of* Taluk *by the ordinary law —Half-brother--Marginal notes to the section.* THAKURAIN BALRAJ KUAR *v.* RAI JAGAT PAL SINGH, **31 I A 132=26 A 393 =7 O C 248**

2 *Oudh Estates Act (I of 1869), S. 33—Award by British Indian Association—*Guzara *land--Suit for possession--Estate for life --Grant af maintenance in perpetuity—Construction.*

The plaintiff's grandfather granted some land as *guzara* to the defendant's father. In consequence of some disputes the plaintiff's grandfather agreed to give to the defendant's father a further cash allowance which was changed for land. The present suit was brought on the ground that the grant was for the life of the defendant's father and not an absolute one.

Held, that there being no evidence to show that the grant was intended to confer an absolute estate, it was for the lifetime only of the defendant's father and where the purpose of the grant is '*guzara*' or the maintenance of the grantee it is immaterial whether the words 'in perpetuity' appear, and it must be taken to be for life only. And as there had been no award by the British Indian Association, the rules of that body did not apply.—RAJA RAMESHWAR BAKSH SINGH *v.* BABU BHAGWAN BAKHSH SINGH, **7 O C 90.**

Construction of Sanad.

1 *Sanad - Construction of—Hindu Law—Widow's estate.*

One D. held 48¾ acres in a certain village as rent free tenure under the former Government. D died leaving him surviving four sons and C. widow of his predeceased son. In April, 1861, the Chief Commissioner of Oudh granted them a *sanad* the terms of which were: it having been established after due enquiry that 5 persons specified therein held 48¾ acres in rent-free tenure under the former Government, the Chief Commissioner is pleased to maintain that tenure for the lives of the incumbents, after whose death it will be resumed." C. wrote a will in favor of the defendant devising her rights in the tenure and after her death, the plaintiffs who were representatives of two of four sons of D. sued as reversioners to recover their share in C.'s estate.

Held, that C. held a widow's estate in the tenure. The *sanad* did not profess to be a fresh grant but merely maintained an existing tenure previously granted under the former Government. The *sanad* simply established the *status quo ante* as contemplated by the law for the time being in force. Granting that the *sanad* was a fresh grant and the tenure became the self-acquired property of the grantee, even then C. had only the estate of a Hindu widow. NANDA *v.* BHAWANI SARAN. **3 O. C. 250.**

Construction of settlement decree.

1 *Of settlement decree—Restriction on the right of transfer—Construction—Suit by son to set aside to transfer of non-transferable holding.*

A suit was brought against the *talukdar* by certain representatives of the *zemindari* body of a village in 1866. A compromise was arrived at between the parties by which the members of the *zemindari* body were to pay the *talukdar* Government Revenue and a certain portion of the profits and to have a heritable but not a transferable right in the village. A decree was passed on a compromise. These persons, thus, held under a special agreement or decree of Court under S. 71 of Act XXII of 1886. On the 13th June, 1885, one of the representatives of the *zemindari* body sold a share of his holding in the village. The plaintiff, son of the transferor, sued the Transferee and the transferor for possession of the share sold on the ground that the share could not be transferred.

Held, that it was not open to the plaintiff to question the transfer made by his father in a suit against the transferee.

Held, that the restriction on the right of transfer in the compromise decree was for the benefit of the *talukdar* and his representatives only. RAMESHUR SINGH *v.* RAM KHELWAN SINGH **2 O. C 252.**

Construction of Statute.

1 Disqualified proprietor, borrowing money without sanction of Court of Wards. 5 O. C. 256 Col: 267 P. I.

2 *Resumption—Grant, revenue-free—Proprietor, meaning of—Revenue Act, (XVII of 1876), ss. 52 and 53—Construction of statute—Cess.*

Following Select Case, No. 259, *held*, that sections 52 and 53, Oudh Land Revenue Act, do not apply to revenue-free lands. The true meaning of the word 'proprietor' in section 52 of the Act is a proprietor paying land-revenue in respect of the land which is the subject of the grant.

Held, also, that a cess is not land-revenue within the meaning of the Act.

Held, further, that a pre-existing legislation may be referred to as an aid towards construction, subject to this, that if the terms of an Act are clear, positive and express they cannot be modified by indications of an intention to be gathered from previous legislation upon the same subject. JANKI BARSARAN *v.* RAM KUMAR DAS. **3 O. C. 325.**

Construction of Thekadar

1 *Thekadar—Ejectment of—Notice of ejectment—Rent Act (XXII of 1886), s. 55—Lease-hold rights of mortgagor, effect of sale of equity of redemption upon—Sale-deed—Construction.—*

The mortgagor took a lease of the mortgaged property from the mortgagee and subsequently sold the equity of redemption. He professed to sell all his rights without the exception of any right or any thing.

Held, that the language of this character is usually intended to pass all proprietary rights, unless special mention is made of the lease-hold rights.

Held, also, that a landlord, who desires to eject a *thekadar* on the expiration of his tenancy, must proceed by the issue of a notice of ejectment under section 55 of the Oudh Rent Act.—MOHAMMAD ALI *v.* ISA KHAN, **2 O. C., 336.**

Construction of Wajib-ul-arz.

1 *Pre-Emption—Wajib-ul arz-Construction of document—Retention of same wajib-ul-arz after division of village into mahals—Hissadaran deh and hissadaran patti on the same footing.*

Where a village was divided into three *mahals* and the new *wajib-ul-arz* which was prepared for one of them A. M., was copied verbatim from the *wajib-ul-arz* of the village before division and clearly put *hissadaran deh* and *hissadaran patti* on the same footing.

Held, that a co-sharer in the *mahal* A. M. had no right of pre-emption in regard to property sold in A. M. as against a co-sharer who, though he had no share in the *mahal*, A. M., was a co-sharer in

Construction of Wajib-ul-arz *(Contd.)*

one of the other *mahals*. Dalgunjan Singh *v.* Kalka Singh. (I. L. R. 22 All. 1) distinguished. SARDAR SINGH *v.* IJAZ HUSSAIN KHAN, **I. L. R. 28 All. 614.**

2 *Pre-emption*—Wajib-ul arz—*Construction of document—Partition of village into separate mahals.*

In a village which consisted of two *pattis* or *mahals*, the *wajib-ul-arz* recorded a custom of pre-emption to the effect that in the case of a sale or mortgage by a shareholder, a claim for pre-emption might be brought by (1) own brothers and nephews, (2) cousins who are co-sharers, (3) co-sharers in the *pattis* (4) share-holders in the village *(hissadaran deh)*. The village was subsequently divided into more *mahals*; but no new *wajib-ul-arz* was framed.

Held, that a co-sharer in the village had a right of pre-emption as against a stranger, even though he did not own a share in the *mahal* in which the property sold was situate Dalganjan Singh *v.* Kalka Singh (I. L. R. 22 All. 1), referred to. JANKI *v.* RAM PARTAB SINGH. **28 A. 286.**

3 *Pre-emption*—Wajib-ul-arz, *construction of—Custom.*

A village *Wajib-ul-arz* contained provisions as to pre-emption or pre-mortgage when a share of the ordinary *khalsa* land would be sold or mortgaged. There was also a provision to the effect that if any transfer of the resumed *muafi* land was made in favour of a stranger, the right of pre-emption of co-sharers should arise as regards that transfer.

Held that the condition as to pre-emption or pre-mortgage in respect of the revenue paying land governed the *muafi* land also, save that the co-sharers in general had a right to pre-empt *muafi* land, whereas in case of *khalsa* land, there was a gradation among the co-sharers. RANG LAL *v.* KAMTA PRASAD. **3 A. L. J. 515=A. W. N. 1906 P. 247.**

4 Wajib ul-arz—*Construction*—Ekjaddi, *meaning of—Custom, proof of—Presumption in favour of entry in* Wajib-ul-arz—*Daughter and daughter's sons, exclusion of, from inheritance.*

One S. died leaving a widow and a daughter him surviving. He was succeeded by his widow, on whose death the plaintiffs claimed as the reversionary heirs of S. to recover possession of S's property, joining as defendants the daughter and her sons. They alleged that S. was great-grandson, in the male line, of L., and that one of the plaintiffs was the great-grandson, and the other plaintiffs the great-great-grandsons, in the male line of the same person. They also alleged that, under the custom prevailing the daughter and her sons had no right in the presence of the plaintiffs. The terms of the *wajib-ul arz* on which the plaintiffs relied were to the following effect:—On the death of a shareholder, his male issue become owners in equal shares; daughters do not get the share; if the widow wishes to adopt, she can adopt an *ekjaddi* of her own husband.

Held, that according to the *wajib-ul-arz* the defendants were excluded by the plaintiffs.

Held, also, that the expression *ekjaddi* in the *wajib-ul-arz* was used in its ordinary sense, as denoting other ancestors of the deceased besides his grandfather.

Held, further, that a single *wajib-ul-arz* even if not rebutted or not shown to have been irregularly prepared, is not necessarily sufficient proof of a custom. There is a presumption that the entry of a custom a *wajib-ul-arz*, prepared before or after the passing of Act XVII of 1876, is a correct record of the custom, until the contrary is proved, that is to say, that the entry contains the information received by the Settlement Offices as to the custom, but no more than this. The question whether a particular *wajib-ul-arz* is sufficient proof of a custom recorded in it, is a qestion not of law, but one of fact. PRAGI *v.* BAIJU. **4 O. C. 71.**

5 Wajib-ul-arz—*Construction—Hindu widow.*

On B.'s death, his childless widow succeeded to the possession of his estate, a part of which she sold. After her death the reversioners sued for possession of the part sold alleging that she had no right to transfer it beyond her lifetime and was in possession with the limited rights of a Hindu widow. The defence was that she had an unrestricted power of alienation under the terms of the *wajib-ul-arz*. The material clauses of the *wajib-ul-arz* were as follows:—"If all the widows have no sons, then each will remain in possession of her respective share with proprietary powers *(ba-ekhtiar malikana)*; whomsoever she may appoint her heir and keep in her house, from the members of her husband's family, that person will be the owner (*malik*) upon her death. Should she not appoint any one as her heir the nearest member of her husband's family will succeed."

Held, that the provisions of the *wajib-ul-arz* were inconsistent with the possession by the widow of an absolute estate in the property of her husband, and did not confer on her unlimited powers of alienation. BINDRABAN DAS *v.* TOTRI. **3 O. C. 258.**

6 *Wajib-ul-arz—Construction of—Hindu Law.*

When a construction can be put on a *wajib-ul-arz* which is compatible with the rules of the Hindu Law, that is the proper construction to be placed on the *wajib-ul-arz*. It would require very clear language in the *wajib-ul-arz* to establish a custom in derogation of the Hindu Law. DHONDHE SINGH *v.* SANT BAKHSH SINGH. **3 O. C. 181.**

Construction of wills.

1 *Absolute or life estate bequeathed—Hindu Law—Self-acquisition—Power of acquirer over*

Construction of Wills (*Contd.*)

Will, construction of—Words conferring absolute estate by subsequent terms held to confer only life-estate—Devise, effect of, when devisees not in existence at testator's death.

Properties acquired by a Hindu, who had inherited no ancestral property, out of income derived by him in Government service are his self-acquisition and he has complete power of disposition over them by will or otherwise to the prejudice of his male issue. Where some terms of a will apparently give an absolute interest but subsequent provisions show that only a life interest was intended to be given, effect will be given to the intention of the testator by cutting down the effect of the former words and construing them as conferring a life estate only. When in making a provision for his sons, the testator uses words which, if strictly construed would give them only a right to be maintained out of the income of certain moveable and immoveable properties, but subsequent portions of the will referred to them as 'donees' and directed such properties to be handed to them on coming of age:

Held that the sons were given a life interest in such properties. Where a testator, after giving a life interest in certain properties to his sons, devised the residue in favour of the male issue of the sons, such issue failing, in favour of female issue and that again failing, in favour of the granddaughters by his daughter, and where at the testator's death there were no grandchildren by his sons, but one of his daughters had two daughters alive.

Held that the sons did not take the residue as on an intestacy but that it was taken by the two daughters of the daughter, who were then alive.—SOMASUNDARA MUDALIAR *v.* GANGA BISSEN SONI, **I L R 28 M 386.**

2 *Absolute estate. Rules as to construction of—Intention of, estator—*

A Hindu, owing absolute moveable and immoveable property, being without issue, made a will wherein it was stated that he was to continue to be the *Malik* of all his property as long as he lived, that after his death, his wife and his sister-in-law, who was joint with him, were to be the Malik, and that his wife so long as she remained chaste, and his sister-in-law during her life were to maintain themselves from the rents of the property, without alienating the property unless for some urgent necessity; and at the end of the will a postcript was added to the effect that his wife and sister-in-law were empowered to alienate the immoveable property in which none else had any interest or claim.

Held, that on the proper construction of the will, the widow and the sister-in-law took absolute estates in the property.

Held also, that in construing a will of this sort the Court will have regard to the following rules collected from the various decisions on previous cases on the subject.

Construction of Wills (*Contd.*)

(1) The actual intention of the testator must as far as possible be ascertained from the contents of the will itself, considered as a whole, and every clause in it being given effect to 8 B. L. R. 842, 12 I. A. 103 (110) referred to.

(2) When the will contains a clear expression of intention, effect must be given to it, unambiguous dispositive words not being taken as controlled or qualified by any general expression of intention 24 I. A. 76 referred to.

(3) Where some of the provisions of the will could not be reconciled with one another, and the actual intention of the testator could not be ascertained by any means, effect should be given to the last words. 7 B. L. R. 236 referred to.

(4) The Court should consider in construing a will such "surrounding circumstances" as may affect the meaning to be attached to the words used in it, *e. g.*, the state of the testator's family; what issue, if any, he left; what near kindred he had; the usual customs, practices, notions, and wishes of his race or caste 6 M. I. A. 526 (550), 2 I. A. 7, 11 B, 573 (579), 17 B. 503 22 B. 409 referred to.

(5) Clear words of inheritance, as also words which clearly give a power of disposition, *e. g.*, "to my wife, her children and grand-children," "to my wife, her heirs and assignees" show an intention to confer a heritable and alienable estate. 24, I. A. 76, 11 B. 573 (579), 21 B. 376, referred to

(6) Also words such as "shall become Malik of my property" or "I appoint my wife to the Malikatwa as exercised by myself" confer a heritable and alienable estate, in the absence of indication of different intention. 24 I. A. 76, 24, C. 406, 27 C. 649 referred to. But "surrounding circumstances" may suggest a different intention, and it is possible that words such as "my wife is the owner after me," "my wife is the heir," or "shall be my heir and Malik" intend merely emphatically to protect her peaceable possession and management during her life-time. 21 B 376, 233 B, 80 19 A 16 22 M 357, 27 M 498 referred to.

If an absolute estate be clearly given and words are superadded restricting the power of alienation, or imposing any other restriction which is repugnant to the estate given, the restriction should be rejected. 5 I. A. 138, 24 I. A. 76 referred to. GOVERDHANDAS *v.* YANTBAI. **1 S. L. R. 211.**

3 *Accumulations directs—Constructions—validity of*:—

It is not incompetent for a Hindu testator to direct accumulations. Principles governing the validity of directions for accumulations examined and explained. 24 C. 589 on app.; 25 C. 662 and 4 C. 443 ref. to. RAJENDER LALL AGARWALLA *v.* RAJ COOMARI. **11 C. W. N. 55; 34 C. 5.**

Construction of Wills (*Contd.*)

4 *Bequest of income of immoveable property —Corpus--Interpretation of will.*

In every case in construing a will, it is the duty of the Court to ascertain what the intention of testator was and to give effect to the intention.

It is a well-established rule of construction that a gift of the rents and profits of property is equivalent to a gift of the property itself; also that a gift of the income of property will also carry the legal and beneficial interest in the property itself. DURGA DEVI *v.* DUNI CHAND. **2 A. L. J. 568.**

5 *Condition against restraint—Mahomedan Law—Will—Construction of document.*

One M made a will, whereby, after making provision for his widow and daughters, he divided his property between his three sons giving to each certain villages. The gift was *prima facie* absolute, but the will further provided that none of the sons should have a right to alienate the property devised to him and that on the death of one of the divisees without issue, his share should go to the surviving brother or brothers or his or their heirs. The testator died, leaving surviving him three sons, Abdul Qayum and Abdul Kadir by one wife, and Abdul Karim, by another. The will was assented to by the heirs of the testator, and the three sons entered into possession of their shares. Then Abdul Kadir died, and his full brother, Abdul Qayum, took possession of his share.

Held, on suit by the half brother for possession of half the share that according to the Mahomedan law, the three devisees took absolutely and the plaintiff's claim could not be maintained. ABDUL KARIM KHAN *v.* ABDUL QAYUM KHAN. **3 A. L. J. 131 =28 A. 342.**

6 *Comparison-—Will—Construction of-—* "Such."

By one of the clauses of his Will the testator directed as follows :—

"As regards the remaining one equal fourth share of the said residue I direct that if at the time the said residue is divisible my son Ardeshir shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand the said share shall be made over to him absolutely but if othewise then I direct that the said share shall be held or settled by my executors upon trust until the said Ardeshir shall be free from such debts and liabilities or until he shall die to apply the income of the same in or towards the maintenance and support of him, his wife and children of such or one or more of them the said Ardeshir, his wife and children as the trustees may at their absolute discretion determine and the education and other benefit of such children including their marriage but when and so soon as he the said Ardeshir shall be free from such debts and liabilities as aforesaid upon trust to pay the same and all unapplied income if any to him the said Ardeshir absolutely."

Held, that the debts and liabilities of Ardeshir to which the clause related were "debts due by him or any liabilities likely to result in a debt or debts of more than Rupees five thousand" and it was with debts of that description that a comparison was implied by the use of the word *such*. Time was no part of their description, and the reference to time was made only to indicate the event on which certain consequences were to follow according as debts and liabilities the description indicated did or did not exist. BAI JAIJI *v.* N C MACLEOD. **8 B. L. R. p 122=30 B 493**

7 *Devisee would not dismiss a certain servant--Will--Trust--Servant Employment of.*

A Will made by a Hindu widow contained a clause to the effect that the defendant, to whom the testatrix had devised and bequeathed property for life, should not have power to dispense with the services of certain servants.

Held, that in the absence of any indication of a clear intention to that effect, the clause did not create a trust in favour of the servant 5 Cl. and Fin. 129 referred to. RAM DULARI *v.* MULU. **2 A. L. J., 637=A. W. N. 1905 P. 233.**

8 Daughter, married—Estate taken by, under a will and by inheritance--Will--Construction of, "to my daughters and their respective sons." meaning of. 10 C. W. N. 595 (F. B) Col. 83 P I.

9 Daughter—Bequest to daughter obsolute estate. 12 C. W. N. 41 Col 87 P. I.

10 Demonstrative--Legatees' rights as to corpus--Interest. 29 M. 155 Col. 732 P. I.

11 Devise to widow—Extent of interest —Case governed by Hindu Wills Act. Legacy in favour of a Hindu wife 5 C. W. N. 300 Col. 83 P. I.

12 *Devolution of property—Hindu Law—Bequest to "daughters and their respective sons"—Woman's estate—Survivorship between daughters—Spiritual benefit—Remainder over to sons Gift over to daughters on failure of adoption—Succession Act (X of 1865), S. 82, 116 and 117.*

In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. 21 A. 7 followed.

In the will of a Hindu drawn up in the English language and probably by an English Solicitor who was one of the attesting witnesses, it was provided, in case of the failure of a prior bequest in favour of a son to be adopted to the testator, (which

Construction of Wills *(Contd.)*

bequest in fact failed) that the estate was to be made over to and divided between his two daughters in equal shares, "to whom and their respective sons he gave, devised and bequeathed the same." There was a proviso that in the event of one of the daughters dying without leaving any male issue surviving the share of the deceased daughter was to go to the surviving daughter and her sons—to the exclusion in both cases of female issue. Further, that "in the case of the the death of either daughter leaving sons, the share of such daughter was to be paid to such her son or sons' share and share alike."

Held, that under the will the testator's daught rs whom he incontestably intended to benefit were to have no more than what is generally known to be a woman's estate in his property;

That the testator intended to create in their favour an estate for life with a remainder over to their sons;

That in the events that happened the daughters were entitled to the testator's estate in equal shares for life and with the benefit of survivorship between themselves. RADHA PROSAD MULLICK *v.* RANIMONI DASSI. **12 C W N 729 (P C)=10 B L R 604=8 C L J 48=5 A L J 460 =4 M L T 23—18 M L J 287.**

13 *Daughter's son made karta—Will, construction of—Legatee must be in existence at the date of the testator's death—Appointed daughter, custom relating to—Indian Succession Act, s. 100.*

The will of a Hindu testator, to which the provisions of the Hindu Wills Act did not apply, contained, *inter alia*, the following paragraph:—"We have no male issue. As a suitable boy could not be found among the *gnatis*, no adoption has been made till now. If our wife Lakshmi Devemma Row finds a suitable boy among our *gnatis*, she shall made an adoption according to her will and in accordance with the law. If no boy is found and if our daughter Venkata Chinnayya has a son, that boy becomes a 'Douhitra karta' (heir as daughter's son) according to the law: so, that boy alone should become the 'karta' for the entire property belonging to me. According to the law the 'kartaship' rests in our wife. So, our funeral rites as well as the acts (rites) to be done subsequently should be caused to be done through our wife alone." At the testator's death his daughter was five years old. Subsequently, she had sons, all of whom predeceased her. The testator's widow died in 1893 and the daughter in 1902. The present suit was brought by the daughter's husband claiming as the heir of his eldest son, who was living in 1893 and who, it was contended, took the estate on the widow's death under the will. The plaintiff contended that under the will the daughter's son had all the rights of an adopted son.

Construction of Wills *(Contd.)*

Held, on the construction of the will —(1) That the testator's daughter was not 'appointed' by him to raise a son for him. The practice of 'appointing' a daughter is now generally reputed to be obsolete and it lies on the person who alleges that she was so appointed by the will to prove that such a custom exists, as the word of the will do not warrant the inference that the testator intended to revive a dead custom. (2) That the daughter's sons, not having been born at the testator's death, took nothing under the will. Section 100 of the Succession Act contemplates a power of disposition extending further in time than that allowed by the Hindu Law and the principle enacted by that section does not apply to the case. SRI RAJA VENKATA NARASIMHA APPA ROW *v.* SRI RAJAH SURANENI VENKATA PURUSHOTHAMA JAGANADHA GOPALA ROW. **4 M L T 9 =18 M L J 420=31 M 310.**

14 *Direction in will appointing a third person—Manager not binding on legatees—Construction.*

N., a member of a Hindu joint-family, executed a will in favour of G. and B., the words of which were to the effect that "he having appointed G. and B., his executors (*wasi*) and owners (*malik*) of all his property under the management *(ba sarbarahkari)* of S. they shall, after his death, remain in possession of it and S. shall continue to be Manager, but they shall have no power of transfer, and, after the death of both of them, S. shall be the absolute owner of all the property."

Held, that the provision that G. and B. shall be the owners of the property for their lives gave them jointly the right to possession of it.

Held, *further*, that the clause, to the effect that G. and D. shall be owners of the property for their lives under S.'s management, must be interpreted as expressing merely a wish or direction that he should act as their Manager, and that such wish or direction was not binding on them.—SITLA BAKHSH *v.* BRIJ RAJ KUAR. **B. R. 65=4 O. C. 87.**

15 *Gift over—Construction of will.*

A will, after payment of certain legacies, divided the residue into three shares, with respect to one of which, trusts were declared in favour of the wife (plaintiff) and children of the testator's son, H. The testator directed a trust deed to be made in respect of this share, and that, out of the share, a sum of Rs. 60,000 should be specifically dealt with as therein mentioned, and provided that "out of the said income (a sum) to the extent of Rs. 300, shall be paid every month to H's wife for (her) household expenses and for the education of (her) chidren."

It further provided: "If H. should not have any son or, after having a son, should he die without leaving any son, then I give the whole of the remaining property to my

Construction of Wills (*Contd.*)

son, M, and his younger brothers and in the same manner after the decease of H, and his wife I give the said sum of Rs. 60,000 also to him and them."

H, had no son at the date of the testator's death. He died leaving, him surviving, his wife (the plaintiff), a daughter and a son. The son died an infant a few months after H's death.

The plaintiff claimed that she was entitled to a one-third share of Rs. 60,000 and to Rs. 300 a month during her life.

Held (1) that the plaintiff, as the heir of her son on whom HUSSEINBHAI'S interest devolved, was entitled to the one-third claimed by her in the balance of Rs. 63,000.

(2) that from the time when the above mentioned one-third was handed over to her, there should be a proportional abatement in the amount of Rs. 300 which was payable to her every month during her life. MAHOMEDBHAI NENSEY *v.* FATMABAI. **8 B. L. R. 615.**

16 *Gift to female—Will, construction of—Gift for maintenance may be of an absolute estate—Where testator gives a female immoveable property for maintenance and makes several devises of other properties to others and adds a clause declaring the gifts to be absolute, the gift for maintenance will be an absolute gift—Devisee in possession of land under an invalid will must be presumed to prescribe for the estate given by the will.*

An absolute gift of immoveable property to a widow for maintenance is not unknown to Hindus or repugnant to their ideas of propriety. In construing a will, every portion of it must be given the full effect which, on a natural and grammatical construction of the will, must be allowed to it, and no portion of it ought to be rejected unless such a construction makes the provisions of the will inconsistent with each other or leads to results which must be repugnant to the testator's ideas of propriety. Where a Hindu testator by his will gave immoveable property to a widow stating it to be for her maintenance and, after making various other gifts, added a clause by which he declared that all the gifts under the will should be absolute, there is no such inconsistency or repugnancy in giving the clause its natural and grammatical construction by making it applicable to the gift to the widow, and she will accordingly take an absolute interest in the property. By so construing the will, the subsequent clause only removes the ambiguity in the case of all the gifts and does not alter any material portion of the will. The statement by the testator that he gave such property 'out of sympathy' will not affect the absolute nature of the estate given if there was no legal obligation on him to provide for such widow's maintenance in his will. Where a person takes possession of property under a will, which cannot legally operate to convey such property, the person so entering on possession must be presumed to prescribe for the interest which the will purports to give him; and the burden of proving that he prescribed for something less will be on the party alleging it. RAMACHANDRA NAIKER *v.* VIJAYARAGAVULU NAIDU. **4 M. L. T. 198 = 31 B. 249.**

17 *Hindu Law—Will, construction of—Bequest to widow—Adoption a condition precedent—Estoppel.*

G a Hindu, executed a will whereby he directed (1) that P should be adopted as his son by his widow "for the purpose of offering libations of water and funeral cakes to my manes after my death"; (2) that after G's death, his property should go to his widow who "during her life-time shall be competent to alienate by sale, gift or otherwise, the property left by me as she pleases" and (3) that after the death of the widow, P should become the owner of the whole of his estate. P could not be adopted by the widow, as his father refused to give him in adoption. The widow at her death executed a will by which she left all her property to P.

Held, that the widow acquired, under the will of her husband, a life interest only to his property and not an absolute estate. The provisions in the will giving her power of alienation or gift must be restricted to such alienations and gifts as would be required in cases of legal necessity or for spiritual purposes at her death. Therefore, the will executed by the widow, in favour of P. did not confer on him any valid title to the property left by G.

Held, also that P. could take nothing under the will executed by G. as his adoption was a condition precedent to his taking the property under the will which was not fulfilled.

Held, further that a legatee who had elected to take a legacy under the will, was estopped from setting up a title contrary to the provisions of the will. But where the legatee is in possession, any one asserting the estoppel could not avail himself of any defect of title in the legatee unless he could establish his own title. Mahomed Thamshool *v.* Shewakram, (L. R., 2 I. A. 7) referred to.—PROBODH LAL KUNDU *v.* HARISH CHANDRA DE, **9 C W N 309.**

18 *Hindu Law—Will—Principle of double portions. Applicability of English law as to.—*

According to the principles of English Law as applicable to double portions with reference to a Will where the two provisions are of the same nature or there are but slight differences the two instruments afford intrinsic evidence against a double provision, but where the provisions are of a different nature the two instruments afford intrinsic evidence in favour of a double provision. And in ascertaining the intention of a Hindu testator from the terms of his Will, this principle of English Law may well be borne in mind as principle of equity, justice and good conscience.

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JUGJIVANDAS KARAMCHAND *v.* BRIJDAS LALJI. 7 B. L. R. 299.

19 *Hindu Law—Will—Construction—Rule applicable to a bequest to a widow as distinguished from a bequest to any other female—Devisee to mother.*

Held, that such a gift did not confer a less estate on the mother than would have been conferred had she been a male, *i. e.*, an absolute estate, and that a bequest by the donee herself will of all the properties so bequeathed was a good and valid bequest. In Hindu Law, there is no presumption that gift to a mother as such confers a limited estate only. Such a presumption exists only in the case of a gift or devise of immoveable property to the wife. Mahomed Shamsul Huda *v.* Shewkaram (L. R., 2 I. A. 7) and Annaji Duttatraya *v.* Chandrabai, (I. L R., 17 Bom. 503) distinguished and explained; Mussammat Kollany Koer *v.* Luchmee Pershad. (25 W. R. 395) and Bhobo Tarini Debya *v.* Peary Lal Sanyal, (I L R 24 Cal 646) followed. —ATUL KRISHNA SIRCAR *v.* SANYASI CHARAN SARCAR, 9 C W N 784=2 C L J 50=32 C 1051.

20 *Hindu — Will — Construction — Rule against perpetuity—Indian Succession Act X. of 1865, s. 101.*

Clause 13 of the will produced in this case was as follows: "As to my other property which there is, that is the property situated on the east side of the house of my step brother, I give the same to my younger son C for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property, and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him, my Mukhtyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years."

Held, on a construction of the above clause, that the bequest in favour of a son of C who might be adopted at any time after C's death by a widow who might not have been living at the testator's decease was void under S. 101 of the Succession Act (X of 1865). KASHINATH CHIMNAJI *v.* CHIMNAJI SADASHIV. 8 B. L. R. 263=30 B. 477

21 Hindu will—Interpretation—Justice, equity and good conscience. 9 O. C. 159 Col. 86 P. 11.

22 *Hindu Law—Will—Of life-interest to woman Life estate.*

A Hindu executed a Will in favour of his daughter-in-law (son's widow) in these terms: "I have no *aulad* (meaning no male child, for he had a daughter) and, therefore, make this Will, in favour of my daughter-in law, to the effect that, all the moveable and immoveable property, which is in my possession, at the time of executing this Will, and any other property which may come into my possession in my lifetime or to which I may become entitled, shall after my death, remain in the proprietary (*malikana*) possession of the devisee; and the said devisee shall be the owner (*malik*) of all the bequeathed property, and it shall be incumbent on the devisee to perform my funeral rites after my death...... the devisee shall be owner of the property that is left after the funeral rites, &c., the devisee has power in case of my not adopting anyone in my life-time to adopt, after my death, any person of my family whom she may think fit......, if any of my relations and heirs or any stranger, claim the bequeathed property from the devisee then that claim shall be false."

After the death of the devisee, the plaintiff, a grandson of the testator's brother brought a suit for possession of the property bequeathed to her by the testator against the testator's daughter and certain descendants of one of his heirs. The question for determination was whether, under the Will, the daughter-in-law took an absolute estate or only a life-interest.

Held, that, having regard to the context and the rules for the construction of Hindu Wills, the will, under consideration conferred only a life interest upon the devisee. 2 I. A. 7, 11 B. 69, 19 A. 16, 17 B. 503, 10 C. 342, 9 C. W. N. 309, 25 A. 351, 10 A. 495, 25 A. 361, 10 A. 495, 23 A. 309, 2 O. C. 226, 19 A. 133, 24 C. 834, 27 C. 44, 27 C. 649, 10 A. 495, referred to. MUSSAMMAT SALTA *v.* KASHI NATH. 9 O. C. 119 (B).

23 *Hindu will—Estate vested in interest as well as in possession—Intestacy—Indian Succession Act (X of 1865), s. 159—Intention of the testator.*

Where it is possible to put a reasonable construction upon a Will which results in a testacy, that construction must prevail, rather than one, which leads to an intestacy. 30 Ch. D. 390 followed.

On the construction of the Will of a Hindu, which provided that, on the death of the testator, his estate was to pass into the possession of his two widows and his nephew, who were to hold it, without powers of alienation, in equal shares, and further that, on the death of the senior widow, the nephew was to hold half of the whole estate and on the death of the second widow, the nephew was to have whole estate absolutely.

Held, that the widows were to have life-interests in certain defined shares, varying from time to time, and subject to such life-estate the nephew was to take an absolute interest in the whole; that, on the death of the senior widow, the nephew had a vested interest in half of the property, though the actual enjoyment of that expectant interest was postponed till the termination of the junior widow's life estate, but that, as regards the other half, it was vested in interest as well as in possession in the nephew; and that, therefore, on the

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subsequent death of the nephew, his heirs were entitled, as against the junior widow, to possession of half of the testator's estate.

S. 159 of the Indian Succession Act does not apply where there is a clear indication of the intention of the testator.

Quare, whether the clause imposing a restraint upon alienation was valid and legally operative. MANDAKINI DEBI *v.* ARUNBALA DEBI. **8 C. L. J. 515.**

24 *Hindu will—Hindu Law—Wills Act XXI of 1870—Ss. 3 and 4—Construction of—Indian Succession Act, Ss. 101 and 102—Residuary Estate.*

In an appeal which turned upon the construction of the will which purported to deal with residuary estate of the testator, who practically intended that the distribution should take place only after all the sons who might be born to him had attained their majority, and whose will ran as follows, "should my son Subramanian who is the (chief person or) executor to this will and testament be willing to divide and give the aforesaid landed properties, ready money and all the other properties, when my grandsons may attain their age, he shall divide the same into five shares as I have had five sons, and give away the same to their respective sons, that is to say, my grandsons. He shall give away the share of such son of mine as may not beget a grandson (to me) to himself. Should he not be willing to effect a division he may deliver up the properties to such of these persons, namely, his brothers or his son or his brother's sons, as may be competent to cause matters to be conducted properly as my eldest son Subramanian who is the (chief person or) executor to this will and testament had been conducting them; should the (chief person or) executor Subramanian be not willing to do so, he may, as he thinks proper, arrange that at least the Administrator General should conduct matters for a fixed time in the same manner in which he himself shall have conducted matters and that the properties should thereafter be divided and given to the aforesaid grandsons or that the same should be delivered up to them intact without devision." It was *held* that the effect of the disposition was that the bequest if any created by the exercise of the so-called power of appiontment might be delayed beyond the period specified in s. 101 of the Indian Succession Act which, when read with s. 102, made the whole disposition invalid. S. 2 of the Hindu Wills Act makes S. 101, Succession Act, applicable in terms, and the provision in s. 3, although it might have the effect of invalidating a disposition which is valid under s. 101 of the Succession Act, cannot have the effect of validating a disposition which is invalid under that section. It is clear, therefore, that the disposition is invalid under sections 101 and 102 of the Succession Act, and there is an intestacy with regard to the residuary estate and the property devolves upon the heirs at-law. L. R. 10 Ch. 35, 20 B. 450 referred to. P. V. SIVASANKARA PILLAI *v.* SUBRAMANIA PILLAI. **4 M L. T. 306**

25 Income of immoveable property [illegible] L. J. 568—*See No. 4 supra.*

26 *Intention of testator how ascertained. Scope of enquiry—Admission of extraneous evidence—A Hindu daughters right to sue for construction of will of father and for [illegible]tal declarations.*

In construing a Will, the intention of the testator must be ascertained from the language used in the entire Will. The true enquiry is not what a testator meant to express, but what the words used to express; extrinsic evidence cannot be received as evidence of a testator's intention, outside and independent of the written words employed by him. *6 M. I. A. 526, followed.* SRIMEBAS DAS *v.* MONMAHINI DASI. **3 C L J 224.**

See also Col. 438 P. I. No. 138 and 3 C. L. J. 224 read for 3 C. L. J.

27 Interposition of intermediate estate. Direction as to unexhausted residue. Ultimate gift to sons. 9 C. W. N. 528 Col. 2031, P. I.

28 *Irrevocability—Test of ascertaining whether a document is will or not.*

The primary test for ascertaining whether a document is a will is whether it is revocable or not. An instrument in order to be a will must be revocable in all its parts. A family arrangement to prevent disputes and consequent waste of family properties cannot be called a will, the more so because it was registered as a non-testamentary document and was stamped. In the goods of Robinson (L. R. 1 P and D, 385 at p 387) and Thakur Ishri Singh *v.* Thakur Baldeo Singh (I. L. R., 10 Cal. 792) referred to.—MUSST. SITA KOER *v.* MUNSHI DEO NATH SAHAI, **8 C W N 614.**

29 Khojah-Mohammadan—Bequest of annuity to daughter and after her to her children, 29 B. 133 Col. 2043 P. I.

30 *Kul malick—Will—Construction.*

One of the clauses of a Will provided: "As to shop 1 (in number) which there is in Madhavpura, the same realizes a rental of Rs: 90 per year. My wife Devkor shall take the rent of the said shop. Should perchance anything have to be paid to my creditors, then my wife shall sell the said shop and pay (the defendant). She is the sole owner of the said (shop)."

Held, on a consideration of the whole Will, that the testator meant by the above clause to pass to his widow an absolute estate in the house. LALBHAI MULCHAND *v.* MANSUKH RAICHAND. **8 B. L. R. 482.**

31 *"Malik"—Hindu widow—Property dedicated to idol—Limited grant—Declaration of property to be debutter—Civ. Pro. Code (Act XIV of 1882), Ss. 244 and 280—Mortgage decree—S. 244, applicability of.*

The word "malik" confers on the donee

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a heritable and an alienable estate. (24 W. R. 395 and 24 I. A. 76 followed.)

But the effect of the word "malik" may be modified by the context, or, in other words, in order to cut down the full proprietary rights that the word imports, something must be found in the context to qualify it. 7 C. L. J. 131 followed.

The Court must, in construing a will, look to all the clauses of the will, and give effect to all the clauses, ignoring none as redundant or contradictory.

Held, on a construction of the will in the present case, that there is ample indication in the context, to displace the presumption of absolute ownership implied in the word "malik" and to justify the conclusion that the gift in favour of the widow must be cut down to something less than a full proprietary right with power of alienation: that it is impossible to maintain that any absolute devise was made to her, that she took a limited estate under the will, that so far as the will is concerned her powers of alienation were confined to the dedication of property for the benefit of ancestral *idol*, and the alienation of the property in case of necessity; and that the dedication to a new *idol* she has established or installed is invalid and the dedicated property is not *debutter*.

Per Mookerjee, J.—S. 244 of the Civ. Pro. Code has no application to a case where the judgment-debtor tries to set aside the effect of the decree itself. In the case of a mortgage decree, the decree itself directs the sale of the property, and, if objection is taken that the property cannot be sold, because it belonged, not to the judgment-debtor, but to a party who is a stranger to the suit, the propriety of the decree is called in question. A question of this description must be tried in a regular suit and not in the execution proceedings which are based on the assumption that the decree is a good and valid decree. 32 C. 265 referred to. SHIB LAKSHAN BHAKAT *v.* SHRIMATI TARANGINI DASI. **8 C. L. J. 20.**

32 '*Malik*'—*Shebaitship right of inheritance of—Dayabhaga, Chap. IV, Section 3, V. 31, 32, 33, spurious—Rival wife's son and daughter's son,—Stridhan, Ayautuk.*

Where the term '*Malik*' is used in a will, its precise meaning is to be determined by the context and with reference to the other clause of the document.

In the absence of any direction to the contrary in the will, the right of inheritance to the *shebaitship* follows the same line as the right of inheritance to immoveable property.

In Bengal, insanity at the time when the inheritance falls in is sufficient for exclusion from the succession, even though the lunacy may not have been congenital; and where the succession to an office is in question, the duties attached to which require that the holder shall be in full possession of his senses, lunacy is undoubtedly sufficient to disqualify a person from succeeding.

The text of the Dayabhaga by Jimut Vahana cannot be regarded as in itself an authority absolutely binding, without any regard to the fact whether the doctrine propounded in the text has been accepted as a true exposition of the law and had been sanctioned by usage, and without any consideration of the question whether a verse relied upon bears on its face the evidence of being spurious and an interpolation. 10 W. R. (P. C.), 17, 21, 12, Moo. I. A. 397 followed.

Verses 32 and 33 and the words "of the rival wife" in verse 31 in section III of Chap. IV of the Dayabhaga are interpolations and are spurious.

The son of a rival wife is not preferential heir to the daughter's son in the line of succession of the *ayautuk stridhan* property of a Hindu female.

The destruction of an image does not destroy the endowment. PURNA CHANDRA BYSACK *v.* GOPAL LAL SETT. **8 C. L. J. 369.**

33 *Malik—Hindu Law—Will—Gift of immoveable property to a Hindu widow—Absolute estate.*

When the question was whether a Hindu widow acquired a right to alienate the property (immoveable) in suit, under a deed of gift or testementary disposition of her late husband, wherein the word used was *malik wa khud ikhtiyar*, their Lordships held that in order to cut down the full proprietary rights that the word *malik* imports, something must be found in the context to qualify it, and that the fact that the donee was a woman and a widow did not suffice to displace the presumption of absolute ownership implied in the word *malik*.

The donee in the case of *Lalit Mohan Singh Roy v. Chukkun Lal Roy. 24 I. A. 76=24 C. 834 referred to*, was a man, but the principles of interpretation laid down in that case were of general application 24 W. R. 395 referred to. MUSSAMMAT SURAJMANI *v.* RABI NATH OJHA. **12 C W. N. 231 (P. C.)=10 B. L. R. 59=5 A. L. J. 67=7 C. L. J. 131=3 M. L. T. 144=18 M. L. J. 7=14 B. L. R. 221=30 A. 84.**

34 *Money cash—General personal estate—See Construction of deed No. 77.*

35 *Money "cash." Will—Intention—Inappropriate words—Mortgage bond.*

In construing a will, what the Court is concerned with is to ascertain the intention of the testator, and if it finds that he intended that all his moveable property should pass to the legatee, it should not hesitate to carry out the testator's intention, even though he used an inappropriate word such as "cash."

No absolute technical meaning should be given to such a word as "money." PARSANNI *v.* GHAREEB DAS, **5 A L J 708.**

36 *Persona designata-Reason and motive*

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of gift—'Adopted Son'—Description.

Where a Hindu testator bequeathed his property to "Lalta Prasad my adopted son."

Held, in the absence of anything in the will to show that the fact of the adoption of the devisee was the motive or the reason for the gift, that the language of the gift was to be interpreted in its ordinary meaning as a gift to Lalta Prasad as a *persona designata*, who was entitled to take under it even though the adoption was not proved 3 I. A. 253—26 W. R. 91 followed. LALTA PRASAD *v.* SALIG RAM, **5 A L J 626**.

37 Reference in will—Testamentary document—Express trust—Trustee de son tort. 29 B. 267 Col. 1752 P. I,

38 *Repugnant words—Construction of Document—Construction of indenture—"Absolutely," interpretation of—Construction of deeds—Construction of wills—Repugnancy in words.*

A deed of indenture contained among other things, a provision which ran: "Upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they might think fit." On a construction of this provision:

Held that having regard to the words that follow the phrase in the indenture in question, the word "absolutely" cannot be taken as conferring an unfettered and unlimited interest on the persons designed as trustees; and that the words used created a valid trust for charitable purposes in the event which had happened. The rule that if there be a repugnancy, the first in a deed and the last in a will shall prevail, as no application when the supposed inconsistencies are found in one and the same provision.—ADVOCATE GENERAL OF BOMBAY *v.* HORMUSJI, **I L R 29 B 375**.

39 *"Sons to grand son" and "my own grand sons being sons' sons" meaning of—Absolute estate, gift of—Gift to members of joint Hindu family—Gift 'in equal shares'—Tenant-in-common—Share of, will pass to his representatives—'Grandson being sons' sons' include a grandson by adoption—Analogy between an adopted son and an appointee under a power.*

C died in 1881, leaving him surviving three sons, Y the plaintiff, M the first defendant and P. P died in 1896, leaving a son B who died in the same year. The second defendant was the son of the first defendant M, the third defendant was the adopted son of the plaintiff Y, and the fourth defendant was the widow of B. The second and third defendants and B were alive at the time of C's death in 1881. The third defendant was adopted by the plaintiff in 1897. C by his last will and testament dated 12th May 1881, disposed of three houses (referred to as Nos. I, II and III). The deposition in regard to No. 1 was in these terms:—" . . . . therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without power to give as gift or sell the same"—subject to a payment of a small rent in respect thereof for charity. As regards Nos. II and III the will provided "that out of a total income of Rs. 530 (being the total amount of the income of rent per month) deducting the aforesaid expenses of Rs. 181, the remaining amount, whatever it may be, shall be divided and paid by my executors to my three sons in equal shares...............my executors shall divide and give away these properties to my own grandsons being my sons' sons after my sons according to their respective shares. My sons shares shall have no right whatever to give as gift or to sell these properties." The plaintiff brought this suit to have the will construed.

Held, *per* Sir Arnold White, C. J., that under the will of C, house No. I vested absolutely in his three sons as members of joint Hindu family and that the law of inheritance in undivided Hindu families applied. B having died without male issue, his interest passed by survivorship to Y and M to the exclusion of his widow, the fouth defendant.

Held, further, that the sons took a limited estate as tenants-in-common in the income of Nos. II and III, in the nature of an estate for lives which subsists till the death of the last survivor, when this limited estate comes to an end and the provision for the division of the corpus will be carried out. On a proper construction of the will, such limited estate of each son passed on his death to his representatives and not to the survivors. The interest of P went to his son B and on B's death his widow, the fourth defendant took a widow's estate in her husband's interest. Bryan *v.* Twigg, (L. R., 3 Eq., 433). Pearce *v.* Edmeades, (51 R R 369), and M' Darmott *v.* Wallace, (59 R R 441), referred to and distinguished.

Held, *also*, that the third defendant, the adopted son of the plaintiff, took an interest under the will as grandson of C. Per Subramania Ayyar, J.—As regards item No. I the words from 'son to grandson' were words of purchase importing the grant of absolute property under the Hindu Law and the sons took an absolute estate. Having regard to the statement in the will that the testator formed an undivided family with his sons, and also to the fact that in disposing of the income and corpus of itmes Nos. II and III, he had used the expressions, in equal shares, and according to their respective shares to indicate a tenancy in-common, the devise of item No. I without such qulifying words was clear evidence of an intention, that the sons should take as a Hindu co-parcenary with rights of survivorship. The fourth defendant therefore could claim no share in item No.

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I Jogeswar Narain Deo *v.* Ram Chund Dutt (L R 23 I A. 37), referred to and distinguished.

Held further, that as regards items Nos. II and III, the sons took an interest in the income only as tenants-in-common. The gift of the income being in equal shares and not limited to each son for his life, the share of each on his death went to his representatives. The fourth defendant therefore took the share of her husband as his heir. The division of the income among those entitled will not cease until the time for the division of the corpus arrives which will not be so long as any of the sons of the testator is alive.

Held also, that as regards the corpus of items Nos. II and III, the words in the will "my own grandsons being My son's sons" include a grandson by adoption and that therefore the third defendant took an equal share with the other two grandsons. The right of the adopted son is analogous to that of an appointee under a power given by the donor, as regards the effectuation of the gift; and the gift to an appointee will be good if he be a person in existence at the testator's death. Bai Motivahoo *v.* Bai Mamoobai, (L. R., 24 I. A. 931,) referred to. YETHIRAJULU NAIDU *v.* MUKUNTHU NAIDU. **15 M. L. J. 299=28 M. 363.**

40 *Specified fund—-Will—-Construction liable for debts and expenses even when there is a residue undisposed of.*

Where a will directs that the funeral and testamentary expenses should be paid out of a legacy but makes no disposition of the residuary estate, such expenses will nevertheless be payable out of the fund specified and the fact that the testator, at the time she made the will, was not aware that she had a residue to dispose of, will not justify the Court in speculating upon what she would or might have done had she been aware of it, and departing from the express directions of the will, to make a new will for her. CAMANI *v.* ADMINISTRATOR-GENERAL OF MADRAS. **29 M. 290.**

41 *Test--Transfer of Property Act S. 6--Will —Adverse possession of joint Hindu family property-Chance of a relation obtaining property on the death of a kinsman transferred—Rights derived under a contract to make testamentary disposition.*

C executed and registered a 'Will' in 1882, in which, after reciting that he was about 75 years of age and that it was desirable to arrange for the succession of his property after his death, he agreed (*ikrar karta hun*) and recorded that R, his nephew, who was a half sharer, should own and possess all his property (8 annas share in two villages) after his death, with full power of sale and transfer, but without any power to interfere with it during his lifetime, also declared that if C's wife survived him, R should maintain and obey her and if he failed to do so, she would retain all the property and the document would become null and void. On the same date, R executed and registered a deed by which in consideration of C's deed he agreed to make no claim to C's property and to obey him and his wife, but that if he failed to comply with this condition, he would have no right to the property. On the 6th November 1903, C and his wife transferred by a deed of gift the greater part of one of the two villages in favour of their sons-in-law and grandson. On the 9th September, 1903, R executed a deed by which he sold to P a 4-annas out of 8-annas share in both the villages and also the half of whatever property they might recover in a suit instituted by them jointly on the deed executed by C on the 27th July, 1882 R and P accordingly instituted a suit for a declaration that C had no power, to transfer the property specified in the deed of 27th July, 1882, and for the cancellation of the deed of gift in favour of C's relatives, or in the alternative for a decree for actual possession of 8-annas share in the villages. R's son was also made a defendant on his alleging that he and his father were members of a joint Hindu family. The principal pleas of the defendants were that the suit was barred by limitation and that R having dealt with the property in contravention of the condition of C's deed of the 27th July, 1882, that deed became null and void. The suit was dismissed and P appealed to the extent of his share.

Held (per Scott J. C.) that the property in suit was not the joint property of C and R after the 27th July, 1882, and that C having been in adverse possession of the property in suit since 1882 the suit was barred by limitation.

A document does not necessarily become a Will because the person executing it calls it one and in order to determine the effect of that document its terms must be considered

Held, therefore, that having regard to the terms of the deed executed by C on the 27th July, 1882, it must be *held* to be a Will and that C had power to revoke it.

Held (per Chamier A. J. C.) that contracts to make testamentary dispositions are valid; but under S. 6 of the Transfer of Property Act the person in whose favour such a contract exists cannot transfer his supposed rights under the contract to a third person and such a third person cannot on the strength of such transfer sue for a declaration of those rights. PRAG DAT *v.* CHOTE SINGH. **9 O. C. 55 (B).**

43 *To widow for life with power of alienation—Hindu will—Construction — Bequest to widow—Power of appointment—Bequest for life with power of alienation—Gift over.*

A will, addressed by the testator to his wife, was to this effect: "You are my legally married wife and entitled to the property to be left by him. Should I on a sudden die.........you shall under this will become possessor of my properties, &c., and perform my *sradh* at a suitable cost; and for the bene-

Construction of Wills (*Contd.*)

fit of my soul you shall purchase a house... ......and establish a *Mohadev* in it and perform its *sheba* and services, &c., and you shall fix a suitable allowance as *pronami* for my spiritual guide. You will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties. My daughter Sreemutty Hara Kumari shall become entitled to and possessor of whatever properties will remain after your death and she shall enjoy the same, keeping up and maintaining the aforesaid *shebas*, &c.,....The said daughter shall have the same rights in the aforesaid properties as you have, and he to whom my said daughter may willingly give away those properties shall possess the same and enjoy them keeping up and maintaining the *sheba*, &c."

Held, that giving effect to all the words of the will, the widow took an estate for life with a power of alienation, and, to the extent to which such power was not exercised, the daughter similarly took the property. S. M. HARA KUMARI DASI *v.* MOHIM CHANDRA SARKAR. **12 C. W. N. 412.**

44 *To widow for life with power of alienation--Meaning of* " Bapika Vanshamanthi."

The testator gave by his will a power to his widow to adopt a son to him from a class described as " *Mara Bapika Vanshamanthi,*"

Held, on a construction of the expression, that it meant " from amongst my paternal agnates," and not " from amongst the defendants of my father." DAYABHAI TAPILAS *v.* CHUNILAL HURGOWANDAS, **10 B. L R 97.**

45 Zauja and Bai—Meaning of the words—Document—A W N 1905 P 214 *See construction of deed of Zauja and Bai.*

Construction of words.

1 Actionable claim—Set off mortgagee—Principal and surety—Estoppel by conduct. 17. M. L. J. 87 Col: 559. P. I.

1 (a) "Adimayavana," Meaning of—Former suit to redeem land. Subsequent suit to recover Adimayavana allowance. MANA VIKRAMA *v.* KARNAVAN GOPALAN NAIR. **30 M. 203.** *See Resjudicata.*

2 *Alienation—Land Revenue--Mad. Act I of 1876--Regulation XXV of 1802, s. 2--Jurisdiction of Collector--Costs--Agreement apportioning peishcush.*

The plaintiff, an alienee of a portion of a permanently settled estate, applied to the Collector of the District for separate registration and sub-division. The third defendant, who was a co-sharer with the alienor and who was one of the parties in whose name the estate stood registered, raised an objection to the separate registration and sub-division of the plaintiff's portion on the ground that the parties had agreed under a partition between the alienor and the other co sharers to a portion the *peishcush* payable by each share-holder, and that the amount of the *peishcush* to be fixed by the Collector

Construction of words (*Contd.*)

as payable by the plaintiff ought not to differ from the amount fixed by the agreement.

Held—(1) That it was the duty of the Collector to enquire into the objection raised by the 3rd defendant, and if he disallowed it to grant the plaintiffs' application, and not to decline jurisdiction. That the agreement between the parties apportioning the *peishcush* was not binding on the Government. (3) That the plaintiff's costs should be paid by the Collector and the 3rd defendant in equal moities. (4) The terms 'alienor' and 'alienee' in Mad. Act 1 of 1876 are reciprocal and necessarily imply only those parties between whom the reciprocal relation exists. (5) The term " alienation " does not refer only to an alienation by a person whose name is entered in the Collector's Register. COLLECTOR OF SALEM *v.* BATCHA SAHEB. **16 M. L. J. 468.**

3 " Anubhavam or anubogam"—Malabar Law—Kanom—Purchaser. 16 M. L. J. 358—29 M. 501 Col. 1938 P. I.

4 " Annual net profits of mines" meaning of—" Owner "—" Occupier "—Meaning and difference—" Sources and income " meaning of. 5 C. L. J. 148=34 C. 257 Col. 80 P. II.

5 " Appear "—Municipal Commissioner's power to remove objectionable structures—" Danger "—10 B. L. R. 821 Col. 220 P. II.

6 *Aulad--Custom--Alienation by widow--Right of step-daughter to contest--Ghelna Arains of Lahore--" Aulad" meaning of.*

Held that by custom among the Ghelna Arains of Lahore District, a daughter who is the heir of her father, can challange alienations of her father's property by her step-mother on the ground that there was no valid necessity nor consideration for such alienation.

Held also that where the rights of females to inherit are widely recognized the wor " *aulad* " should be deemed to mean femald issue as well as male. CHIRAGH BIBI *vs* HASSAN, **19 P R 1906** *Civil* **70 P L R. 1906.**

7 *Bandhuvallus*—Adoption—Authority—*Construction--Words.—*

A Hindu gave an authority to his wife to adopt which ran in the following words : " If my younger brother Narasimha Row has children and if he would give his second son among them in adoption, he should be taken. In the meanwhile if another is adopted, much trouble would occur. If a boy is available among relations with reference to whom trouble may not ensue, he may be taken. "

Held, on a construction of the authority that the words meant that if the boy to be adopted was not the second son of the brother, the boy should be taken from a family of relations who were not likely to give trouble to the widow and that the concluding sentence was meant as an advice or recommendation and that it was not meant by the authority to make the

Construction of words (*Contd.*)

adoption of a stranger boy dependent on the previous assent of the brother.

Held, also that the popular signification of the word " Bandhuvallus " is " relation in general " and is not confined to one's own relations as distinct from one's wife's relations and that there was in the particular will nothing to indicate that the term was used in a restricted sense. RADHA RUKMINAMMAH *v.* NARASIMHA ROW. **2 M. L. T. 340=17 M. L. J. 186.**

8 Claim—Interpretation—Suit—Accounts—The word claim in S. 12 of Act XVII of 1879 (Bombay) 7 B. L. R. 688 Col. 209 P. II.

9 Collector can not delegate his powers to Deputy Collector—Legality of award 8 O. C. 118 Col. 838 P. I.

10 Conclusive proof. Oath—8 B. L. R. 19 Col. 386 P. I.

11 *Co-sharer—Co-tenant. C. P. Tenancy Act S. 70—"Co-sharer"—" Co-tenant."*

S. 70 of the Tenancy Act, 1898, enacts that, when a tenant dies, his right in the holding shall devolve as if it were land. But a collateral relative of the tenant shall not be entitled to inherit his right unless, at the death of the tenant, the relative was a co sharer in the holding (*i.e.*) unless he was a " co-tenant " of the holding in the sense of a party to the contract of tenancy. So, where one member of a joint Hindu family takes land as a tenant, not as representing the family but on his own behalf the other members do not become his co-tenant or "co-sharer" in the holding within the meaning of the Act unless they have also been parties to the contract of tenancy and the mere fact that the *nazarina* may have been paid out of the family funds or that the other members of the family may have shared in the cultivation is immaterial but, where the member of the undivided family has been given the lease as representing the family in the capacity of its managing member, the others would continue in the leasehold by right of survivorship. DEOCHAND BHAGWANDAS MARWARI *v.* MOTI, **1 N L R 178.**

12 *Collector—Chaplain etc. Trust Act II of 1882 S. 34—Public charitable trust—Whether Collector, Chaplain etc are corporation sole—Constituting them as trustees.*

C executed a trust deed dated 28th April 1862 deed, constituting the Collector of Karachi, the Chaplain and the officer commanding the troops, trustees for administering certain property mentioned in the deed, and giving the rents and profits thereof in charity to the poor. On the 29th May, 1907, the gentlemen holding the said offices at the time filed an application under the Trust Act for permission to sell the property and invest the sale proceeds thereof in some recognized securities; the interest accruing therefrom being appropriated for the purpose specified in the trust.

Held that the application could not be

Construction of words (*Contd*).

made, as Section 1 of the Act excluded public charitable trusts from the scope of the Act.

Held, also, that, as the officers mentioned in the trust deed were not corporations sole, and as only legally recognized persons could be appointed trustees, the effect of appointing them as trustees was to be restricted to those only who were holding the offices at the time the deed came into operation. The present incumbents of those offices could at best be considered as constructive trustees, to which case section 34 was inapplicable The proper remedy open to them under the circumstances was a suit under section 539, Civil Procedure Code, or an application under Sections 4 to 6 of the Charitable Endowments Act, 1890. APPLICATION BY GERALD EDWARD, NICOLLS & OTHERS. **1 S. L. R , 218.**

13 Date of issuing notice under section 248 Civil Procedure Code—Execution of decree 10 C. W. N. 303 Col. 2020, P. I.

14 Demand—Limitation—Meaning of—Bond. 16 M. L. J. 364—*See Construction of deed No. 35.*

15 *Deposit as security for due discharge of duties—Refund—Limitation Act (XV of 1877), Sch. II, Arts. 120, 145—" Deposit", " Depositary," meaning of—" Moveable property ", if includes money—Return in current coin, if return in specie—Art. 120, when applicable.*

Art 120 of Sch. II of the Limitation Act (XV of 1877) is final and residuary, and includes all suits not specially provided for, and the Court ought not to regard a case as coming under that Article unless clearly satisfied that it does not come under any of the many Articles dealing with specific cases. 26 C. 564 R.

Per Mookerjee, J—The term " moveable property " as used in Art. 145 of Sch. II of the Limitation Act includes money, and is not restricted in its application to cases where property is recoverable in specie. 28 I. A. 227–24 A. 27 S. B. 17, 11 B. 133, 22 C. 877, 22 M. 478 R.

Although the term " deposit " ordinarily implies the deposit of specific property returnable in specie, it has a wider meaning.

If a Government Security or a sum of money is delivered to be held as security for the performance of some engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the engagement has been fulfilled, the person with whom the deposit has been made may rightly be treated as a depositary within the meaning of Art. 145 of the Second Schedule of the Limitation Act. 31 C. 519 (526). 12 C. 113 R. and F.

Per Holmwood, J—A return of deposit made in current coin is a return in specie, the term specie meaning, when applied to money, current coin of the Realm as opposed to bullion.

An Article of the Limitation Act which

Construction of words (*Contd*).

fully applies to a particular case should not be thrown aside because it might create hardship in other cases. LALA GOBIND PRASAD *v* CHAIRMAN OF PATNA MUNICIPALITY. **6 C. L. J. 535.**

16 *Day. Meaning of—Madras District Municipalities Act, Section 55—Professional tax.*

The word "day" in section 55 of the Madras District Municipalities Act must be taken to mean a duration of 24 hours and not 12 hours. THE MUNICIPAL COUNCIL OF CUDDALORE *v.* S. SUBRAHMANYA AIYAR. **16 M. L. J. 101.**

17 "*Dharma*" *in bequests.*

Per WHITE, C J.—The Privy Council decision in 26 I. A. 71 must be followed in construing the word "dharma."

Per SUBRAHMANIA AIYER, J.—The word "*dharma*" denotes objects indicated by the terms *ishta* and *poorta*. *Ishta* gifts refer to gifts at the altar in connection with sacrificial ceremonies and the objects of the gift are as certain as they can be. *Poorta* works include service to fellow beings, such as constructing tanks, wells, temples, feeding, etc. Gifts for "*dharma*" should, therefore, be upheld as intended and understood to be for definite objects known to the people, even were that word devoid of a technical import. PARTHASARATHI PILLAY *v.* THIRUYENGADA PILLAY. **2 M. L. T. 198=17 M. L. J. 379=30 M 340.**

18 "Disturbance of easements"—Meaning of disturbance—Light and air—Physical comfort. 7 B. L. R. 825 Col: 739 P. I.

19 "Debts and liabilities"—Meaning of —Barring of pending suits—Contract by person subsequently declared to be owner of Encumbered Estate. 7 C. L. J. 578 Col. 60 P. II.

20 "*Definite share*"—*Court fees Act s. 7, sub-s. V, cls. (a) and (d)—Revenue-paying estate—Suit for possession of share in—Court-fee on plaint—*"*Definite share,*" *if must also be separately assessed with revenue.*

In a suit to recover possession of definite share in a permanently settled revenue-paying estate, the Court-fee on the plaint should be calculated according to the first part of cl. (*a*) of s. 7 sub-s. V of the Court Fees Act, *i. e.*, at ten times the proportionate revenue annually payable. Whether such share is recorded in the Collector's register as separately assessed with revenue or not, does not matter.

The words "definite share" in the first part of the clause, do not mean a definite share separately assessed with revenue. 8 C. 192 R. BUNIAD LAL *v.* SHYAM LAL. **12 C. W. N 990.**

21 *Digar dawedar—Sale—Covenants by vendor—Pre-emption—Decree against purchaser in suit by pre-emptor—Vendee's right and vendor's liability—*"Digar dawadar."

Where, shortly after the defendant sold to plaintiff a house purchased by herself recently, and covenanted for title and contracted that she would indemnify the plaintiff against any loss that might arise by reason of the bargain being annulled at the instance of any one, including a pre emptor 67 P. R, 1881, 4 A. 357 D., a third person brought a suit for pre-emption against the original vendee and the parties to the present suit and obtained a decree for possession, *held*, that the plaintiff (purchaser) was entitled to recover from the vendor (defendant) the loss sustained in the transaction.

The words "*digar dawedar*," in one of the clauses in the vendor's contract on which the vendee relied, being very wide, they included a person claiming property by right of pre-emption. KHONMON BIBI *v.* SHAH MALI. **111 P. R. 1909.**

22 Due course of law—Tenant holding over dispossessed—His suit for possession. 7 B. L. R. 12=29 B. 213 Col. 391 P. I.

23 *Due date of draft explained—Damages for non-delivery of goods—Limitation based on a special covenant—Indent.*

In a claim for damages arising out of non-delivery of goods, a clause of the Indent provided that "no claim or dispute of any sort whatever can be recognised if not made in writing within 60 days from the due date of draft."

Held, that the clause does not apply where the goods indented for are never delivered and no draft has been drawn for them: the words "due date of draft" do not mean the date on which draft drawn for goods shipped, and shipment been effected would have fallen due. TANNU LAL *v.* BEHARI LAL. **54 P. W. R. 1908=127 P. L. R. 1908.**

24 Dwell—Suit for administration, obtaining probate of will constituted part of the cause of action in a court granting probate. 29 M. 231. *See Construction of Act No. 15.*

25 Executor—Universal legatees—Application for probate. 1 N. L. R. 164 Col. 515 P. I.

26 "*Foreclosure,*"*—Mortgage—Redemption —Meaning of* "Ta miyad das sal tak giran rahn ba kabza rakha hai"*—Right to mortgagor to redeem.*

Held, that, in the absence of any words clearly signifying that the mortgagor is not to redeem for a certain period he can redeem it at any time; and that any phrase in the deed simply reciting that the mortgage is for a certain period should be regarded as a clause inserted for the benefit of the mortgagor and intended to protect him from *foreclosure* for a period and not to hinder him from redeeming within that period; and that the words "*ta miyad das sal tak girau rahn ba kabza rakha hai,*" mean in the absence of any further words showing for whose benefit the period of ten years was fixed, that the mortgagee is not to foreclose till the end of that period C. 201 of 1889: 10 A. 602; 2 M. 314, F; 40 P. L. R. 1903, R and D; 5 B. 22; 20 B. 677, Diss.

Construction of words (*Contd.*)

Obiter. Per Kensington, J—That in the case of mortgages in the Punjab, other than those containing a conditional clause, the term *foreclosure* denotes merely the right of a mortgagee to sue for his money and does not bear the technical meaning given to the term in other Provinces where the Transfer of Property Act IV of 1882 is in force. FIROZE-UD-DIN *v.* FIROZE-UD-DIN. **137 P. W. R. 1908.**

27 From son to grandson—28 M. 363 *See Construction of will No. 39.*

28 Ghat—Meaning of—Burning ghat. 10 C. W. N. 1044=33 C. 1290 Col. 84 P. II.

29 "Heirs", meaning of the term—Distinct provisions for devolution of trusteeship and of beneficial interest. HAIDER HUSAIN KHAN *v.* FAGHFUR MIRZA. **27 A. 383=9 C. W. N. 817=8 O. C. 70 P. C.**

See trust.

30 House—Meaning of. 9 O. C. 311 Col. 864 P. I.

31 *Illegally enforce—Rent Act—(XXII of 1886). S. 17, 103, cl. (9),—Landlord and tenant—Compensation*—Nazrana, *illegal enforcement of payment of—Rent Court—Jurisdiction.*

The Respondent, a tenant, sued the landlord and his agent, the appellants, for the recovery of a certain sum which he had been compelled to pay as *nazrana* to the agent under a threat that if it were not paid he would be ejected from his holding. The suit was brought under S. 108, cl (9) read with S. 17 of the Oudh Rent Act

Held, that the suit was not cognizable by the Revenue Court, because S. 17 applies only when a landlord enforces the payment of any sum by an under-proprietor or tenant in excess of the rent legally claimable from him and such payment is claimed by reason of the position of the latter as under-proprietor or tenant; in the present case the payment was not illegally enforced, for a mere threat to eject is not illegally enforced cannot be applied to something which is to be done by process of law. NAND KUMAR *v.* GHASI. **8 O. C. 200.**

32 Immediately—Limitation—Document—Statute—Construction of. 7 B. L. R. 697—30 B 275 Col. 848 P. I.

33 *Imprisonment of applicant—Civil Procedure Code, 1882, section 359—Insolvency.*

The applicant's petition to be declared an insolvent, under S. 344 of the Code, was rejected on 2nd February 1905. On 25th March a creditor applied for the imprisonment of applicant under S. 359, and after applicant had been heard he was sentenced to six months' rigorous imprisonment.

Held, that the Court had jurisdiction to entertain and act upon the creditor's application.

Held also, that the word "imprisonment" in S. 359 means imprisonment of their description as defined in the Indian Penal Code. *Kadar Bakhsh* v. *Bhawani Prasad*, (1892) I. L. R. 14 All., 145, referred to. THA MAUNG *v.* AGAMBERAM CHETTY. **3 L. B. R. 1906 P. 172.**

Construction of words (*Contd.*)

34 Insolvent—Wagering contract—Suspending payment—7 B. L R. 154. Col: 299. P. I.

35 In future, in a wajib-ul-arz relating to a pre-emption—2. A. L. 7. 6=A. W. N. 1905, P. 16. *See construction of deed No. 92.*

36 *Interested in payment "—Contract Act (Travancore) Ss. 69, 70—" Quasi Contract—*Negotiorum gestor, *rights of.*

In a suit for expenses incurred by plaintiff in having celebrated a festival in a *Sirkar* temple, the Plaintiff alleged that the defendants, who were bound in duty to perform the festival, were not prepared to celebrate it, and so he incurred the expenses and conducted the festival for them, on orders from the *Sirkar.*

Held, plaintiff was not entitled to recover the costs incurred by him. His position, at best, was only that of an agent under the *Sirkar*, to whom the temple belonged. Nothing could be claimed by him from the defendants, who did not owe any duty to him legally or morally.

Held, also, the plaintiff could not be said to have had any "interest" in having made the payment sought to be recouped, within the meaning of the term in S. 69 of the Act.

Held, further, that the defendants having previously declined to be liable for the entire costs of the festival, no action can be maintained against them by plaintiff, the *negotiorum gestor*, charging them with liability in respect of an act done as against their consent 18. M. 93 followed, nor could the plaintiff, therefore, claim as under the provisions of S. 70, since he performed the act and underwent the expenses in spite of the defendants' open and avowed disclaimer of their duty to pay the high rates of expenses claimed by him. EASWARAN PERUMAL NAMBIAR *v.* KANUKU SIVAGURUNATHAN PADMANABHAN. **21 T. L. R., 142.**

37 *Judge of the Court of small causes—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 8 and Ss. 15 (1), 32—Suit for recovery of rent of homestead land—Jurisdiction of Jugdes of Courts invested with Small Cause Court Powers.*

Clause 1) of section 15 of the Provincial Small Cause Courts Act should be read with Clause 8 of the Second Schedule of the Act. So read the expression "the Judge of the Court of Small Causes" in clause 8 of the Second Schedule must be taken to apply either to a Court of Small Causes constituted under the Act or to a Court invested with the jurisdiction of a Court of Small Causes AKSHAY KUMAR. SAHA *v.* HIRA RAM DOSAD. **7 C. L. J. 407=35 C. 677.**

38 Karabeti—*See Qarabati.*

39 *Khalal, meaning of—Mortgage containing a covenant to pay money—Right of subsequent mortgagee to sue for mortgage—Money.*

The word '*khalal*' is not confined to an unforeseen event or accident but includes

Construction of words *(Contd.)*

the consequences of fraudulent conduct as displayed by the mortgagor in this case. AHMAD ULLAH KHAN *v.* SALAR BAKSH. **2 A. L. J. 241=A. W. N. 1905 P. 61.**

See for other facts Col. 624 P. I.

40 Khanadamad—Allienation by sonless proprietor to daughter, effect of. 70 P. R. 1908 Col: 2117 P. I.

41 Kul malik in a Hindu Law will. 8 B. L. R. 482.—*See Construction of will No. 30.*

42 Labham—Demonstrative legacy-Right of legatee as to corpus. 29 M. 155 Col: 732 P. I.

43 *Lands—Punjab Laws Act (IV. of 1872), s. 10—Pre-emption—Sale of water-mills in occupancy holding.*

The word "land" in s. 10 of the Punjab Laws Act has the ordinary dictionary meaning and does not carry the meaning that is attached to the word in Act XXVIII. of 1868 or in Act XVI. of 1887. *The wajib-ul-arz* of a village provided that water-mills of the village were transferable. A water mill owned by an occupancy tenant and situated on the occupancy holding was sold and the proprietor of the village, to whom belonged the site of the mill, claimed the right of pre-emption.

Held, that the right of pre-emption must be presumed to exist because the sale of the structure of the mill carried with it the sale of the occupancy right in the site.

Held, also that where the market-value of the property sold is conspicuously below the price stated in the sale deed and the consideration consists in part of old debts due to the vendee, the old debts should not be taken at their arithmatical value and they should be valued as *claims* and not as *cash*. HAIDAR *v.* ISWAR DAS. **22 P. R. 1906** *Civil.*

44 *Land—Punjab Laws Act IV of 1872 Ss. 12 and 15—Pre-emption—Compound interest on money awarded to vendee—Plaintiff claiming for benefit of another—Burden of proof—"Land"—Vendee—Owning small bit of cultivable land used as building site*

Held, that the defendant, on whom the onus lay, had failed to show that the plaintiff did not file the suit for pre-emption for his own benefit, but for the pleader engaged in the case, who, it was shown, was a personal friend of the plaintiff and had apparently taken extreme personal interest in the matter of the claim.

Held, also, that a small bit of land, at one time agricultural and assessed with revenue of 9 pies, purchased by the vendees after it had been built over could not be considered as "land" conferring the right of pre-emption on the vendees 7 P. R. 1896, 153 P. R. 1888, 96 P. R. 1898, referred to.

Held, also, that under section 15 of the Panjab Laws Act, compound interest may be allowed to the vendee. SHAM SUNDAR *v.* SODHI HARBANS SINGH. **78 P. W. R. 1908=109 P. L. R. 1908.**

45 *Legatee, Oudh Estate Act (I of 1869), s. 2—Succession under will taking effect before Act came into force—"Legatees of a* taluqdar*—Surrender of grant by* talukdar *and acceptance of* sanad *on new terms—Power of* talukdar*—Power of Government to change nature of* sanad*—Crown Grants Act (XV of 1895), section 3—New Case—Discretion of Privy Council to allow to be set up on appeal.*

A person who succeeded to a *taluqa* in 1865, and therefore before the passing of the Oudh Estates Act (I of 1869) under a will of the preceding Talukdar, is not the legatee of a Taludkar within the meaning of the Act *Balraj Kunwar* v. *Rae Jagatpal Singh*, 7 O. C. 248, followed.

An estate in Oudh was settled with a Talukdar in 1859 and a *sanad* was granted to him under which the estate descended to the grantee and his heirs, without indication of the line of inheritance. To the heir who succeeded him as Talukdar was granted in 1861, in substitution of the former one, a *sanad* under which the *taluq* descended to him and his nearest male heir by the rule of primogeniture. The Lower Courts held that the second *sanad* could not, even if proved, operate to substitute the line of descent prescribed by it for the line preseribed by the former *sanad* and they decided the case on other grounds.

Held, by the Judicial Committee who found that the second *sanad* and its terms were proved, that the Taluqdar succeeding as heir had power to surrender the estate conveyed by the old *sanad*. When he succeeded as heir he became absolutely entitled by inheritance to every thing that passed under the earlier grant, and there was nothing to prevent his entering into an arrangement with the Government to surrender it in consideration of a regrant of the same estate on new terms. To such a transaction an objection that the Government having already granted the estate in 1859 to the former Taluqdar and his heir had nothing left to grant to the succeeding Talucdar would not apply; and the Government therefore, on its surrender had power to grant the same estate under the new *sanad*.

Section 3 of the Crown Grants Act (XV of 1895) which made valid "all provisions, restrictions, conditions, and limitations over, contained in any grant or transfer" made by the Government or under their authority, "any rule of law, statute or enactment of the Legislature to the contrary notwithstanding" was held by the Judicial Committee to remove the force of an objection that no executive Act of the Government could, in or after 1861, have created an estate descendible by any rule of inheritance other than that laid down by law, which in this case was the Hindu Law.

The above case was allowed to be set up on appeal to the Privy Council though it had not been made in the written statement, nor raised by any specific issue where the issues as settled were sufficiently wide to cover it, and all parties had been aware of the importance of the primogeniture sa-

Construction of words *(Contd).*

nad if it could be shown to have been granted and its contents could be ascertained, and were therefore not taken by surprise by the way in which the case was presented on appeals so that no injustice could be done by disposing of the appeal upon it. 31 I. A. 132 followed. SHEO SINGH *v.* RAGHUBANS KUNWAR. **8 O. C., 317=9 C. W. N., 1009=32 I. A., 203=15 M. L. J., 352=2 C. L J., 194=27 A. 634 (P. C.)**

46 *May—Insolvency Act XI and XII vic. C. 21 S. 49—'May,' construction of—Stay of further proceedings after the filing of the insolvent's schedule.*

S. 49 of the Indian Insolvent Act empowers the Insolvent Court to deal with (1) cases in which a decree has been passed; and (2) cases in which a suit has been instituted but a decree has not been passed. In the former case the Court may stay the execution; in the latter it may stay further proceedings in the suit.

The word 'may' in the section indicates that the requisite conditions which the section lays down being fulfilled, the Court will and ought to exercise the power it may exercise. The word 'may' does not vest the Court with a discretion which it can uniformly exercise in one case and renounce in the other. What discretion there is, is meant to be used in exceptional cases. HOOKAMCHAND SARUPCHAND *v.* NOWROJI SORABJI TALATI. **10 B. L. R., 345.**

47 "May"—Explained—Notice served on Traffic Manager insufficient. 12 C. W. N. 450 Col. 829 P. I.

48 *"Malik"—Interpretation—Bequest in favour of Hindu female*

The word *malik* ordinarily denotes the absolute owner of property, and its ordinary meaning is to be given to it, unless there is to be found in the will indications that it was not the intention of the testator to use it in its ordinary sense.

Where, therefore, all that was said in a will by a Hindu testator was that he had two heirs, a wife and a daughter, and they should be *maliks* of his property in specified shares, *held*, that the devisees acquired an absolute interest in the property, and the widow could mortgage it at her pleasure. 24 C. 406; 24 C. 834 (P. C.), 27 C. 44, 649 R. 27 A. 264 dist. 25 A. 351 diss. PADAM LAL *v.* TEK SINGH. **4 A. L. J. 68=29 A. 217.**

49 "Malik" in will—Meaning of—Hindu Law—Absolute estate. 12 C. W. N. 231 *See Construction of will No. 33.*

50 "Made" in S. 516 Civ. Pro. Code means that the minds of the arbitrators have been declared. A. W. N. 1905 P. 47 *See Col. 1692 P. I.*

51 *Mahsul—Punjab Alienation of Land Act (XIII of 1900), Section 2 (3) (b), (d)—Crops—Land.*

Sub-clauses (*b*) and (*d*) of section 2 (3) of the Punjab Alienation of Land Act do not refer to things material, such as crops, but refer to incorporeal rights. NUR MUHAMMAD *v.* TILOKA MAL. **130 P L R 1904=14 P R 1905.**

52 May presume, Shall presume. Meaning of—Discretion of Court. 7 B L. R. 267 Col. 581 P. I.

53 "Meddatu Krayam," meaning of—Mortgage by conditional sale—29 M. 531 *See Col. 600 P. I.*

54 Mines and Minerals—Interpretation of grant—Reservation of minerals 1 C. L. J. 526 *See Construction of grant No. 5.*

55 "Money"—Cash—Construction of document—General personal estate. A. W. N. 1908 P. 205 *See Construction of Deed No. 77.*

56 Mokurari meaning of Abwab—Rent. 12 C. W. N. 175 Col. 94 P. II.

57 "New plaintiff" substitution of plaintiff after expiry of period of limitation—Benamidar. 9 C. W. N. 883 Col. 1796 P. I.

58 Not resident. Meaning of—Temporary absence. Effect of—Recognised agent—Jurisdiction of Court. 28 A. 135 Col. 1429 P. I.

59 Object—Fraudulent transfer—Unlawful object. 33 C. 702 Col. 280 P. I.

60 *"Official signature" meaning of—Regulation XVII of 1806, s. 8—Mortgage by conditional sale—Foreclosure—*Parwanah—*Procedure.*

Held, that a *parwanah,* or notification to the mortgagor, issued in a suit for foreclosure of a mortgage by conditional sale under the provisions of section 8 of Regulation XVII of 1806, which bore the seal of the Court and the initials of the Judge of the Court from which it issued, was a good and sufficient notification within the meaning of the Regulation. 11 Cal., 111 distinguished. 16 All., 59 quoad hoc overruled. BHAGWAT KUARI *v.* BALDEO RAI. **3 A. L. J. 857=A. W. N. 1907 P. 309=29 A. 145.**

61 Other cases—Meaning of—Mortgage suit—Lis, when completed. 9 C. W. N. 171 Col. 1575 P. I.

62 Or otherwise, Ejusdem generis—Mortgage lien, if subsists. 13 C. W. N. 12 Col. 99 P. II.

63 Permanent settlement. Suit to set aside incumbrances—Revenue sale. 10 C. W. N. 503 Col. 45 P. II.

64 'Person interested'—Reference as regards sufficiency of compensation. 10 C. W. N. 195 Col. 851 P. I.

65 'Plaintiff'. Defendants supporting plaintiff must begin before defendant opposing him. 10 B. L. R. 327=32 B. 599 Col. 1377 P. I.

66 'Preliminary point'—Remand—2 P. R. 1908 Col. 1670 P. I.

67 'Proprietor'—Assignment of debt to creditor—Duty of creditor to recover debt. 32 C. 27 Col. 49 P. I.

68 "Purporting to be done in official capacity"—Meaning of—Damages—Suit of, against a public officer. 9 O. C. 275—*See Amendment of plaint.*

69 Karabati—*Custom—Succession—Occupancy rights—Near relations resident in other*

Construction of words (*Contd.*)

villages.

There is no reason to limit the meaning of the word *Karabati* when used in a *wajib-ul-arz* as relations entitled to succeed to occupancy rights left by the deceased occupancy tenant, merely to such near kinsmen as are resident in the village in which the deceased held occupancy rights. P. R. 98 of 1891 explained. P. R. No. 6 of 1900 Rev, referred to. MAMAN v. KARTAR BAKHSH. 128 P. L. R. 1906.

70 "Relative"—Meaning of—Inquiry into the lunacy, who could apply order by District Judge appeal. 94 P. R. 1906 Col. 65 P. I.

71 Rent not payable to landlord—Putnidar contracting to pay Government Revenue—Default by Putnidar. 33 C. 140 (P. C.), Col. 90 P. II.

72 Rent—Interest, suit for. 11 C. W. N. 110 Col. 114 P. II.

73 Representative—Judgment debtor, representative of—Putni—Unregistered purchaser. 9 C. W. N. 824—32 C. 1031 Col. 1099 P. I.

74 *Representative of tenant, liability of to ejectment—Perpetual tenancy—Liability of landlord for improvements—Oudh Rent Act, Ss. 22, 108 (cls. 4 and 13)—Jurisdiction of Civil Courts—Transfer of Property Act (IV of 1882), S. 51.*

Plaintiff's predecessor in title granted certain lands, on lease, to defendant's father. The deed provided (1) that the lessee should pay a certain sum fixed thereby as the annual rent in perpetuity: and (2) that certain other lands had been granted free of rent for the purpose of digging wells, planting a grove and costructing dwelling-houses. On the death of the lessee, plaintiff sued to eject the defendants alleging that the lease enured only during the life of the father of the defendants and that the defendants were liable to ejectment, because they were in possession without any right and without his possession. The defendats contended (1) that the lease was perpetual; (2) that they were not liable to ejectment; (3) that the suit was not cognizable by the Civil Courts; (4) that they were entitled to compensation for the improvements effected by their father and (5) that Civil Courts were not competent to take cognizance of the question as to compensation.

Held, (1) that the lease was not perpetual; (2) that the defendants were not the representatives of their father, so far as the tenancy was concerned, within the meaning of S. 22 of the Oudh Rent Act, because the plaintiff did not admit them to the tenancy and because they could not become tenants [S. 108, cls. 4 and 13, and S. 127] merely by entering on the land of plaintiff and occupying it without his consent, the term 'representative' in S. 108 having reference to a tenancy devolving upon another by operation of law or by succession; (3) that it was competent for the plaintiff to enforce ejectment of the defendants by a suit in a Civil Court; (4) that the provisions of the Oudh Rent Act, as to compensation for improvements by tenants, were not applicable to the case but (5) that the provisions of S. 51 of the Transfer of Property Act were applicable, and that there being a very strong presumption, in this case, that the lessee made the improvements under a *bona fide* belief that he was absolutely entitled to the land under the lessee, the defendants were entitled to compensation for the improvements made by their father. RAJA RUDRA PARTAB SAHI v. DEBI PERSHAD, 8 O. C. 13.

75 "Representative" in S. 244 C. P. Code—Execution decree—Restitution of property sold pending appeal to Privy Council. 3 A L J 110=28 A 337 Col: 1687 P. I.

76 "Representatives" Meaning of—Execution of decree—Transferee of judgment-debtor's objection. 8 O. C. 370 Col. 1107, P. I.

77 Right which the plaintiff claims to the property in dispute, meaning of. 2 O. L. J. 381 Col. 445 P. I.

78 *"Revenue" and "Proprietor"—Tanki-tenure—Revenue sale—(Act VII of 1868 B. C.) Ss. 1 and 14—Ejectment—Revenue sale Law (Act XI of 1859), S. 29—Subsisting title at date of suit—Title, recognition of, as tankidar if sufficient to give right of suit—"Revenue" and "proprietor" meaning of—Tankidar, amount due from, and payable to government—Revenue—Sale by Collector for Government dues, if legal—Occupancy raiyats, protection of, from ejectment—Sale, effect of—Suit, frame of—Multifariousness—Tanki tenures, nature of settlement of—Regulation VII of 1822, S. 10, Clauses 3, 4, 5, 7 and 8,—Origin and incidents of such tenancies.*

The word "Revenue," as defined in Act VII of 1868, (B. C.) includes every sum annually payable to the Government by the proprietor of an estate or tenure in respect thereof; and the word "proprietor," includes any tenant by whom any estate or tenure is held directly under the Government.

Upon the disappearance of the zemindars who held the tenures (*tanki tenures*) directly from the Government under successive temporary settlements, upon their refusal to take fresh settlements at the time of resettlement, the *tankidars* came into direct relations with the Government and became proprietors of the tenures which were thereforth held by them under the Government within the meaning of s. 1 of Act VII of 1868, (B. C.) and the sum annually payable by them in respect of the tenures would be rightly described as revenue, within the meaning of the same provision of the law, and the Collector has ample authority to bring such tenures to sale under the provisions of Act VII of 1868, (B. C.).

If the *tankidars* in a body are the tenure-holders liable for the payment of the

Construction of Words (*Contd.*)

Government revenue, each of them *prima facie* has to contribute a portion of the sum payable. The payment of such sum by any *tankidar* is payment by him in his character as a member of the body of *tankidars*; merely because he cultivates the land in his occupation, he cannot be regarded as a cultivating raiyat under the entire body of *tankidaks* which includes himself as a member. The *tankidars* cannot therefore be regarded as occupancy raiyats protected from eviction under S. 14 of Act VII of 1868 (B. C.).

The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendant prefers to hold possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that fact gives him his cause of action. What the plaintiff is entitled to claim is the recovery of possession of the land as a whole and not in fragments, and all persons who oppose him in the enforcement of that right are concerned in his cause of action and ought accordingly to be made parties to the suit in which he seeks to eject them, and particularly so, when they combine to keep him out of possession. 29 C. 871 R.

It cannot be affirmed as a matter of law that upon default of payment by a *tankidar*, the entire village is liable to be brought to sale so as to destroy the right of all the tenure holders. The question depends upon the circumstance whether the settlement originally was under cls. 3, 4 and 5 or under cls. 7 and 8 of S. 10 of Reg. VII of 1882.

The fundamental distinction between the two kinds of settlement is that in the case of settlement under cls. 2, 3 and 4, the settlement is made with a Sudder Malguzar who represents all the persons interested in the property, and his default makes the entire tenure liable for sale unless there is a provision to the contrary in the settlement; and in the case of a settlement under cls. 7 and 8, there is a settlement with a selected person as Sudder Malguzar, but his default does not make the entire tenure liable to sale, unless there is a specific provision to the contrary in the settlement.

A settlement can be made under cls. 7 and 8 only in the case of cultivating proprietors who hold their tenure in *putteedari* or *bhyacharee* or similar form 14 W. R. 1 and 15 W. R. 141, R. BANDHU ACHARJA *v.* NATHNI BAHAR SINGH. **7 C. L. J. 460.**

79 *Resumption—Grant by way of endowment to religious institution—Personal Law—Revenue Act (XVII of 1876), ss. 52, 53—Assessment of rent on rent-free grant—Long possession of grantee—Construction of the words "in part"—.*

In a suit for resumption of a rent-free grant by way of endowment for religious purposes, the questions to be decided were: (1) whether the grant was one within the meaning of section 52, Oudh Land Revenue Act; (2) whether the words "in part" in section 53 of the Act refer only to the land or refer also to the terms on which the land was, in future, to be held; and (3) whether the grant should be declared liable, in whole or in part to resumption.

Held, (1) that the provisions of s. 52 of the Act were applicable to the grant of land exempt from the payment of rent, to a religious institution and that it was, therefore, liable to resumption. The question as to the liability of such a grant to resumption must be decided with reference to the provisions of the Oudh Land Revenue Act relating to the resumption of rent-free grants, and not to the personal law of the grantor and grantee.

Held, (2) that the words "in part" in section 53 of the Act also refer to the terms on which the land is, in future, to be held and that therefore the Court has power to assess rent on the land.

Held, (3) that the grant should only be declared liable, in part, to resumption owing to its long possession for about a hundred years, by the original grantee and his successors. (S. C. No. 307) dissented from. RAMPAL SINGH *v.* JANKI BARSARAN DAS. **2 O. C. 295.**

80 *Samokara—Debt—Joint family—Marriage of co-parcener—Family purpose.*

A debt contracted for the marriage of a co-parcener in a Joint Hindu Family is binding on the other co-parcener as a debt contracted for a family purpose and therefore for the benefit of the family. 27 M. 206 diss. from. Under the Mitakshara as well as the Mayukha, the word *samskara* ordinarily includes marriage, SUNDRABAI *v.* SHIV NARAYAN. **9 B. L. R. 1366.**

81 *Shikmi Sharik Dormant partner—Notice of dissolution on retirement of dormant partner whether necessary—His liability—Contract Act, Ss. 219 and 260—Evidence Act, S. 105.*

The phrase *Shikmi Sharik*, by its etymological sense, means a partner whose name is not disclosed, that is, a dormant partner. Therefore, on the retirement of a *Shikmi Sharik*, no notice of the dissolution of the partnership need be given. But he is liable to all the claims on the partnership till the date of his retirement. The onus of proving that he has retired from the partnership at a specific period lies on him, on general principles as well as under S. 105 Evidence Act 77 P. R. 1900 R. HASHMAT ALI *v.* LACHMI NARAIN. **75 P. R. 1908=122 P. W. R. 1908.**

82 *"Special Contract." meaning of—Tenant of lands in a joint* mahal *taking a mortgage with possession of a share therein, liability of, to pay rent as tenant to the* lambardar.

The plaintiff was owner of a two annas 8 pies share in a *mahal*. He was also *lambardar* to the entire *mahal*. His brother R. had a 2 annas 8 pies share and the remaining 10 annas 8 pies share in the *mahal* belonged to other persons who mortgaged it with possession to the plaintiff. The defendant, who was a tenant of 15 plots in the *mahal* took a mortgage with possession of

Construction of words (*Contd.*)

R's share. This was a suit for recovery of the plaintiff's share of the rent.

Upon the defence that by an arrangement between the plaintiff and R the latter had received the rent of the plots in question and therefore the plaintiff was not entitled to sue for it, *held*, that there being nothing to show that this was intended to be a permanent arrangement or that the arrangement was intended to continue even if R parted with his share, it did not evidence a "special contract" within the meaning of s. 126 of the Oudh Rent Act.

Held, further, that the defendant did not cease to be a tenant of the plots in question and liable for the rent thereof to the *lambardar* by taking a possessory mortgage of the share of R. 24 A. 487, A. W. N. 1901 P. 53 and 28 A. 763 F, R. A. R. No. 67 and 1 O. C. 152 R. JOKHU SINGH *v.* RAM AUTAR SINGH. **11 O. C. 75.**

83 "Sub division". Meaning of—Pre-emption—Suit for. 9 O. C. 211. *See Construction of Act No. 53.*

84 "Such" in a will as implying comparison. 8 B. L. R. 122=30 B. 493. *See Construction of will No. 6.*

85 Such debts and liabilities—Appeal—Competency to Contract—Perpetuities, law against. 4 C. L. J. 238—33 C. 1065 Col. 59 P. II.

86 Such plaintiff non-liable to give security for costs 18 M. L. J. 155 Col. 1605 P. I.

87 Sufficient cause for not presenting appeal in time—Review, admission of—Notice, issue of. 3 C. L. J. 545—33 C. 1323 Col. 1316 P. I.

88 "Sufficient cause'—Appeal—Preferred to wrong Court—Mistake—Due diligence—Negligence. 34 C. 216 Col. 1732 P. I.

89 Suit—Execution proceedings—Partition—Joint family property—Consent decree 7 B L. R. 659 Col. 142 P. I.

90 Suit for money, includes a suit resulting in a decree for money—10 B. L. R. 337 Col. 1605 P. I.

91 Supersession—Maintainability of suit against the new—Municipality for trespass committed by the old one—Natural rights. 1 M. L. J. 133.—*See Madras District Municipalities Act IV of 1884 Ss. 3, 4, 21, 27, 261.*

92 Suspending payment—Insolvent—Wagering contract—Condition as to anticipation of date of performance and measure of damages. 7 B. L. R. 154 Col: 299 P. I.

93 *Taraf—Evidence—Maps—Description in plaint—Administrative divisions—Points not raised in the first Court—Partition—Title—Reformation—Accretion.*

The word "*Taraf*" appears to mean a sub-division of a *pergunnah*, including several villages.

In 1862 two suits were brought by the predecessors in interest of the present plaintiffs to recover the respective shares now claimed by them in the *char* which is also the subject-matter of present litigation. A map of the disputed lands was prepared by an Amin and was made part of the decrees passed in the said suits.

Held, that the proceedings in the suits of 1863 and the Amin's map were not evidence against the Government, which was not a party to the said suits except for the purpose of shewing the nature of the claim made and what lands were recovered by them and explaining the decrees made. For that purpose, the map might legitimately and must necessarily be used.

Held, further, that the decision come to in the suits of 1863 was in accordance with the construction then put by the Indian Courts on Regulation XI of 1825. That view of the law was, however, overruled by a Full Bench of the Calcutta High Court in 6 *B. L. R.*, 255, and the law on the subject has been settled by that case, and the case of 5 *B. L. R.* 521, decided by the Judicial Committee in the same year.

The allegation in the plaint that the disputed lands appertain to particular district is merely descriptive and is not restrictive. Where the plaintiff claimed the lands in dispute as re-formations *in situ* of her diluviated and permanently settled estate pergunnah Luskurpore and succeeded in proving that said lands were on the original site of the said e tate, as it existed at the time of the Permanent Settlement, and the High Court considered that this was not sufficient to entitle her to obtain a decree, because the pergunnah was partitioned in 1839 and different mouzas or parts of mouzas fell to the shares of the different co-sharers and accordingly the parties went to trial, not upon the broad issue, whether the disputed lands were reformations on the original site of the pergunnah but upon the narrower issue whether they were re-formations on the original site of certain specified *tarafs*: and it lay upon the plaintiff to make out the affirmative of that issue.

Held, reversing the decision of the High Court, that the failure of the plaintiff to identify the sites of these *tarafs* should not be regarded as fatal to her case. The defendant in his written statement did not traverse the allegation of the plaintiff's title to be a co-sharer of the estate and did not mention the alleged partition, and no issue was directed either to the plaintiff's title or to the partition. The plaintiff should be treated as having a *prima facie* title as co-sharer in every part of the permanently settled estate of Luskurpore which was not shown to have been alienated and no weight should be attached to a suggestion not made in the Court of the first instance, where it might have been explained and met by evidence, RANI HEMANTA KUMARI DEBI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL SRI SUNDARI DEBI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **3 C. L. J. 560 (P. C.)=1 M. L. T. 175.**

94 To sue—Cause of action—Meaning of—Policy of insurance—Mortgage of. 7 B.

Construction of words (*Contd.*)

L. R. 138 Col. 1413 P. I.

95 "Treaty" — "Any other written grant" —Name given by parties to document—Injunction. 29 B. 10 Col. 201 P. II.

96 "*Tribe,*" *meaning of—Sheikhs—Punjab Pre-emption Act S. 11.*

Ethnological experts differing as to what constituted a tribe, the only reasonable construction of the term as used in s. 11 of the Pre-emption Act (1905) is the broadest possible. Consequently, the word "tribe" will necessarily indicate the principal tribe, and not a branch of a tribe. The framers of the Act having given no assistance in the right interpretation of the term, the word "Sheikhs" will cover, consequently, Sheikhs of all classes, until some indication is given that the word "tribe" is used in a narrower sense. ALI MUHAMMAD *v.* SHAMAN. **112 P. R. 1908.**

97 *Mortgage—Redemption—Town of redemption - Covenant by mortgagors to pay interest at 2 per cent.—Construction.*

On the construction of a covenant in a deed of mortgage between Hindus that the mortgagors would on redemption pay interest at the rate of 2 per cent.," it was *held* by the Judicial Committee that the expression 2 per cent. "meant" 2 per cent. per mensem. LEKHA SINGH *v.* CHAMPAT SINGH. **28 A. 724; P. C.**

98 "Undivided family"—Muhammadans 9 O. C. 156 Col. 831 P. I.

99 "*Vagaira*"—*Meaning of—Palmyrahs etc., if include mango trees.*

A clause in a patah runs thus:—You have no connection whatever with the palmrahs, dates, babul and other (Vaigaira) trees standing on the said lands.

Held, that it may be reasonably doubted whether fruit trees like mangoe trees can be properly said to fall within this clause. The term "vagaira" should be understood to indicate other trees of the same class as those previously specified and those are not generally looked upon as fruit trees. GUTTA YENKATASUBBANNA *v.* GOVINDA KRISHNA YACHANDRULA YARU BAHADUR. **4 M. L. T. 438.**

100 Valuation of suit—Suit for restitution of conjugal rights—Jurisdiction. 3 A. L. J. 266=28 A 545 Col. 760 P. I.

101 Village - Custom—Pre-emption—Presumption. 21 P. R. 1905 *See Construction of Act No. 67.*

102 "You shall enjoy the said lands with right of gift sale etc"—Compromise 17 M. L. J. 243—30 M. 356 Col. 497 P. I.

103 "Zauja" and "bai"—Evidence—Burden of proof—Meaning of—Construction of document. A. W. N. 1905 P. 214 Col. 294 P. II.

Constructive.

1 Constructive notice—Sale—Power of vendor—Reasonable care. 1 L. B. R. 1900—1902 P. 196 Col 564 P. I.

2 Constructive possession.

1 *Minerals, right to—Digwari Jaigir of Manbhum, nature of—Mokarari lease of all surface and sub-soil rights granted by Digwar—Government, consent of—Government, rights of—Landlord, rights of—Sankarari ijara settlement—Government, if a necessary party—Constructive possession—Wrong-doers or trespassers—Limitation—Ejectment—Digwari tenure, if analogous to Ghatwali tenures—Digwar, right of, character of—Resume of the history and law on the subject—Resumption of tenure.*

The circumstances that the *Digwar* has all along been responsible to Government for the due discharge of his duties, that the appointments to and dismissals from the office have been all along made by Government and that the (*Digwari*) tenure has passed to the persons whom Government has appointed, shew that the holder of the tenure is not a servant under the landlord responsible to him for the due collections of the rent of the estate, and that he did not hold the tenure as a simple *ijardar* under the landlord responsible to him for the rents of the tenure and receiving as his remuneration only the *man* lands.

The *Digwari* tenure is an ancient and hereditary tenure held subject to the payment of a fixed rent to the landlord, and on condition of the performance of certain Police or public services, for the due discharge of which the holder has been responsible to the Government, which alone has exercised the power of appointment to or dismissal from the office.

The Government having all along asserted a right in the *Digwari mouzahs* on the ground that they are public service lands, and in granting permission to the *Digwar* to lease out the property, subject to the condition that the settlement was to be made without prejudice to the rights of Government, the same position having been maintained by Government, without any objection having been raised by the landlord, and the landlord having advanced an exclusive right to the sub-soil profits, in which the Government has a substantial interest as affecting the profits derivable from the tenure, the Government is, in a suit brought by the landlord for a declaration that the sub-soil belongs to him and not to the *Digwar* or his lessee, a necessary party. 21 B. 229, 44, ch. D. 374 Distgd, 13 B. L. R. 118, 22 W. R. 52; 5 C. L. R. 154 R.

Constructive possession applies only in favour of a rightful owner and need not (as a rule) be extended in favour of a wrong-doer, whose possession must be confined to land of which he is actually in possession 24 C. 256 R.

Occupation by a wrong-doer of a portion of land only cannot be held to constitute constructive possession of the whole so as to enable him to obtain a title by presciption.

Where the right to the sub-soil coal has not been asserted by the *Digwar* openly to the knowledge of the landlord for more than statutory period of twelve years, though there

Constructive possession (*Contd.*)

may have been no concealment that the *Digwar* has been working the coal, a suit by the landlord for the sub-soil cannot be held to be barred by limitation 31 C. 397, 19 W. R. Eng. 444, 6 Ch, D. 719, 1 Ch. and Lef. 8 R.

The enactments dealing with the Ghatwals of Birbhum are not of the nature of private statutes.

A clear distinction must be drawn between the grant of an estate burdened with certain duties and the grant of an office, the performance of whose duties is remunerated by the use of certain lands; and a further distinction must also be drawn between a grant for services of public nature and one for services, private or personal to the grantor. The former class of grants in such instance are liable to resumption by the grantor, while the latter class are not so liable 13 Moo. I. A. 438 (463), 22 C. 938 (941) R.

The *Digwari* tenure having been created in the first instance to enable the holder to discharge public duties, and it all along having been so regarded, it is not liable to resumption by the landlord.

The position of the *Digwar* is analogous to that of the Ghatwals in Birbhum and the *Digwar* having been recognized throughout as possessing the same rights, it must be held that the mineral rights in the tenure do not belong to the zemindar 5 C 389 on appeal 9 C 187 R.

The tenure was created as a permanent tenure on a fixed rent and was heritable, the zemindar reserving only a fixed quit rent 22 C. 533 (543), 11 M. I. A. 433 (466) R.

The *Digwar*, as holder of a permanent tenure possesses all underground rights including mining rights, unless there is an express reservation to the contrary 3 C. L. J. 59 F., 3 C. L. J. 306, 33 C. 203 (215) F. 9 C. W. N. 292 and 2 C. L. J. 20 D. BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH. **5 C. L. J. 583=34 C. 753.**

2 Loss of possession by vis major—Essential of—Adverse possession. 6 C. W. N. 617 —29 C. 518 Col: 2057 P. I.

Contemporaneous deeds.

1 *Sale and agreement to reconvey—Transaction whether mortgage—Intention—Date of repayment—Mortgage by conditional sale—Transfer of Property Act (IV of 1882), S. 58 (c).*

On the construction of two contemporaneous documents, one of which purported to be a deed of sale, and the other provided that, on the vendor repaying the purchase-money mentioned in the deed of sale, with costs, within a fixed period, the vendee would return the land, and in case he did not do so, the vendor would deposit the money in Court, and take possession.

Held, that the two documents together did not constitute a mortgage 12 A. 387, *F* 4 C. W. N. 153=22 A. 149 *Dis*

A certain date of payment is an essential element of a mortgage by conditional

Contemporaneous deeds (*Contd.*)

sale. KINURAM MONDOL *v.* NITYE CHAND SIRDAR. **11 C. W. N., 400.**

Contempt.

Person not party to proceedings—Executing Court, power to commit for contempt. 17 M. L. 334=2 M. L. T. 365=30 M. 413 Col. 1075 P. I.

Contempt of Court.

1 Contempt of Court—Order passed in exercise of power to punish contempt of court—Decree—Appeal—Revision. 27 A. 380 Col. 904 P. I.

2 *Contempt of Court—Direction to plaintiff to hand over possession of property—Suit by plaintiff and injunction obtained restraining defendant from taking possession.*

Where the plaintiff who was directed as receiver to hand over possession to the mother, subsequently brought a suit and obtained a temporary injunction restrianing her (the defendant) from taking possession of her son's properties he was not guilty of any contempt so as to disentitle him to get a declaration in his favor in such suit. VEDANAYAGA MUDALIAR *v.* VEDAMMAL. **14 M. L. J. 297=27 M. 591.**

3 *Contempt of Court—Forcible occupation by a co sharer of property in the hands of a reciever—Co-sharer into a party to suit—Right of a receiver to move the Court for contempt:—*

Though ordinarily the receiver himself does not commence proceedings for contempt against a person who unlawfully occupies land in the possession of a receiver and generally speaking the parties beneficially interested to do so, there is nothing to prohibit the receiver himself moving. GREY *v.* WOOARA MOHUN THAKUR. **28 C. 790 at 793.**

4 *Criticism of judge or court how far justifiable—Language which strikes at the root of all respect for the Court and its authority amount to contempt.*

Any act done or writing published, calculated to bring a Court of a Judge of the Court to contempt, or to lower his authority, or to obstruct or interfere with the due course of justice or the lawful process of the Court, is a contempt of Court.

Judges and Courts are alike open to criticism; and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, it is not a contempt of Court. 2 Q. B, 39 followed. *In re.* NARSINHA C. KELKAR. **10 B. L. R. 1040.**

5 Injunction—Perpetual injunction. 23 A. 465. *See Col. 1999 P. I.*

Note 23 A. 465 read for 23 A. 466.

6 Injunction — Power of subordinate Courts. 26 M. 494 Col. 1638 P. I.

7 *Receiver—Proceedings for contempt of—Application by Receiver—Power of Court.*

A Receiver can himself apply to Court

Contempt of Court (*Contd.*)

for taking proceedings against a party for contempt.

When pending the appeal to the High Court a Receiver was appointed and the High Court set aside the decree of the lower court and remanded the case for trial on the merits and the Receiver applied to Court for taking proceedings against a party for contempt, *held*, that the High Court had jurisdiction to entertain the Receiver's application till he was discharged. C. E. GREY *v.* WOOGRA MOHUN THAKUR. **28 C. 790.**

Contention

1 Form of proceedings in a case where there is contention—Objectors right not prejudiced. 1 L. B. R. 1900-1902 P. 155 Col. 523 P. I.

Contentious suit.

1 Lispendens—Alienation after the institution of suit but before service of summons. 9 B. L. R. 530=31 B. 393 Col. 572 P. I.

2 Lispendens — Service of summons if necessary—Right of redempton extinguished on confirmation of sale. 11 C. W. N. 561= 29 A. 339 (P. C.) Col. 573 P. I.

3 Lispendens — Suit for partition—Admission of share in plaint—Transfer after filing of plaint. 31 C. 658 Col. 570 P. I.

4 Lispendens —Mortgage—Surplus sale proceeds. 31 C. 745 at 752 Col. 570 P. I.

Contingent interest.

Will—Adopted son to take after widow, if of good character — Contingent interest — Uncertainty—Implied contract on adoption not to make will.

A Hindu, by his will gave his widow a life-interest in a house and provided that, on her death, their adopted son should have the house provided he was of good character and obedient to the widow.

Held that the condition, viz., that the adopted son should be of good character and be obedient to the adoptive mother and should survive her, was a condition precedent to the adopted son taking under the will and was not void for vagueness.

The adopted son had a contingent reversionary interest in the house during the widow's life-time and this was inalienable Merivale's Reports (1816) 26 F.

In Hindu adoption, there is no implied contract with the natural father that, in consideration of the gift of his son, the adopter will not make a will 3 C. W. N. 415= 26 I. A. 38. F. SURENDRA NATH GHOSE *v.* RAMA CHAND BANERJEE. **12 C. W. N. 668.**

Continuing wrong.

1 Suit for compensation for wrongful attachment—Reasonable and probable cause—

Continuing wrong (*Contd.*)

Want of. 6 B. L. R. 704 Col. 1834 P. I.

2 Right of government to contract—Irrigation works—Injunction against government. 28 M. 72 Col. 1806 P. I.

Note 28 M. 72 read for 27 M. 72.

3 Suit for custody of wife—Third person harbouring wife—Revision 14 P. L. R. 1903 Col. 1802 P. I.

Note 14 P. L. R. 1903 read for 14 P. R. 1905.

Contract.

1 *Contract.*

Held that a lien over money lent may be created by deposit of a non-negotiable document which is evidence of the loan. Such a transaction is not necessarily contrary to public policy.

Rahim Bakhsh, Head Clerk to the Cantonment Committee, apparently gave security for the due performance of his duties by a deposit of Rs. 500 in the Post Office Savings Bank, and subsequently agreed to the Committee taking and using that money in the purchase of bullocks, the Committee giving him in exchange a receipt in the following terms :—

"I acknowledge to have received from Rahim Bakhsh, Head Clerk, the amount of his security deposit, namely, five hundred rupees, as an advance to the Cantonment Committee for the purchase of conservancy bullocks. The same to be replaced in the Post Office Savings Bank within three months—Cantonment Magistrate. E. A. LUDDY *v.* C. P. R. ARUNACHELLUM CHETTY. **U. B. R. 1904 P. 1 Contract.**

2 Agreement not to partition property—Powers of arbitrator, suit upon on award—Mohammadan Law—Inheritance — Custom. 23 A. 383=28 I. A. 141 (P. C.) Col. 1859 P. I.

3 Alteration of document—Effect—Material alteration. 25 A. 580 Col. 231 P. II.

4 Alteration of document — Material alterations in a document — Alterations in acknowledgement. 25 B. 616 Col. 34 P. I.

5 Alteration of document — Undue influence sale—Inadequacy of consideration—Voidable contract. 25 B. 126 Col. 257 P. I.

6 Assignment of mortgage for future illicit co-habitation; suit to set aside 28 M. 413. *See Consideration No. 25.*

7 *Assignment of—Benefit of a contract.*

The benefit of a contract, that is, the beneficial right or interest of a party under the contract, and the right to sue to recover the benefits created thereby, are assignable, provided that

(*a*) the benefit is not coupled with any liability or obligation that the assignor is bound to discharge, and

(*b*) the contract has not been induced by personal qualifications or considerations as regards the parties to it 33 C. 702, F. 1 M. H. C. 150, 4 M. 76, 16 B. 441, R. NATHU GANGARAM *v.* HANSRAJ MORARJI. **9 B. L. R. 114.**

Contract (*Contd.*)

8 Assignment of contract—Chose in action. 9 P. L. R. 119 Col: 872 P I.

9 *To assign pattas—Legality of, of insurance—Specific performance.*

On a proimse to effect an assurance and assign the pattas to the defendant on his paying a certain amount to the plaintiff, *held*, that there is nothing illegal in the contract to assign the pattas, and that, even if the original contract of insurance is illegal, it is not open to the defendant to set it up, as the plaintiff effected the assurance and paid the amounts as they fell due, on the defendant's promise to take an assignment after a certain period. NARIGIRI YEERASALINGAM *v.* SEETHAPATHY SATHIRAGOO. **3 M. L. T. 393.**

10 Alternative promise—Indivisible. 7 B. L. R. 606.—*See Col. 312 P. I.*

11 *Avoiding contract—Document—Bond—Altering a document—Material alteration.*

Any change in an instrument, which causes it to speak a different language in legal effect, from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is an alteration which will invalidate it against all parties not consenting to the alteration. It is of no consequence whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. Where after a bond had been executed by the first defendant and delivered to the plaintiff, the name of the second defendant was added as an executant without any authority from him and without the assent of the first defendant

Held, that this was such an alteration in the deed as would vitiate it against the first defendant.

Held, further, that the plaintiff was not entitled to succeed on the basis of the original consideration and to rely on the altered bond as poof of acknowledgment. Gogun Chunder Ghose *v.* Dhuronidhur Mundul (I. L. R. 7 Cal. 616); Motilal Saha *v.* Monmohan Gossami (5 C. W .N. 56); Atmaram *v.* Umedram (I. L. R. 25 Bom. 616); Subrahmania Ayyar *v.* Krishna Ayyan (I. L. R. 23 Mad. 137); Mangal Sen *v.* Shankar Sahai (I. L. R 25 All. 580). GOUR CHANDRA DAS *v.* PRASANNA KUMAR CHANDRA. **3 C. L. J. 363=10 C. W. N. 788=33 C 812.**

12 Avoiding contract—Mortgage executed by a minor—Distinction between such mortgage and a mortgage executed by the certificated guardian on behalf of the minor. 23 A 288 Col: 813 P I.

13 Badni contract — Gambling transactions—Contracts for sale and purchase of goods without intention to complete them by delivery and payment. 29 C 461 (P C). Col: 296 P I.

14 Badni contract—Principal and agent. 25 A 38 Col: 297 P I.

15 Badni contract—Wagering contract—Principal and agent. 25 A 639 Col: 298 P I.

Contract (*Contd.*)

16 Badni contract—Contract collateral to a wagering contract not void. 23 A 165 Col; 298 P I.

17 Bania and Zamindar—Undue influence—Interest—Unconscionable bargain. 13 P R 1905 Col: 258 P I.

18 *Breach of contract—Tender to supply gram to Commissariat Department—Continuing offers and not contract—Rescission of contract—Damages.*

The plaintiff, the Secretary of State for India in Council, sued the defendant for compensation for breach of contract to supply gram. It was alleged for the plaintiff that in pursuance of a written contract in the form of a tender accepted by the Commissariat Department, the defendant was given an order on the 12th September 1806 to supply 64,000 lbs. (800 maunds) of gram of the first quality and 48,000 lbs. (800 maunds) of the second quality by the 28th September, that he failed to do so and that the time was successively extended to the 8th, 10th, 16th and 24th October, but he still continued to be in default, in consequence of which the whole contract was suspended by the Executive Commissariat officer on the last date and rescinded by the Chief Commissariat Officer on the 27th October, with effect from the 24th. The claim was for loss sustained by the defendant's default in complying with the orders.

It was pleaded for the defendant that the order for 1,400 maunds of gram was imporper, not being in accordance with clause 2 (a) of the tender, as fifteen days' time fixed thereunder was not allowed to him, that the subsequent notices were open to the same objection, that there was no contract on the defendant's part to deliver a fixed quantity of gram, but only a series of offers to supply such quantities as the Commissariat Department ordered up to a maximum named in the tender within the periods mentioned in it, that as there was no proper order there was no liability on defendant to supply any gram and that, in any case, if there was a contract, the rescission of it, in consequence of the defendant's failure to supply the first order, was not justified in law. It was also contended for the defendant that, as the Commissariat Department was not bound to take anything there was no mutuality in the agreement, and that there was no liability on defendant, until a proper notice for the supply of a definite quantity was given and that the liability could be terminated by the defendant giving a reasonable notice before an order was actually received.

The tender submitted by the defendant and accepted by the plaintiff, provided that when an order for a quantity between 1,000 and 1,500 maunds was to be given, a notice of 15 days was required, that the Commissariat Officer was not bound to take all or any of the articles for which the tender was accepted but only what he required. It also provid-

Contract (*Contd.*)

ed for rescission of the contract in case of five successive defaults in the manner specified therein.

Held, that the pleas of the defendant were valid, that the tender made by the defendant accepted by the plaintiff merely created a series of continuing offers on the part of the defendant which plaintiff was at liberty to convert into contracts by giving orders in accordance with the terms of the tender, that the order given on the 12th September 1896 did not create a binding obligation on the defendant to supply the gram, as from the date of its receipt by the defendant the defendant was allowed only 14 days to comply with it and that the alleged failure did not justify the rescission of the so called contract. *L. J. N. S. Vol. 23, Exchequer, page 184; L. R... P. 43 (1873) and 24 Bom, 97 followed.* KUNDAN LAL *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **72 P. R. 1904=1 P. L. R. 1905.**

19 Breach of contract—Value payable insured parcel—Principal and agent—Measure of damages. 15 M. L. J. 226=28 M. 213 Col. 871 P. I.

20 *Breach of contract—Damages. Rate of —In case of breach of contract of sale.*

If the vendor has any specific period of time allowed to him for making the delivery, and finds, before the time has elapsed, that he will be unable to complete the delivery, and gives notice to the purchaser that he refuses to proceed therewith, and the price rises, the measure of damages is the difference between the contract-price and the higher price of the subject-matter on the last day of the period within which the delivery ought to have been made.—8 *Taunt* p. 540, *followed.*

Where under a contract of sale of jute the delivery or shipment was at the seller's option during August-September, and the seller refused to perform the contract

Held, that the measure of damages was the difference between the contract-price and the higher price of jute on the 30th of September. A. S. MACKERTICH *v.* NAVA COOMAR ROY. **7. C. W. N. 431=30 C. 477.**

21 Breach of contract by decree holder—Condition—Consent decree—Effect of breach of the terms of the decree on the part of plaintiff. 5 C. W. N. 536=28 C. 557 Col. 337 P. I.

22 *Breach of contract by decree holder—Vendor and Purchaser—Damages for—Speculation on the rise and fall of cotton market—Panchayet.*

In this case, the parties entered into an agreement which though purporting to be a contract was really speculation on the rise and fall of the cotton market. The defendant having failed to deliver to the plaintiff the total quantity of cotton agreed upon, the plaintiff brought this suit upon the alleged contract. It was found that such transactions related to goods which had no real existence in the market and

Contract (*Contd.*)

it was customary that in cases of breach of contract, damages were assessed at rates to be fixed by *panchayets* composed of merchants engaged in similar transactions. The defendant claimed to have the damages assessed at the ordinary market value of the quantity of cotton not delivered, whereas the *panchayet* settled at a higher rate.

Held that the parties must abide by the decision of the *panchayet* unless there was proof of fraud.

Held also that where an expert tribunal is voluntarily set up for the decision of matters of skill, mere error on its part would be no ground by itself to upset its decision and unless there is proof of fraud, the parties are bound by its decision. PESTONJI JEHANGIRJI *v.* JAISINGDAS HANSRAJ. **8 C. W. N. 57, P. C.**

23 Breach of contract by decree holder—Assessment of damages 1 L. B. R. 1900—1902 P. 21 Col, 338 P. I.

24 *Breach of contract by decree holder—Market-rate, Evidence of—Damage—Computation of.*

Defendants contracted to deliver "ex-hopper" from one or other of ten firms of "large millers" a quantity of "usual Straits quality" rice in "all November 1901." They failed to deliver any rice under the contract.

No rice was milled on 30th November 1901 by any of the large firms of rice-millers named in the contract, consequently there was no market-rate on that day for rice to be delivered according to the terms of the contract.

An open auction sale of two lots of ready-milled rice which had been milled by two of the large firms of millers took place on the 30th November 1901. The quality of the rice was the same as that contracted for.

Held that the provision for delivery "ex-hopper" was merely an incident of the delivery not effecting the quality or description of the article contracted for.

Held also, that where no suggestion that the rice sold at the auction was not such as any willing buyer would have taken as "usual quality Straits cleaned rice" and if he had made an open contract to buy would have been bound to take under that description, the auction sale was a fair test of the general market-value of the particular description of rice on the day of breach and should be taken as evidence of the market-rate on that day in calculating damages. KHOO SEIN KHOO *v.* ELIAS A. MANASSEH. **1 L. B. R. 1900—1902 P. 262.**

24 (a) *Breach of Contract—Interest—Rent Act (XXII of 1886), s. 141—Suit by superior proprietor against under-proprietor for arrears of rent—Breach of contract—Damages.*

The defendants were under-proprietors and the plaintiff the superior proprietor. The defendants' predecessors in title had

Contract (*Contd.*)

executed an *iqrarnama* whereby they promised to pay to the superior proprietor the Government Revenue plus 10 per cent. *Held*, that there being proof of a contract which had been broken, the defendants were liable to pay interest as damages for the breach of it. THAKUR GANESH BAKHSH *v.* THAKUR HARIHAR BAKHSH. **1 O. C. 270.**

24 (b) Breach of contract. 3 O. C. 22 Col. 338 P. I.

24 (c) Penalty for breach of contract. 5 O. C. 406 Col. 347 P. I.

24 (d) Breach of contract to transfer immoveable property—Compensation. 2 O. C. 24 Col. 626 P. I.

25 Brokerage--Commission agents right to--Mortgage. 40 C. 202 Col. 236 P. II.

26 Bombay Trader Association--Agreement to pay differences--Closing the contract--Wager contract. 7 C. W. N. 805--*See Construction (of Articles of Association) No. 2.*

26 (a) Champerty--Contract to transfer immoveable property. KAZIM HUSAIN KHAN *v.* ACHAL RAM. **2 O. C., 149.** *See Misjoinder.*

27 Compensation for abducting a woman --Illegal contract. 82 P. R. 1904 Col. 277 P. I.

28 Company—Contract entered into before a company is formed--Ratification--Liability of Company. 2 P. R. 1905 Col. 471 P. II.

29 Company--Memorandum and Articles of Association--Commission contract. 10 B. L. R. 141 Col. 471 P. II.

30 Consideration--Champerty--Right of purchaser from rightful heir to sue trespasser for possession of estate. 17 A. 271 (P. C.) Col. 385 P. II.

31 Construction of document--Alaulad —Gift--Custom--Landlord and Tenant. 31 C. 561 Col. 2091 P. I.

32 Construction—Contract in writing—Admissibility of oral evidence as to terms. 32 C. 96 Col. 195 P. I.

33 *Construction--Agreement on printed form--Inconsistency between printed and written provisions--Custom of Trade in Bombay--Principal and agent--Liability to render account to indentor.*

When there is an inconsistency between the printed and the written provisions of an agreement the Court cannot discard the print, but must, as far as possible, discover the real contract of the parties from the printed as well as from the written words.

According to the custom of trade in Bombay when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe at a fixed price nett free godown including duty, or free Bombay Harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer.

Contract (*Contd.*)

And it does not make any difference that the firm receives commission or trade discount from the manufacturer either with or without the knowledge of the merchant. PAUL BEIER *v.* CHHOTALAL JAVERDAS. **6 B L R 948=30 B I.**

34 Co-parceners by—Special general meeting—President--Promiso—Executed consideration, 28 B. 66 Col. 252 P. I.

35 Corporation with suit on--Contract defective under Municipalities Act not binding though performed in part 2 A. L. J. 321--27 A. 592 Col. 320 P. I.

36 *Cross contracts—Suit for recovering difference on the cross contracts—Breach—Readiness and willingness to take or give delivery.*

Where cross contracts were entered into between plaintiff and defendant, for the same quantity of goods deliverable between the same dates.

Held, that plaintiff was entitled to recover the amount of the difference on the two sets of contracts, without proving his readiness and willingness to give or take delivery of the goods. Neither party could, under the circumstances, have intended to require actual delivery. THAKURSI HANSRAJ *v.* TEJANMAL, **1 S L R 248.**

36 a Damages caused by reason of contract. SURAJMAN *v.* BHAGWAN SINGH, **7 O C 351,** *See Sub-Tenant.*

37 *Deposit of — Contract — Security for performance of contract—Breach of conditions of contract—Forfeiture of deposit—Attachment of deposit.*

When deposit made as security for performance of a contract is alleged as forfeited for non-performance of the contract, and a judgment creditor of the person who made the deposit attaches it in execution of his decree, the Court has to decide whether the forfeiture of the deposit was reasonable. If it be reasonable, the forfeiture cannot be relieved. MANIAN PATTER *v.* THE MADRAS RAILWAY COMPANY. **M. L. J., 1906, p. 37=29 M., 118.**

38 *Decree, derogation of, in Contract—Civil Procedure Code (Act XIV of 1882), Section 244—Question relating to execution—Court incompetent to go behind decree.*

A contract made between the parties to a suit in derogation of a decree which may be passed in future cannot form the subject of an enquiry under section 244, C. P. C., in a proceeding for the execution of the decree.

Questions under section 244 (c) relating to the execution of a decree and arising between the parties to a suit in which the decree was passed or their representatives, must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. CHHOTI NARAIN SINGH *v.* MUSSAMMAT RAMESHWAR KOER **6 C. W. N. 796.**

See for other fact Col: 1106 P. I.

Contract *(Contd.)*

39 To defer payment — "Contract to the contrary"—Sale in consideration of a particular covenant—Waiver charge on property sold. 31 C. 57 P. C. Col. 596 P. I.

40 Enforcement of contract by one not party to it—Privity of contract—Appeal. 5 O. C. 235 Col. 1663 P. I.

41 Enhanced rate of interest in case of default in payment — Penalty — Compensation. 3 O. C. 168 Col. 347 P. I.

42 Evidence of oral agreement varying terms of document. 2 L. B. R. 1904, P. 268 Col. 220 P. I.

43 *Equity—Hard and unconscionable bargain—Money lent under pressing necessity—Compound interest.*

The plaintiff sued the defendant (a woman) for recovery of a certain sum of money alleged to be due on two mortgage-deeds, which provided for the payment of compound interest at the rate of Rs. 1-8-0 *per cent, per mensem* with yearly rests. The defence was that the mortgages were executed under the undue influence of the plaintiff and that the terms of them were hard. There was no proof that the defendant was in any way over-reached, tricked or deceived, or that the plaintiff took an unfair advantage of her weakness or necessities. She was pressed for money and accepted the terms offered by the plaintiff.

Held, that the transaction was not a hard and unconscionable one, which it would be unreasonable and inequitable for a Court of Justice to give effect to and that the plaintiff was entitled to a decree for the full amount due for principal 9 A 228 Diss. and 31 C 233 Refd. to and compound interest at the stipulated rate. RAM CHARAN *v.* MUSAMMAT KANCHAN KUR. **8 O. C. 193.**

44 Evidence of—Transfer now to be effected—Pleadings—Family arrangement—Inplement of contract to transfer—Costs. 28 I A 46=24 M 377 (P C) Col: 584 P I.

45 Executory—Assignability of consideration. 10 C. W. N., 755—33 C., 707 Col. 553 P. I.

46 Failure of—Specific performance suit for—Ekrar—Attempt by party to rescind agreement of which his heirs afterwards seek specific performance. 31 C. 584. (P. C.) Col. 248 P. I.

47 *Forbidden by law—Punj S. 7 A.—Contract forbidden by law—Relief where a person deliberately enters into such a contract—Remedy after the contract has been executed—Suit for setting aside sale where ex-proprietary rights claimed.*

When, along with some zamindari, certain sir land was sold, and the vendor undertook not to claim occupancy rights therein under S. 7 A of the Oudh Rent Act, but subsequently claimed and obtained those rights, *held*, that the purchaser was not entitled to compensation in respect of the sir land. 19 A. 35, 22 A. 205 referred to. BHIKHAM *v.* GHASI RAM. **10 O C 243.**

Contract *(Contd.)*

48 *Formation of—Railway Company—Liability for the acts of servants of the Company—Booking of goods.*

Plaintiff got his goods booked to Bagalkot Station. He got the Station Master, Hotgi, to send a service telegram to Bagalkot to re-book the goods to Hotgi, but this was not done. He sued the Railway Company for damages.

Held, that the mere fact that the plaintiff got the Hotgi Station Master to send a service telegram to Bagalkot to re-book the goods from Bagalkot to Hotgi could not possibly constitute a valid contract which bound the Railway Company, and the plaintiff's suit was not maintainable. MALKARJUN SHIDDAPPA *v.* THE SOUTHERN MARATHA RY. COMPAMY. **4 B. L. R. 890=27 B. 126.**

49 Fresh cause of action—Promise without consideration—Acknowledgement on account stated. 1 L. B. R. 1900-1902 P. 190.—*See Consideration No. 40.*

50 *Forbidden by law—Paper Currency Act XX of 1882 S. 25—Suit on—Maintainability.*

A party cannot be permitted to sue on a contract forbidden by law.

Thus, the Courts will not allow a person to recover on a document which is of the form expressly forbidden by S. 25 of the Paper Currency Act, unless the document comes within the proviso to that section. 5 B. & Ald. 335; 24 W. R. 401; 2 M. & W. 149; 46 R. R. 532, F. 16 B. 689, *diss.* A. R. C. S. SOOBRAMONION CHETTY *v.* R. M. K. CURPEN CHETTY. **14 B. L. R. 120.**

51 *Goods supplied on order of a person entitled to portion of an estate—Estate, whether bound.*

Where, after the death of the owner of an estate, a person who claimed the whole estate, but who, according to a decree of the High Court, was held to be entitled only to a portion of it, incurred charges necessary for the maintenance of the estate, while he was managing it, *held* that such expenses were bindig upon the estate. 3 M. 145, 9 M. 80 referred to. NARAYANASWAMI NAIDU *v.* RANGAM. **17 M. L. J. 484.**

52 *Guardian—Minor—Contract for sale by the guardian—Subsequent sale—Collusion between the guardian and the 1st vendee—Suit for specific performance.*

A certificated guardian of the minors contracted to sell their house to the plaintiff, undertaking to obtain the sanction of the District Judge to the transaction. She then conveyed the property by registered deed to her relative defendant No. 1, ostensibly for a consideration, part of which had been paid, the defendant being fully aware of the previous contract with the plaintiff.

Held, that the sale to the plaintiff was not *ipso facto* void but only voidable at the instance of any person affected thereby. The guardian being in collusion with defendant No. 1 and being his catspaw and the District Judge having in effect sanctioned the sale to the plaintiff as being for the benefit of the

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minors, the plaintiff was entitled to obtain specific performance of the contract. MUSSUMMAT ETWARIA *v.* CHANDRA NATH MUKERJEE. **10 C. W. N. 763.**

53 *Guardian—Suit through next friend by a, to set aside a prejudicial contract by guardian whether maintainable.*

Suit by a minor through his next friend to set aside a lease by the guardian of the minor as being detrimental to his interests. It was argued on appeal that, as a minor is not competent to make or ratify a contract, he is equally incompetent to repudiate a contract but the agreement was held untenable as ignoring the distinction between a contract that is void because entered into by a minor, and a contract entered into on the minor's behalf by a proper guardian and it was held, that, seeing that a minor may legally contract through his guardian, it necessarily follows that he is competent as well to sue through a next friend to set aside such a contract, if found prejudicial to his interests. ABDULLA KHAN *v.* RAMDAS, **2 N L R 146.**

54 *Guardian by—Contract of sale and purchase—Minor—Specific performance—Personal liability.*

Woodroffe, J.—Specific performance may be granted of a contract entered into by a guardian on behalf of a minor, if the contract be one which being within the guardian's power, binds the minor.

An agreement for sale and purchase entered into on behalf of a minor may be specifically enforced, notwithstanding the fact that it involves a personal liability to pay the price, if the agreement be carried out, and also damages in lieu of, or in addition to, specific performance, if the agreement be broken 14 I. A. 89 referred to. MIR SARWARJAM *v.* FAKHRUDDIN MAHOMED CHOWDRY, **11 C W N 207=34 C 163=1 M L T 860=4 C L J 431.**

55 *Guardian — Contract—Specific performance—Contract by guardian with permission of Judge—Subsequent sale with permission for higher price.*

A Court will not specifically enforce a contract, made by the guardian of a minor, if it is shown that it was made to the detriment of the minor.

Where, therefore, a guardian contracted to sell to A the minor's property for ~~Rs~~ 725, with the permission of the Judge, and subsequently sold it to B for ~~Rs~~ 825, with the renewed sanction of the Judge, who, however, gave notice of the higher bid to A, who declined to pay the higher figure, *held* that the first contract could not be specifically enforced. CHITTER MAL *v.* JAGANNATH PERSHAD. **4 A. L. J. 24=A. W. N. 1907 P. 25=29 A. 213.**

56 Hiring—Contract of hiring providing for payment of certain wages—Discontinuances of business—Action for damages. NGA MAUNG GYI *v.* RAMZAN ALI, **U. B. R. 1908 P. 1.** **Master and Servant.** *See Master and Servant.*

Contract Act (*Contd.*)

57 Illegal—Jurisdiction—Suit for a fractional Share of land assessed to land revenue—Claim for specific performance of agreement. 37 P. R. 1901 Col. 116 P. I.

57 a Illegal—*See Contract Act IX of 1872 s. 23, 58—Implied to pay rent—Landlord and Tenant—Well dug by tenant—Garden rent—Notice to tenant—Omission of date of kists.*

The question whether there was an implied contract on the part of the tenants to pay jarib rates on lands cultivated by aid of wells dug by themselves is one that must be decided on the facts of each case. The mere fact that garden rates had been paid for a few years would not necessarily lead to the inference that there was any such contract. On the other hand, payment of garden rates for a lengthened period coupled with other circumstances may justify the finding that there was an implied contract.

The omission in notices to enter the dates on which the kists fell due is not a material irregularity when the fasli with respect to which the rent was due is correctly given. VENKATA NARASIMHA APPA ROW *v.* NALLA KONDAYYA. VENKATA NARASIMHA APPA ROW *v.* LAKSHMANNA. **14 M. L. J. 145.**

59 *Implied to payment—Rent Recovery Act (Mad. Act VIII of 1865), ss. 9, 10, 11—Suit to compel acceptance of patta—Provision in patta for payment of rent in kind—Power of Court to amend patta by providing for payment in money—" Rent."*

The term "rent" as used in s. II, para. (1), (2) of the Rent Recovery Act, includes rent of every description, whether payable in kind or in money. Polu *v.* Ragavammal, (I. L. R., 14 Mad. 52), explained. Where rent is payable in money but a *patta* has been tendered which provides for the payment in kind, the Court has power to amend the *patta.* Mahasingavastha Ayyar *v.* Gopaliyan (5 Mad. H. C. R. 425), approved. Rent had been paid in money from fasli 1288 to fasli 1308, at rates which had varied. On its being contended that the Court could find, from the mere fact of these past payments, that there was an implied contract between the parties that rent was to be payable in money at a rate to be determined by the Court.

Held that such an implied contract could not be found. To warrant such a finding, the circumstances should be such as to suggest an agreement to pay at some definite rate. KAVIPURAPU RAMA RAO *v.* DIRISAVALI NARASAYYA. **27 M. 417**

60 Implied to pay rent—Promissory Note —Suit by payee—Defence by maker—Payee not true owner. 28 M. 244 Col. 540 P. I.

61 Indent form—6 B. L. R. 948—30 B. 1 *See No. 33 supra.*

62 Incompeted—Restraint of trade—Continuous cause of action—Damages previous and after the institution of suit 29 B. 107 Col. 294 P. I.

Contract Act (*Contd.*)

63 Interest—Rate of interest—Permanent tenure—Interpretation of statute 29 B. 674 *See Col. 123 P. II.*

64 *Immoral contract—Right to sue.*

Where the plaintiff cannot make out his case except through an immoral transaction to which he was a party, must fail. MUNCHARAM PITAMBER *v.* REGINA STRANGER, **10 B L R 318.**

65 *Immoral purposes—Contract, opposed to morality and public policy, if money advanced applied for.*

If money was advanced by the creditor to the debtor to be applied for an immoral purpose, the contract would be opposed to morality and public policy. A suit to recover money advanced in pursuance of such a contract will not lie. 3 Barnewall and Alderson. 179. F. PANNICHAND *v.* T. NANOO SANKER TAWKER, **4 M L T 107.**

66 *Instrument evidencing loan of paddy and providing for its return on certain date whether bond—Limitation.*

The suit was on an instrument for certain quantity of paddy, which provided for the payment of the principal amount of paddy advanced on a certain date, and in default of such payment, for payment on demand with interest at certain rate.

Held, in a suit on the instrument, that the instrument was not a bond falling within either Art. 57 or Art. 97, and that the suit fell under Art 95 of the Limitation Regulation. 10 P. L. R. 89, 7 B. H. C. R. 36, 21 P. L. R. 194 ref. to. NARAYANAN KRISHNAN *v.* KANAKKU NARAYANAN KRISHNAN. **23 T L R 48.**

67 Jurisdiction—Contract by correspondence, where completed—Jurisdiction—Suit for damages for breach of contract—2 C L J 656=32 C. 84 Col. 253 P I.

68 Jurisdiction—Suit for money paid and damages—Marriage contract—Pay money paid. Onus—1 C. L. J. 261 Col. 319 P. I.

69 Jurisdiction—Principal and Agent—Liability of principal to pay money borrowed by Agent—Interest—1 C. L. J. 199 Col. 363 P. I.

70 Jurisdiction—Where grant of a patta under the Darkhast Rules is a matter of contract—Cognizable by Courts—1 M. L. T. 278=29 M. 461 Col. 420 P. I.

71 Law intended by parties to govern—Interest passing at sale. Impartible estate. ABDUL AZIZ KHAN *v.* APPAYASAMI NAICKER. **27 M. 131.** *See Execution Sale.*

72 Liability of ship-owner who carries goods for hire in his ship—Law on the subject, how affected by the—14 B. L. R. 77 Col. 322 P. II.

73 Lunatics guardian—Agreement for sale of property of lunatic not sanctioned by Civil Court—A. W. N. 1906 P. 298 Col. 66 P. I.

74 Limitation Act Art 116—Breach of contract in writing registered—Lease of villages. 25 M. 587 Col; 1893 P. I.

Contract Act (*Contd.*)

75 *To lend money—Suit to recover money agreed to be paid on a mortgage—Debt—Specific performance of contract to lend mony—Specific Relief Act (I of 1877). S. 21, cl. (a).*

The plaintiff mortgaged certain property to the defendants for Rs. 12,000. He received Rs. 4,000 in cash. Rs. 7,000 were left with the defendants to pay off a prior mortgage and the balance, Rs. 1000 was to be paid to the plaintiff after a month and half. This was a suit to recover this sum of Rs. 1,000. The defence was that the defendants had to pay Rs. 8,400 to the prior mortgagee so that instead of there being a sum of Rs. 1,000 due to the plaintiff he owed them Rs. 400.

Held, that, it being a contract to lend money, a suit for specific performance of such a contract was not maintainable.

Held, further, that such a contract does not create a debt 8 O. C. 5 and A. W. N. (1908) 105 R. MEHDI ABBAS *v.* MUHAMMAD FAKHR-UD-DIN. **11 O. C. 217.**

76 Mahabrahmani collections—Right to—Suit for share in offerings not one in which right to property is involved—Cause of action. 5 O. C. 225 Col: 349 P. II.

77 *Maintenance of chaukidar—Local rates Act (V of 1894), ss. 13 and 14—Rural Police Rate—Suit by proprietor against under-proprietors for recovery of—Implied contract for maintenance of* Chaukidar—Wajib-ul-arz—*Admissibility in evidence of.*

The respondent was the superior proprietor and the appellants were sub-settlement holders of a village on account of which the former paid to the Government Rs. 4-2 as Rural Police Rate imposed under s. 13 of N. W. P. and Oudh Act V. of 1894. The respondent sued to recover the sum from the appellants. The question in second appeal was whether the appellants were bound by any contract to provide wholly or in part for the maintenance of Chaukidars. The first Court held they were not so bound while the Court of first appeal held that certain arrangements of which the most important evidence was the *Wajib-ul-arz* amounted to such a contract as is intended by s. 14 of the Act.

Held (1) it is settled law that entries in a *Wajib-ul-arz* properly prepared are admissible in proof of any custom therein recorded and the same holds good with regard to other matters which it is the duty of the Settlement Officers to record in the *Wajib-ul-arz.* (2) That under Chief Commissioner's Circulars No. 16 of 1862 and No. 20 of 1863 it was the duty of the Settlement Officer to make entries in the *Wajib-ul-arz* relating to arrangements in regard to Patwaris, Chaukidars and other village servants and therefore the *Wajib-ul-arz* was admissible under s. 35, Evidence Act. (3) That the Legislature cannot have intended that 'contract' in S. 14 should be confined to an express contract between the superior and inferior proprietors. KUSHARI DIN *v.* RANI CHANDAR KUAR. **7 O. C. 35.**

Contract Act (*Contd.*)

78 *Minor—Contract respecting minor's estate made by his natural guardian not void but voidable—Contract between plaintiff and third party, on what grounds defendant can question validity of—Transfer of minor's property by guardian whether natural or certified, voidable, not void—When can a third party challenge the validity of a contract.*

A sale or mortgage of or other dealing with a minor's estate by a *de facto* and natural guardian is not a nullity; it is not void but only voidable, and only the minor or his representatives can ratify or avoid it and the same is the case with a certificated guardian who deals with his ward's estate without the sanction of the Court.

A volunteer cannot, as plaintiff, avoid a transaction which does not concern him, and a defendant can always resist a suit upon the ground that no right or title at all has passed to the plaintiff or that an assignment to the plaintiff was made to defraud the defendant or was illegal or void or opposed to public policy; but where an assignment is in law sufficient to pass title to the plaintiff and is not illegal or void or opposed to public policy or a fraud upon the defendant but is only voidable at the instance of a third party on the ground of undue influence, failure of consideration or the like, then the defendant cannot challenge the validity of the assignment unless a trial of the question of its validity is necessary for his protection, in which case the person who has the right to ratify or avoid the assignment should be made a party to the suit and the validity of the assignment tried out. The defendant was a mere trespasser. As against him the title of the plaintiff was good unless it was successfully assailed by a third person. Therefore the defendant could not challenge the validity of the assignment to the plaintiffs HAZARI *v.* LALLU. **7 O. C. 181.**

79 *Minor—Contract—Specific performance.* If a contract is validly entered into on behalf of a minor and there is mutuality in such contract, it may be specifically enforced, but each case must depend upon its own particular circumstances. 20 Cal. 508 approved. MIR SARWARJAN *v.* FAKHAR-UD-DIN MAHOMED CHOWDHURY. **4 C. L. J., 431=1 M. L. T., 360=11 C. W. N., 34 (F. B.).**

80 Minor—Lease granted by a minor void. MOHAMMED SALIMKHAN *v.* NGO MARAR. **1 N. L. R. 185.** *See Minor.*

81 Minor—Void agreement—Estoppel—Representation by infant as to his age. 30 C. 539 Col. 255 P. I.

82 Mistake—One sided mistake—Ratification—Proper remedy—8 O. C. 1 Col. 418 P. I.

83 Mortgage—Contract to lend money on mortgage—Suit for breach of contract—8 O. C. 5 Col. 406 P. I.

84 *Mortgage—Usufructuary mortgage—Agreement to pay Government revenue—Enhancement of revenue—Liability of mortgage to pay enhanced revenue.*

The defendant obtained a mortgage from the plaintiff and was put into possession of the mortgage property. Under the mortgage instrument the mortgagee was to pay the Government revenue payable on the land mortgaged and to take the profits in lieu of interest without reference to whether the profits were more or less in particular years. Subsequently the Government revenue was enhanced which the mortgagee refused to pay at the enhanced rate. The mortgagor paid the balance and brought a suit against the mortgagee for the amount so paid by him.

Held, that the suit must be dismissed, the reasonable view being that the revenue payable under the settlement in force was all that the mortgagee undertook to pay, the ultimate responsibility in repect of any addition to the land revenue devolved on the mortgagor. 22 *Bom. 440 L. R.* 9 *I. A., at pp. 68, 69 referred to.* KRISHNIER *v.* ARAPPULI IYER. **14 M L J 486.**

85 *Mahabrahmani offerings, contract with respect to—Representatives of parties to the agreement, effect on—Immoveable property—Transfer of non-existent property.*

Held, that a contract amongst Mahabrahmans with respect to the distribution of alms to be received in the future by the exercise of voluntary charity is not enforceable against the heirs or representatives of the parties to the agreement.

Held, further, that, if the transaction were regarded as a transfer rather than a contract, it could not take effect with respect to non-existent property 5 O C 225 S C A No 216 of 1886 S C A No 486 of 1898 J P's A C App i S 622 Appn No 53/38 of 1895 S C A S No 309/483 of 1900 S C A No 213 of 1901 and S C A No 243 of 1903 R. BADDU *v.* BABU LAL. **11 O C 212. (B).**

86 *Mortgagee knowing all circumstances of mortgage—Implication of contract. T. P. A. S. 65.*

The contract which was said to have been broken in this case was a contract to be implied by reason of S. 65 (*a*) of the Transfer of Property Act. The contract in question was only to be inferred in the absence of a contract to the contrary. It was found however that the appellant (mortgagee) knew all the circumstances when he took his mortgage.

Held, it was reasonable to infer that there was an understanding between the parties that the mortgagor did not contract in the terms of S. 65 (*a*). PARATURAMA PATTAR'S SON KRISHNAN *v.* KUNHUNNI, **4 M L T 437.**

87 *Not signed in accordance with section unenforceable. Municipality—District Municipalities Act (Mad IV. of 1884), S. 45.—*

A contract purporting to be made by a Municipality but not signed by the Chairman or Vice-Chairman and a Councillor as

Contract Act (*Contd.*)

required by S 45 of Act IV. of 1884 is not binding on the Municipality. Radha Krishna Das v. The Municipal Board of Benares (I. L R. 27 All. 592), followed. Where the contract is not so signed, the Municipality cannot be rendered liable on the ground of executed consideration.——RAMASWAMY CHETTY v THE MUNICIPAL COUNCIL, TANJORE. **26 Mad. 360.**

88 Novation of—Contract to pay—Cause of action.

The mere acknowledgment of a debt, signed by the debtor, although it may amount to the so called account stated does not evidence a new contract to pay the debt admitted to be due. JAWAHIR SINGH v. LACHMAN PRASAD **3 O. C. 195**

89 Obligations resembling those created by contract—Interest—Rent fixed by settlement officer—Liability to pay—6 O. C. 346 Col. 338 P. I.

90 Omission of material term in written contract—Onus—Agreement to take lease, on lessor erecting suitable buildings—MOULVI MOHAMMAD IKRAMULL HAQ v. WILKIE **11 C W N 946 (P C).**

91 Power of encumbered estate—Contract by person subsequently declared to be owner of encumbered estate. 7 C. L. J. 578 Col. 60 P. II.

92 Plea that contract is void—Wagering contract—Written agreement 9 C. W. N. 305 —32 C. 437 Col. 26 P. I.

93 *Prima facie*—Court of Wards, power of, to make such commutation—Benefit of estate. 6 C. L. J. 727 Col. 177 P. II.

94 *Partition not to—Illegal contract—Co-sharers—Agreement not to partition not binding upon heirs of parties to it—N.-W. P. Land Revenue Act (XIX of 1873), Section 113—Appeal—Question of proprietary right—Jurisdiction of Civil Court.*

When co-owners of a joint family property enter into an agreement that the property will remain joint for ever, the heirs of the parties to the agreement are not bound by it.

An objection to the validity of such an agreement made in partition proceedings raises a question of proprietary right within the meaning of Section 113, Land Revenue Act, 1873, and an appeal would lie from the order passed thereon. ABU MUHAMMAD KHAN v. KANIZ FIZZA. **A. W N 1905 P 240.**

See also 11 M. L. J. 149 Col. 1859 P. I.

95 Place of payment, when debtor to follow his creditor. 11 O. C. 191 Col. 1056 P. I.

96 *Privity of—Principal and agent—Right of agent to sue.*

Where an agent enters into a contract as such, if he has any interest in the contract, he may sue in his own name, and unless the contract for the breach of which the action is brought is one made by the agent, he has no cause of action because there is no privity between him and the defendant. The mere fact that after a contract has been made between A and B, A gives C authority to act for him for a consideration, does not create any privity between C and B, so as to enable C to sue B for breach of his contract with A, if there is a breach and C wishes to sue B he must do so in the name of A that is in the name of the person whose right has been violated. SUBRAHMANIA PATTAR v. NARAYANAN NAYAR. **24 M., 130.**

97 By proprietor during term of anulment—Anulment of settlement—Effect of—MANSAB ALI v. RAJA KAZIM HUSAIN KHAN. **5 O. C. 30.** *See Jurisdiction and Oudh Revenue Act (XXII of 1876) ss. 124, 125.*

98 Proposal by Municipality to acquire land—Acceptance of proposal—Completed contract. 10 B. L. R. 617 Col. 225 P II.

99 Public policy—Ratification of contract caused by undue influence—Disqualified proprietor. 5 O. C. 256 Col. 267 P. I.

100 Ratification of—Capacity of disqualified proprietor to contract. 25 A. 195 Col. 253 P. I.

101 To resell—Mortgage. 1 L. B. R. 1900 —1902 P. 257 Col. 409 P. I.

102 Resale on rejection on breach of contract—Acceptance by buyer by directing delivery to a third person—30 C. 649 Col. 351 P I.

103 Railway Company—Receipt of goods by one company for carriage over its own and another company's line. 29 A. 228 (F. B.). Col. 333 P. I.

104 Rectification of contract—Sale of land situated outside original jurisdiction of High Court. 7 B. L. R. 319 Col. 271 P. I.

105 *Rescission of contract—Sale—Purchaser—Purchase money—Action for rescission of the contract.*

When by a contract of sale the ownership of the subject matter of the sale has passed to the purchaser, mere default in payment of the purchase money will not justify an action for the rescission of the contract. 21 A. 244 8 C. P. L. R. 1 referred to. SETH LAKHMICHAND v. KISAN. **14 C. P. L. R. 57.**

106 *Running with the land—Pre-emption.*

It was provided in a sale-deed of property that in case the vendee sold the property subsequently he would be bound to give preference to the vendors to purchase the same for a fixed sum and on their refusal to accept the offer he would be at liberty to sell the same to others.

Held, upon a suit against the son of the vendee who has sold the property to third parties, that the contract was not binding on him and that the sale was not invalid. NOBIN CHANDRA SOOT v. NABAB ALI SARKAR. **5 W. N. C., 343.**

107 Sale of goods by sample—Goods not equal to sample. SUMER CHAMD v. ARDESHIR. **A. W. N, 1907 P. 67=4 A L J 245 C., 353 N. 327 P. I.**

Contract Act *(Contd.)*

108 *Sale of property*—Pre-emption—*Contract for the sale of property—Oudh Laws Act (XVIII of 1876), S. 10—Transfer of Property Act (IV of 1882), s 54,—*

Held, that in Oudh, a right of pre-emption is enforceable in the event of a person entering into a contract for the sale of property, in respect of which other persons have a right of pre-emption, and failing to give such other persons the notice required by S. 10 of Act XVIII of 1876; and the enforcement of such right does not depend on the existence of a sale of the property in the mode provided by section 54, Transfer of Property Act. RAM CHARAN *v.* QIAM UDDIN. **2 O. C. 7.**

109 *Sale of encumbered property—Failure to clear encumbrance—Rent—Retention of purchase money—Transfer of Property Act—Applicability of principles of S. 55 (1) (g) and 5 (b).*

Plaintiff entered into a contract with defendant to sell his house to the latter, who was already in possession. The house was encumbered at the time of the contract. Plaintiff received a portion of the purchase money, agreed to clear the encumbrance himself within a certain time and execute a conveyance to the defendant on receipt of the balance at the time of the sale. Defendant continued in possession. Two years later plaintiff, without clearing the encumbrance and executing the sale, sued defendant for rent of the house. There was no contract for payment of rent after the contract for sale. The defendant retained with himself the balance of the purchase money towards the payment of the encumbrance

Held, the plaintiff was not entitled to the rent. The defendant remained in possession as purchaser and owner, and all that remained for the plaintiff to do was to clear the encumbrance and execute the sale to the defendant. Plaintiff having failed to do this, the fault was his own and he could not hold the defendant liable to the rent or damages.

The principles of S. 55 of the Transfer of Property Act, were applicable to the case, though the Act was not in force at the place where the contract was entored into. Plaintiff was bound to clear the encumbrance and the defendant was entitled to retain the purchase money. H. MCDONALD *v.* C. B. WILLS. **4 L. B. R. 224.**

109 a *Sale by Registrar—Misrepresentations—Recision of sale—Compensation.*

The purchaser applied to be discharged from the purchase of a dwelling house sold by the Registrar of the Court on the ground that the vendor was entitled to eight-twelfths of the house, whereas, according to the abstract of title, it was represented to him that he was purchasing the entire sixteen anna share of the house and premises. It was found that the statement in the abstract of title was misleading, though it was not inserted in it fraudulently or intentionally.

Contract Act *(Contd.)*

Held, that under such circumstances it is open to the purchaser to raise objection to the completion of the sale, though he has accepted the title so far as acceptance can be inferred from raising no objection or requisition, and from paying the balance of the purchase money into Court without reserving any right to object to the title, and notwithstanding the rule of Court which declares that upon confirmation of sale and payment of the purchase-money a purchaser is to be deemed to have accepted the title.

Held, also that owing to misrepresentation the matter was not one for compensation, and the Court must either enforce the contract or rescind the sale. It would be impossible to compensate a purchaser in respect of such a material misstatement in the case of a purchase of a dwelling house. In the case of land occupied for agricultural or such like purposes a deficiency in area, if it were not a deficiency of very great extent, would not entitle the purchaser to rescind his contract, but would be a proper subject of compensation; but to say that a purchaser, who believed that he was the purchaser of an entire dwelling house and then discovers that what he is purchasing is not the entire but only an undivided share of such house, is to accept the undivided portion with compensation in respect of the remaining shares under his contract, is a very different matter and is wholly unreasonable and contrary to fairness and justice.

The Court referred the matter to the Registrar to enquire and report whether a title could be made by the vendor to the entire house. Further hearing of the application adjourned until the receipt of the report.—*Kay's Rep., 52 (1153); Kay and Johnson, 286 (1855); 2 Cox, 394 (1794); L. R, 13, Eq. 196 (1872); 12 Ch. Div., 131 (1879), referred to.* UPENDRA NATH MITTER *v.* OBHOY KALI DASSEE. **5 C W N. 1901 P 593.**

110 Specific performance—Contract—Right of plaintiff to sue on agreement entered into between others. 49 P. R. 1905 Col: 251 P. I.

111 Specific performance—Failure of consideration—Futile attempts to rescind agreement. 2 A. L. J. 31 (P. C.) Col: 512 P. I.

112 Specific performance of contract—Award not filed in Court within six months, enforcement of. 7 O. C. 369 Col: 1715 P. I.

113 Specific performance of contract—Contract made in course of partition proceedings. 5 O. C. 140 Col: 1889 P. I.

114 Separate suits for separate breaches of the same contract are maintainable. 8. W. N. 1908 P. 199 Col: 1410 P. I.

115 Suit for rent by malguzar—Purchaser from tenant not liable in a suit for a simple money decree. 3 N. L. R 111 Col: 371 P. I.

116 Ship owners liability—14 Bur. L. R, 77.—*See Contract No. 72 supra.*

Contract Act (Contd.)

117 *Title—Hindu Law—Contracts entered into by expectant heirs.*
Persons claiming in their own right as heirs when the succession opens out are not bound by a contract made by persons who were expectant heirs with a *spes successionis*, BAHADUR SINGH *v.* MOHAR SINGH. **6 C. W. N. 169=29 I. A. 1=24 A. 94 (P. C.).**

118 Tender to supply gram to Commissariat Department 79 P. R. 1904=1 P. R. 1905. *See Contract No. 18 supra.*

119 Terms of the contract—Question as to who were the parties to a contract—Oral evidence. 18 M. L. J. 1=31 M. 45 Col. 201 P. I.

120 *Termination of—Regulation VIII of 1819 (Putni) S. 13 and 14 (4)—Under-tenure-holder making deposit—Suit for possession—Statutory lien—Contract revived—Estoppel—Silence.*

Per Stephen, J. A special suit to declare the lien, created by S. 13 Cl. 4 of the Putni Regulation, terminated by satisfaction of the debt is unnecessary, when the plea of suit is set up as a reply to a claim for rent and the defendant uses it only as a basis for resisting that claim.

The creation of a *gribi* estate is a formal act both according to the language of Reg. VIII of 1819, S. 14, and according to universal practice and cannot be inferred from the conduct of parties.

When a contract has terminated, it cannot be revived unless by the incorporation of its terms in a new one.

Per Mookerjee, J. The under-tenure-holder who makes the deposit under S. 13, Cl. 4 of Putni Regulation is entitled to remain in possession only so long as the full amount advanced, with interest, is not realized from the usufruct of the tenure. If, after his death has been satisfied, he does continue in occupation, he does so at his peril and renders himself liable to account for the profits received in excess. His position is analogous to that of a mortgagee in possession who stays on the premises after his dues have been satisfied.

The lien is extinguished by satisfaction of the debt from the profits of the tenure. No order of the Collector is necessary in this behalf, nor his recourse to a regular suit essential to alter the legal position of the parties. The moment the lien is extinguished, the defaulter becomes entitled to recover possession.

S. 13, Cl, 4 of the Putni Regulation makes it a condition precedent to the creation of the lien that the amount lodged should be advanced from private funds and should be paid by the tenure-holder after be had already paid the whole of the rent due from himself.

The lien in question is (a) creation of the Statute ; and statutory lines cannot be created by consent; the provision of the law must be strictly complied with before reliance can be placed upon the lien.

A more treatment of the under-tenure-holder by the land-lord as a usufructuary encumbrancer is not sufficient to create the statutory lien.

A statement in the plaint, unchallenged and made by the putnidar after his interest has been transferred is in no way binding upon the transferee. 1 C. L. J. 23=32 C. 357 R.

When silence is of such a character and under such circumstances that it would be a fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel. JAKHOMULL MEHARA *v.* SARODA PROSAD DEY. **7 C. L. J. 604.**

121 *Validity of—Canals and Public Ferries Act (II of 1890, Madras), S. 16—Transfer of lease by renter.*

In the absence of a rule under S. 16, Act II of 1890, Madras, a sub-lease of a ferry by the renter is not invalid as between the renter and his assignee. It may be invalid against Government where the terms of the lease granted by Government prohibit the transfer of the lease by the renter. ABDULLA *v.* MAMMOD. **26 M. 156.**

122 Vendor and purchaser—Sale of jote for arrears of rent—Liability of vendor. 7 C. W. N. 905 Col. 235 P. II.

123 Void contract—Rent—Enhancement—Suit for arrears of rent. 1 O. C. 78 Col. 287 P. I.

124 Wagering—Advance on risk (yogyam) of ship—Marine Insurance. 25 M. 561 Col. 271 P. I.

Contract Act IX of 1872.

See Act IX of 1872 (Contract Act) See Cols, 248 to 382. P. I.

1 *Ss. 2 (c), 37, 38 and 67—Payment of interest—Creditor dying with will without executors—Interest payable as damages—"Promise" in S. 38—No legal representative in existence—Tender under S. 37—Promisee in S. 67—Under S. 67, debtor entitled to reasonable facilities=Appointment of legal representative within reasonable time—Onus on debtor to prove readiness—Notice by debtor of readiness—Provisional appointment of administrator* pendente lite.—

At Common Law, when interest is payable by the terms of the contract, it runs ordinarily up to date of payment or legal tender 42 Ch. D 610 1 E Q Ca Ab 319 2 EQ Ca Ab 643 referred to.

Where interest is payable, not under the terms of a contract, but by way of damages, the Courts will deprive the representative of a deceased creditor of interest, when he has omitted to take out administration and thereby prevented the debtor from paying 15 Ch D 169 referred to.

When interest is payable under a contract up to the date of payment of the

Contract Act *(Contd.)*

principal payment of interest, being in performance of the contract, must be governed by the provisions of the Contract Act relating to the performance of contracts.

The word "promisee" in S. 38, Contract Act, includes the representative of a deceased promisee.

Where the promisee died, leaving a will but without naming executors, unless and until such executor is appointed, there can be no representative of the deceased to whom performance can be made.

When a debtor requires a representative of his deceased creditor to come and receive payment, and further makes the payment conditional on his producing a succession certificate, the tender so made is not proper, as it does not fulfil the conditions mentioned in S. 38 of the Contract Act 28 C. 567 1 M H C 124 16 B 141 (150) 26 B 643 referred to.

By S. 2 (c) of the Contract Act, the word "promisee" means the person accepting the proposal. only unless a contray intention appears from the context; and so in S. 67 of the Act the word "promisee" must include a person interesting the estate of a creditor who has died leaving a will but without executors, as, otherwise between the date of the death of the deceased and the appointment of a legal representative, there will be no promisee at all within the meaning of the section.

Under S. 67 of the Contract Act a debtor has to show that his non-performance (failure to pay) has been caused by the absence of reasonable facilities for paying and to successfully do this, he has to prove that he had the money ready, and was only prevented from paying it by the absence of reasonable facilities.

Under S. 67 of the Act, a debtor to the estate of a deceased creditor is, like any other promisor, entitled to be afforded reasonable facilities for the preformance of his contract; and he cannot be said to be afforded reasonable facilities, if no one is provided, "within a reasonable time," to whom payment may be made with safety: and such "reasonable time" must be calculated from the time when the debtor intimates his desire to pay, rather than from the time of the death of the deceased creditor. ADMINISTRATOR-GENERAL OF MADRAS *v.* JAGHIRDHAR OF ARNI, **4 M L T 835.**

See for other facts Col: 1513 P I.

1 a *S. 7—Variation in bought notes, effect of—Variation in acceptance—Bought Notes, and Sold Notes.*

Where the defendant offered to supply cotton which would meet with the plaintiff's approval.—

Held, that the addition of the letters 'G. S. R.' in the Bought Notes which were a symbol denoting a particular standard of quality was not a variation of the proposal, *i.e.*, an introduction of a new term, which vitiated the acceptance 1 Dig and S. 897 and L. R. 41 Ch. D. 295, referred to.

An acceptance must be absolute and unqualified. If there is a variation in the acceptance, the acceptance is not an acceptance but a counter-proposal, and there is no contract until, this counter-proposal is, in its turn, accepted by the original proposer 24 B. 510, R.

The Sold Notes are the proposals to sell and, on their being given by the broker to the intended buyer, his signing the Bought Notes signifies the acceptance of the proposals. THE FIRM OF BHERUMAL CHANDIRAM *v.* MESSRS. RALLI BROTHERS AGENCY, **2 S L R 7.**

2 *S. 11—Minor—Indian Evidence Act, S. 115—Estoppel against a minor—Misrepresentation by a minor—Liability.*

Per Banerji, J:—When a plaintiff made false and fraudulent representations as to his age with a view to induce the defendant at first to lend him and afterwards to purchase his property, *held*, that, in a suit to recover the property upon the ground that the contract was by reason of his minority void, the plaintiff was liable in equity to make restitution of the benefit he had obtained 30 C. 539 *distinguished.* In a case like this the liability attaches to a minor, not on the ground of estoppel, but on the ground that an infant shall not take advantage of his own fraud 16 L. J. Ch. 205 *followed.*

Per Richards, J:—Even assuming that an infant is liable for fraudulent misrepresentation in an action for deceit, and that the fraud of an infant may be set up as a defence when the infant seeks to set aside a transaction induced by his fraud, a fair test, in a case when the infant sues to recover property sold by him, for awarding restitution of the money to the vendee, is to consider whether the defendant vendee on the evidence could succeed if he were suing as plaintiff in a suit for damages for fraudulent misrepresentation. The vendees in the present case, not having proved that they were induced to enter into the contract of sale by the fraudulent misrepresentation of the minor plaintiff, were not entitled to restitution of money 30 C. 539 Ch. I and (1903) A. C. 6 *referred to.*

Obiter:—Per Banerji, J:—"I do not deem it necessary to express any opinion on the point although it seems to me to be difficult to hold that in no case would the doctrine of estoppel be applicable to infants."

Per Richards, J:—"In my opinion the ordinary law as to estoppel does not apply to infants." JAGAR NATH SINGH *v.* LALTA PRASAD. **5 A. L. J. 674.**

3 *S. 12, 30—Lunatic—Relief—Specific R. Act Ss. 38, 41.*

If a party to a contract seeks to enforce a contract which is void under s. 12 of the Contract Act on account of the ab-

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sence of capacity to contracting party, it is not permissible to give equitable relief. However statutory relief can be given under Ss. 38 and 41 of the Specific Relief Act when rescission of a contract is asked for on this ground. MONOSSEH *v.* SHAPURJI. **10 B. L. R. 1004**

4 *S. 16—Under influence—Relation between parties which placed one in a subordinate position essential.*

Held, that, in order to make out a case for undue influence under s. 16 of the Indian Contract Act, there must be certain relations between the parties anterior to the transaction in question which placed one party in a position to dominate the will of the other. 8 C L R 419, 22 B. 17, 25 B. 10, 36 P. R. 1901, 10 A. 535 referred to. DWARKA SINGH *v.* RAGHUBIR PRASAD. **11 O. C. 295.**

5 *S. 16—Good faith—Undue influence.*

Section 16 of the Contract Act only presumes undue influence by a person in a position to dominate the will of another, when the contract appears on the face of it to be unconscionable.

To prove "good faith" of a transaction in which one party stands in a fiduciary relationship to the other, it is certainly not necessary to prove that all the accounts on which the contract is based are correct.—SHAMULDHONE *v.* SRIMUTTY. **12 C. W. N., 1102.**

6 *Sec. 16—Undue influence—Urgent need of money—Loan borrowed by a person in urgent need of money—Promise to pay a time-barred debt—Unfair and unconscionable bargains—Fraud—Co-ercion—Equity.*

The defendant, a karkun in the Government service, being heavily indebted and being very much harrased by his creditors, applied to the plaintiff for a loan on a mortgage. The plaintiff agreed to lend provided the defendant executed a *khata* for the payment of Rs. 307-4-0, originally due by the latter's father but which in 1894 had been held to be time-barred in a suit brought by the plaintiff, and also for the payment of Rs. 25, the costs of that suit. The defendant accordingly on the 16th September 1895 passed a *khata* for Rs. 332-4-0, for the amount due under which the defendant finally passed a promissory note for Rs. 600 on the 27 August 1901. Upon this promissory note the present suit was brought. The Subordinate Judge held that the defendant received from the plaintiff only Rs. 28 on the 16th September 1895 of which Rs. 10 had been repaid; and passed a decree for Rs. 36 (*viz.*, Rs. 18, the amount of principal, and Rs. 18 as interest). On appeal, the District Judge varied the decree by allowing plaintiff's claim to the further extent of Rs. 307-4-0; and disallowed the rest of the claim on the ground that it was vitiated by undue influence which the plaintiff exercised over the defendant. On appeal;—

Held, that the plaintiff's claim ought to be allowed in full. If, according to law a promise to pay a debt barred under the Statute of Limitations is valid and is supported on the principle that in so promising the debtor is doing what every honest man, morally speaking, ought to do and would do, the same principle ought equally to apply to a further promise to pay the said debt with interest, because interest is only accessory to the principal, and is paid to the creditor because the latter has been deprived of the use of his money and the debtor has had the benefit of it.

Under section 16, clause 1, of the Indian Contract Act (IX of 1872), when two persons enter into a contract, first, there must be subsisting between them some relation of the kind described in the section and secondly, the dominating position arising out of that relation must have been set by the party holding that position to secure an *unfair* advantage over the other party.

When a man who is in urgent need of money on account of his poverty and pecuniary difficulties asks for a loan from another, that other is in one sense in a position to dominate the will of the former by proposing his own terms and getting the borrower to agree to them. The borrower's necessity is in such cases the measure of the terms agreed to. That is a feature of every contract of money-lending, where the borrower is a man without credit and the lender is exposing his money to considerable risk. But that is not the vague kind of relation and domination contemplated by the plain terms of clause 1 of section 16 of the Indian Contract Act (IX of 1872).

There are well-known relations such as those of guradian and ward, father and son, patient and medical adviser, solicitor and client, trustee and *cestue que trust* and the like which plainly fall within clause 1 of the section. Where no such specific relations exist and the parties are at arm's length, being strangers, undue influence may be exerted, but its existence must be proved by evidence; and in such cases, the nature of the benefit, or the age, capacity, or health of the party on whom the undue influence is alleged to have been exerted are of great importance. In short, the test is, confidence reposed by one party and betrayed by the other, which mean that there must be an element of fraud or coercion, under either of which acts constituting undue influence must range themselves.

The expression "unfair advantage" in clause 1 of section 16 of the Indian Contract Act (IX of 1872) is used as meaning an advantage obtained by unrighteous means.

A Court of Equity will not set aside a con-

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tract, merely because it flows from moral, not legal, obligations, unless it was proved that the defendant was forced, tricked or misled into it by the plaintiff by means of fraud, using that word not merely in the restricted sense of actual deceit, but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions, and showing that the defendant having been victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing. GANESH *v.* VISHNU. **9 B. L. R. 1164 = 32 B. 37.**

7 *S. 16—Undue influence—Mortgage executed while under arrest in execution—Punjab Courts Act, XVIII of 1884, S. 70 (1), (a) & (b).*

B executed a mortgage deed, the consideration for the deed being a previous money decree, and where it was found that B was arrested and kept in custody and was released on or just before executing the deed, *held*, that the deed was not void on the ground of undue influence, merely because the deed was executed, while B the defendant was under arrest in execution of the previous money decree 4 A. 352 Distinguished.

An appeal is not competent in a suit for possession, but the case can be taken up by the Chief Court under S. 70 (1), (*a*) & (*b*) of the Punjab Courts Act 24 P. R. 1903 referred to. MUL CHAND *v.* IMAM BAKSH, **101 P. W. R. 1908 = 160 P. L. R. 1908 = 51 P. R. 1908.**

8 *S. 16—Undue influence—Unconscionable bargain.*

Where a professional money-lender sued a person in difficulties for money, on a pro-note, the consideration being a much smaller sum than that mentioned in the pro-note, it was *held* that, at the time of executing the note, defendant was clearly under the plaintiff's thumb, and a hard, unconscionable and exorbitant bargain was driven with him taking advantage of his necessities, and that the plaintiff could recover only the sum actually advanced by him, but with a high rate of interest (*e. g.* 18 p. c.), as he ran considerable risk when he lent out the money. 11 A. 57 ; 11 A. 118 ; 11 A. 128 ; 15 ch. D. 705 ; 11 Eq. 789. RAMDAS *v.* NETTO. **115 P. R. 1908.**

9 *S. 16, 19A — Unconscionable bargain—Parties not on an equal footing—Defendant not aware of the nature of the transaction—Undue influence—Contract voidable.*

To render a contract voidable on the ground of undue influence there must be evidence of undue influence as required by S. 16 of the Indian Contract Act. A high rate of interest which would induce a Court of Equity to give relief against a bargain as being on that account hard and unconscionable is not by itself sufficient evidence of undue influence. There must be additional circumstances and when there is evidence of such additional circumstances they should be considered in the light of justice and equity. When the parties to the transaction are not on an equal footing, when it appears that the borrower was not aware of the real nature of the bargain, so that he put his signature to a document which in fact imposed very different terms to those appearing on the face of it, when the actual rate of interest is many times higher than what appears on the document, when the borrower when pressed for payment for what appears due on such a document has to renew on still more exorbitant terms, all these are additional circumstances sufficient to make out a *prima facie* case of undue influence so as to throw the onus on the lenders to disprove it. CHATRING MOOLCHAND *v.* LIEUT. R. H. WHITCHURCH, **32 B. 208.**

10 *S. 23—Contract to pay a father giving his daughter in marriage—Public policy.*

A contract to make a payment to a father, in considertaion of his giving his daughter in marriage, is immoral and opposed to public policy within the meaning of this section 13 M 83, 17 M 9, 22 B 658 cons. An inquiry in each case as to whether, having regard to the terms of the particular contract, the contract is or is not contrary to public policy, would be objectionable. A question of this sort should be decided on general principles. KALAYAGUNTA VENKATA KRISTNAYYA *v.* KALAYAGUNTA LAKSHMI NARAYANA, **4 M L T 1 = 18 M L T 403 (F B).**

11 *S. 23—Immoral or opposed to public policy—Lease of house to a prostitute.*

Held, that knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy : and a landlord who knowingly so lets quarters to a prostitute to carry on prostitution cannot recover the rent in a Court of law. CHOGA LAL *v.* PIYARI, **A W N (1908) 285.**

12 *S. 23, 24, 26—Validity of—Agreement by a Hindu not to marry a second wife during the continuance of the first wife.*

An agreement by a Hindu bridegroom, not to marry a second wife during the continuance of his marriage with his first wife, is not *prima facie* repugnant to Hindu law or void, either as a restraint on marriage as immoral or opposed to public policy. GAMA *v.* LAHNOO. **4 N L R 86.**

13 S. 23 and 151—Liability for negligence and damage to goods—Bill of lading—Provision as to exemption from liability, effect of. 4 M L T 110 (F B) Col 182 P II.

14 *S. 24—Contract with public servant—Conflict with public duties—Public Policy—Damages.*

If a person enters into a contract with a public servant, which, he knows, casts upon the public servant duties which may conflict with the duties he owes to the public, such a conract is void.

A defendant with special skill, when employed for reward by the plaintiff, is bound to exercise his skill in the execution of the duties entrusted to him and ought

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not to rely on the statement of others. THE SITARAMPUR COAL CO., LD. *v.* T. H. COLLEY, **13 C W N 59.**

15 S. 24—*See 4 N L R 86 No 12 supra.*

16 *S.* 25 (3)—Suit on balance of account —Acknowledgment—Fresh promise to pay barred debt 102 P R 1908 Col 1780 P I.

Note 102 P. R. 908 read for 102 P. L. R. 1908.

17 S. 26—*See 4 N L R 86 No 12 supra.*

18 *S. 30—Wagering Contract containing Arbitration clause—Enforcement of—Act III of 1865—Suit for injunction—Court fees—Several agreements—One injunction sought.*

Held, (1) an arbitration clause contained in the agreement, which purports to be a genuine forward contract, but which really is by way of wager, is void and unenforceable.

(2) It is nevertheless open to the parties to carry it out, and if once an award is passed thereon the grounds on which the Court will set aside an award are quite different from those on which it will grant leave to revoke a submission.

(3) Before an award based on such a submissiom is passed, the plaintiff has a right to ask for an injunction restraining arbitration proceedings and the Court in view of the terms of S. 30, Indian Contract Act, and Act III of 1865, grant relief to the plaintiff, though he be entitled to no sympathy. PARSOTUM *v.* RANCHOD, **1 S L R 173.**

19 *Wagering contract—Badni—Principal & Agent—Their respective rights and liabilities in wagering contracts—Cash payment—Enforceable liability defined.*

Held, that (1) a cash payment or incuring an enforceable liability, which is equivalent to cash payment, by an agent on account of a single badni transaction entered into on behalf of a principal is legally recoverable from the principal. An "enforceable liability" means a liability which the agent cannot resist or repudiate at Law.

Held, also, that mutual adjustment of account with the party in the following cases also amounts to a cash payment.

(1) If the agent has already dealings with the third party and is owed money by him on accounts with which the principal has no concern, and the sum lost, being less than the sum due to the agent, is settled by a credit in agent's books and a debit in the third party's books.

(2) In a similar case if the debt owed to the agent is less than the sum lost by him on account of this principal and the matter is settled by a debit and credit as aforesaid, *plus* a payment in cash of balance due by the agent.

(3) If in such a case the sum already owed to the agent by the third party equal to the sum lost as aforesaid to the third party and the agent authorized that party to set off one against the other in his books and treat the account as squared.

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Held, further, that if an agent dealing *badni* for a principal loses a sum of money on the transaction and, having no previous account with the third party authorizes him to enter up in his books a debit against him (the agent) he cannot recover the amount thus debited from his principal without 1st paying it to the third party. 74 P. R. 1908 overruled ; 18 P. R. 1895; 46 P. R. 1901 ; 23 A. 165 ; 8 Bom. H. C. R. 131, 29 C. 461, L. R. 4 Q. B. D. 685 ; 64 L. J. P. C. 62 ; L. R. 10 Q. B. D. 105 ; L. R. 13 Q. B. D. 779 R. BEHARI LAL *v.* PARBHU LAL. **79 P. R. 1908=130 P. W. R. 1908 (F. B).**

20 *S. 30—See 10. B. L. R. 1004, No 3 supra.*

21 *S. 37, 38 4 M. L. T. 335 No. 1 supra.*

22 S. 54 Suit on Hundi—Decree for money due on different consideration to that stated in hundi 3 M. L. T. 405. *See consideration No 44.*

23 *S. 56—A—Sale not completed—Return of deposit—Rescission.*

S. 56 of the Contract Act provides for a case in which the performance of the contract becomes impossible otherwise than by some act of the promisor. The contract does not become void, if the promisor does something which renders the performance of the contract impossible.

Where the parties to a contract agreed to sell and purchase certain property, but did not get the sale completed in ten months after the agreement, and allowed the property to be auctioned, *held*, that the reasonable interference from their conduct was that the parties had rescinded the contract. GANGA DEI *v.* ASA RAM. **4 A. L. J. 778 =30 M. L. T. 177=A W. N. 1908 P. 5.**

24 *Ss. 59, 60—Setting aside sale—Appropriation of payments by Collector. 35 C. 636 Col. 31 P. II.*

25 *S. 67—4 M. L. T. 335 No. 1 supra.*

26 *S. 69—' Purchaser's liability for arrears of Government Revenue—Contribution between persons equally liable for payment—Land Revenue Act (III of 1901), S. 142.*

Held, that the object of the second part of the first clause of S. 142 of Act III of 1901 is not to transfer the liability for the revenue from one person to another, but to make the person succeeding to the property liable in addition to those already liable.

Held further, that, as between a vendee and the vendor, in the absence of a contract to the contrary, the responsibility for payment of the arrears of revenue, rests on the latter who enjoyed the property during the time for which the arrears were payable.

Held also, that S. 69 of the Contract Act applies to cases in which both plaintiff and defendant were liable for a payment which has been made by the plaintiff alone. 1 C. W. N. 458, 32 C. 643, 6 C. W. N. 794 distinguished and A. W. N. 1901 P. 37 followed. JAGOLE *v.* RAZAWAND SINGH. **11 O. C. 279 (B)**

27 Ss. 69, 70—A. W. N. 1908 P. 58—5 A. 163—30 A. 167 Col. 326 P. I.

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28 *S. 69, 70—Money paid for income-tax by the person assessed and on whom demand is made cannot under these sections be recovered from a person who is alleged to be party really liable to pay.*

When the income tax authorities assess a person in respect of certain income alleged to be derived by him and recover the tax so assessed from him such person cannot, under section 69 or section 70 of the Contract Act recover the amount so paid from another person on the ground that such other was in actual receipt of the income S. 69 cannot apply, as the latter person, not being assessed was not legally bound to pay the tax and S. 70 cannot apply as the person paying the tax did so on his own account and not on behalf of another. RAGHAVAN *v.* ALAMELU AMMAL. **31 M. 35.**

29 *S. 73—Vendor and purchaser—Contract to sell immoveable property—Damages for such contract.*

The rule in Flareau *v.* Thornhill (1776) 2 W. Bl. 1378 is not law in this country. Section 73 of the Contract Act imposes no exeception on the ordinary law as to damages, whatever the subject-matter of the contract. In cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. Pitamber Sundarji *v.* Cassibai 11 Bom. 272, distinguished. RANCHHOD *v.* MANMOHANDAS. **32 B. 165.**

30 *Ss. 73, 107—Damage for breach—Mistake unilateral does not vitiate the contract.*

Where both parties to a contract are agreed as to the sale and purchase of a particular parcel of goods, the mistake of the defendant as to their quality does not invalidate the contract. L. R. 6 Q. B. 597, *F*; 4 Bing. 722, 15 B. L. R. 276 (292), 19 A. 535, 6 C. 67, 29 I. A. 202—4 Bom. L. R. 793, 30 C. 548—5 Bom. L. R. 621 and 28 C. 577, 578, R.

The Contract Act, 1872, does not sanction or permit an action for breach of contract of sale, save where specific damage is proved to have resulted from the breach. Section 73 of the Act not only confines the right of relief to the party who suffers, but provides how his loss is to be measured, what it is to include and what to exclude and what circumstances the Court must take into account in estimating the loss.

Hence, in cases of breach of contract, it is not permissible to the aggrieved party to file a suit to recover the price of the goods in dispute. Under the Act, the aggrieved party must sell the refused goods and then seek to recover the loss if any accruing on such sale. P. R. AND Co. *v.* BHAGWANDAS CHATURBHUJ, **10 B L R 1113.**

Contract Act (*Contd.*)

31 *S. 74—Higher rate of interest.*

Where the stipulation is retrospective, and the increased rate runs from the date of the bond, and not merely from the date of default, it is always to be considered as a penalty within the meaning of S. 74.

An agreement to pay enhanced rate of interest for the future *may be* a penalty under S. 74 of the Contract Act as amended in 1899 whatever may have been the law before; and an agreement to pay compound interest combined with one for enhanced rate of interest, being in excess of and outside the ordinary and usual stipulation, should be considered to involve a penalty. But compound interest is in itself a perfectly legal provisions and not a penalty.

An agreement to pay a higher rate of interest with a proviso for reduced rate on punctual payment is not the same thing as an agreement to pay the higher rate on default, and if the debtor does not earn the reduction by fulfilment of the condition, no question of penalty arises when the creditor claims the higher rate, 34 C. 150; 14 C. P. L. R. 53, *F.* 1 N. L. R. 9, *F.* and *qualified*; and Wallis *v.* Smith, 21 Ch. D. 242, R. JAGANNATH PRASHAD *v.* BALICHAND, **4 N L R 187.**

32 *S. 74—Interest at enhanced rate on default, when penal—Penalty.*

Held, that an agreement for enhanced interest, simple or compound, payable prospectively from date of default may or may not be a penalty according to the circumstances of each case 29 M. 491 15 A. 232, 30 C. 15 referred to. S C. No. 296 distinguished.

Held, further, that a covenant for interest at an enhanced rate to take effect retrospectively from date of the bond is necessarily a penalty 12 M. 161, 2 C. W. N. 234, 2 C. W. N. 333 referred to.

Held, also that where no unfair advantage has been taken, a debtor is not entitled to relief merely because in case of default the terms accepted by him are markedly less favourable. 10 M. 203 referred to. MUSAMMAT MUNNA *v.* RAM PRASAD. **11 O C 307.**

33 S. 107—10 B. L. R. 1113 No. 30 *supra.*

34 *129—Probate and Administration Act V of 1881 S. 78—Continuing guarantee.*

When a person becomes surety that an administrator will duly get in and administer the estate of a deceased person, this is not a continuing guarantee within the meaning of Section 129 of the Indian Contract Act, 1872. Such a surety cannot of his own free will, withdraw from his suretyship. 28 M. 161 followed, 29 C. 68 diss. KANDHYA LAL *v.* MANKI. **A. W. N. (1908) 288.**

35 S. 151—4 M. L. T. 110 No. 13 *supra.*

36 *Ss. 151, 152 and 154—Bailment—Giving for repairs driving beam of a sewing machine to a smith—Care—Burden of proof.*

Plaintiff entrusted a driving beam of

Contract Act (*Contd*)

his sewing machine to defendant who was a copper-smith, for repair. He wanted a broken tip soldered with copper. Defendant undertook to do the repair. He empolyed another copper-smith to do the work under his instructions. In the course of the soldering, excessive heat was applied, and the other tip of the driving beam was melted rendering the driving beam useless.

Held, in a suit for damages, that S. 151 of the Contract Act governed the case, and that the section required from the defendant the care of a skilled copper-smith.

Held, also, that, if a man undertakes, whether for reward or not, to do something requiring special skill, he may be fairly called on, if things go wrong, to prove his competence. Sm. L. C. I. 167, U B R (1897-1901), II, 337, 3 H. and C. 596 referred to. MOHAMAD ALI *v.* NGA PE. **U B R (1908) Contract P 11.**

37 *S. 78—Pawnor and pawnee—Pownor not owner but having a right to possession—Suit by owner for declaration of his title.*

A person who had obtained possession of certain moveable property belonging to a minor in the capacity of a trustee, and who had been allowed to retain possession of such property after the minor came of age, pawned some of it to persons who were found to have acted, negligently perhaps, but honestly and in good faith.

Held, that the pledge was valid, but the owner was entitled to a declaration of his right to redeem the articles so pawned. SUNDAR DEO *v.* BHAGWAN DAS **A W N 1908 P 57=30 A 165.**

38 *S. 191, 192—Maintainability of—Receiver appointing tehsildar—Agent and sub-agent.*

A suit for accounts is not maintainable by the owner against a *tehsildar*, who was appointed by a receiver to his estate.

The *tehsildar* (defendant) is a sub agent under the receiver, who may be regarded as the agent of the principal (plaintiff), and, as sub-agent, he is liable to render accounts to the receiver, and not to the principal. JOTINDRA NARAIN ACHARJA CHOWDHURY *v.* RAJENDRA KISHORE DAS. **8 C. L. J. 114.**

39 *S. 196—Champerty Pleaded by a third party—Gambling in litigation—Public policy—Purchase from limited owner—Onus on purchaser, extent of—Ratification—Legal necessity—Recovery by reversioner—Mesne profits.*

In India an agreement cannot be avoided on the ground of champerty 4 I. A. 23=2 C. 233, 20 I. A. 112, 9 C. W. N. 477=32 I. A. 113=27 A. 271, followed.

The agreement in this case provided that out of the purchase money which was fixed at Rs. 52,600, Rs. 600 only was to be paid down and the balance when the property should be recovered.

Held, that the agreement was generally of a champertous character but was not void on that account, nor was it opposed to public policy and void as such by reason of the stipulation relating to the payment of consideration.

An assignment cannot be questioned as unfair and unconscionable by a person who was not a party to the assignment.

One who claims title under a conveyance from a Hindu woman with the usual limited interest which a Hindu woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving, not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making and also that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

Ratification in the proper sense of the term, as used with reference to the Law of Agency, is applicable only to acts done on behalf of the ratifier; and this rule is recognised in S. 196 of the Indian Contract Act.

Where the defendant held possession of properties under deeds of sale from a limited owner, which were found to have been executed without legal necessity, the plaintiff's claim for mesne profits was allowed. RAJA RAI BHAGWAN DAYAL SINGH *v.* DEBI DAYAL SAHU. **12 C. W. N. 393 (P. C.).**

40 *S. 231—Agent—Undisclosed principal—"Discloses himself"—Strict construction.*

S. 231 of the Contract Act (IX of 1872) deals with the rights (*a*) of the principal and (*b*) of the third party in cases where the contract is entered into by the agent without disclosing the principal. The first clause refers to the general case and the rule is that the third party shall have as against the undisclosed principal the same rights which he would have against the agent if the agent had been the principal. The second clause deals with the particular case where the principal discloses himself before the contract is completed. The second clause should be read as governed by the first clause.

The words "discloses himself" in section 231 of the Contract Act (IX of 1872) should be construed strictly.

Per Batchelor, J. :—It has been warmly urged that the third party's right to repudiate, which is allowed if the principal himself makes the disclosure, should not be refused merely because the disclosure is made by some other person or the information reaches him from some other source. But the argument to my mind is not convincing. For whatever may be the subjective belief or conviction of the third party, it is conceivable that he should have no right to avoid the contract unless the principal, hitherto undisclosed, comes out into the open and claims the benefit of the contract for himself, and there would be no hardship

Contract Act (*Contd.*)

in requiring the third party to challenge the alleged principal as to whether he makes this claim or not. LAKSHMANDAS *v* ANNA. **6 B L R 731=32 Bom 356.**

41 Sec. 245—*Liability of retiring partner,*

A partner who had retired before a certain transaction with the firm to which he had belonged takes place, cannot be held responsible unless it can be shown that the transaction who was with either a previous customer or one who was aware that the retired partner had been a partner. When a person enters into transaction with a firm without even knowing that a certain person who has already retired ever had been a partner, such person is clearly not liable whether he has notice of the retirement or not, unless he has actually held himself not to be a partner, a position which gives rise to a different class of consideration. If a person is a member of a firm, and known to be such, persons dealing with the firm may be influenced by his credit, and unless he takes proper steps to make his retirement clear, he will be held responsible to them who knew of his partnership and might have been influenced by the firm.

But it is definite personal knowledge which is required, not the vague impression in that, because a firm once belonged to a joint Hindu family all members of that family which may exist, although not personally known to the customer to exist, will for ever be liable unless they take definite steps to disabuse him of his vague impression. It cannot be held as a principal that when a person has dealings with a man who was once a member of a joint family and competent to pledge the resources of that family, such person can hold the whole of the members who once constituted a joint Hindu family responsible unless they have taken the precaution publicly to proclaim their partition. If it be shown that the father of a minor son had notice of a fact, such minor cannot say that he had no notice. MIAN AMARSINGH *v.* SETH CHAND MAL, **102 P. W. R. 1908=137 P. L. R. 1908**

42 S. 249 and 264—Retirement of dorment partner—Notice of dissolution of partnership. 75 P R 1908. *See Construction of Words No. 81.*

43 *S. 251—Partner, power of single, to mortgage partnership property—A single partner by objecting cannot vary articles of partnership—Transfer of Property Act, S. 53—Transfer cannot be impeached by any but the creditors :*

Where one of several partners has, under arrangement with the other partners, the sole management of the business, he has the power of borrowing as incidental to the power to trade, and the power to pledge partnership assets as incidental to the power of borrowing : *Obiter.*—The English doctrine that a single partner cannot mortgage the immoveable property of the firm does not apply in India. It is not competent to a single partner to take objection to the exercise of any power conferred by the articles of partnership. Where a partner has power to borrow or mortgage for the purpose of trade, he has power to give a mortgage for an antecedent debt. An objection that a transfer of property was made with intent to defeat or delay creditors must be taken by the creditors and it is not open to others to object to the transfer on that ground. ASAM KANI RAVUTTAR *v.* SOMASUNDARAM CHETTIAR **4 M L T 66=31 M 206.**

44 *S. 253—Provision in parnership deed regarding succession of partner's nephew on partner's death—Partnership terminable at will, and not for a term.*

Where a deed of partnership provides that, on the death of one of the partners, his nephew should act in his stead.

Held, that the provision did not constitute the partnership as one for a term intended to run during the life-time of the partner, but only a parnership dissoluble at will. 13 Ch. D. 863 and 7 Ir. 411 R. SOURI AYYANGAR *v.* SRINIVASA AYYANGAR, **4 M L T 478.**

45 *S. 264—See 75 P. R. 1908 See Contract No. 42 supra.*

Contribution.

1 Among co-judgment—-Debtors—-One paying whole of mortgage decree—Right of purchaser—26 B. 379 Col. 641 P. I.

2 Apportionment of mortgage money. Parties—Contribution against purchasers—5 C. W. N. 423 Col, 641 P. I.

3 *Arrears of rent—Suit for contribution severally and jointly—Joint promisers, liability —Cause of action—Liability of co-sharer to contribute even if not sued by superior—Costs, contribution.*

The appellant and the respondent along with other persons were co-sharers in an under-proprietary tenure. The superior proprietor sued the respondent and the other co-sharers for arrears, but did not implead the appellant. The suit was decreed ; the respondent paid the whole decretal amount and now brought the present suit for contribution against the appellant for the share of rent due from her. The appellant contended that, as she was not a party to the former suit, she was not bound by the decree, and that she could not be held liable to the respondent, because, at the time when the respondent paid the sum decreed, she had no interest in the payment, inasmuch as at that time she had no interest in the holding, and the superior proprietor's claim for rent was barred by limitation as against her. The appellant also urged that she was not liable for any part of the costs incurred by the respondent in the former suit.

Held, that a person, liable with others jointly and severally for rent, does not lose

Contribution (*Contd.*)

his right of contribution against the others, by failing to ask the Court to make them parties to the suit, inasmuch as the liability to contribute does not depend upon the decree, but on the fact that he and the co-sharers were in the position of joint promisors *qua* the superior proprietor; and where one of such promisors has to discharge the whole debt, or a part greater than his share, he is entitled to recover from each of the others a contribution or proportion of the excess beyond his own share 9 C. B. 493 referred to.

Held, further, that, as the respondent could not have avoided payment of the whole rent, at the time when he was sued and when he had to pay it, a cause of action for contribution accrued on the payment.

Held, also, that there could be no right to contribution in respect of costs 6 N. W. P A. C. R. 192 followed. MUSAMMAT KANIZ FIZZA BIBI *v.* SHEO NARAIN MISR, **10 C C 108.**

4 Arrears of rent—Sale of putni taluq for arrears of rent—Payment by mortgagee—Purchaser of mortgagor's interest benami—Suit against such purchaser 34 C. 96 Col. 324 P. I.

5 Auction purchaser—Suit for contribution, on auction purchaser being deprived of a portion of property purchased. A. W. N 1905 P 99--27 A. 537 Col. 1556 P. I.

6 *As between judgment-debtors—Decree against two defendants jointly—Satisfaction by one alone—Prima facie case, case by production of judgment alone and certificate of satisfaction—Joint tort feasors—Power of Court to go behind.*

In a suit for contribution by one joint judgment-debtor against them jointly in the former suit is conclusive, not only as between them on the one hand and the decree-holder, on the other (who is no party to the contribution-suits) but also as between the judgment-debtors *inter se.* It is not conclusive on the question of the liability to contribute *or the extent of such* liability, but it is conclusive in the sense that it is not open to the other party to contend that the former suit ought to have been entirely dismissed, or that at any rate he ought not to have been held liable to the decree-holder therein, or that the amount decreed was excessive or fixed on principles erroneous on the very face of the judgment. Without infringing the propriety of the judgments, it is open to the party from whom contribution is sought to plead and establish that as between the joint debtors the plaintiff is solely liable to the debt, or that he is not equally liable with the plaintiff, or that both being joint tort-feasors in a sense in which, on public grounds, the right of contribution is negatived, the suit is not maintainable. SIVA PANDA *v.* JUJUSTI PANDA. **M L J 1902 P 13=25 M 599.**

7 *Accounts—Mode of taking of—Contribution suit—Decree against an estate—Accounts—Interest.*

In 1826 *R.* was the owner and in possession of a 12-annas share of an estate, and the remaining 4 annas share was the property of one *K.* From 1826 to 1854 *R.* and after his death his heirs were in wrongful possession of the remaining 4-annas share. In 1854 *K.*'s heirs recovered possession of their 4 annas share and in 1862 they instituted a suit for mesne profits against those persons who were co-partners in the estate at the time of its institution. Both in form and substance, the suit sought to charge them as such.

The final decree in the suit was passed in 1882.

The plaintiff, one of the heirs of *R.*, sued his other heirs on the allegation that he had paid a larger amount towards the satisfaction of the decree passed in 1882 than properly fell to his share as between him and his co-debtors.

The decree had been satisfied by payments made from time to time on behalf of the several co-partners from 1883 to 1889 and during this period interest ran on so much only of the amount of the decree as for the time being remained unsatisfied.

Between 1854 and 1882 several changes took place in the distribution of interests amongst the different branches of R.'s family.

The Garo Hill Treasury held a sum of money to the credit of the co-partners in separate accounts and derived as income from a portion of the estate. That sum of money was also paid towards satisfaction of the decree.

Held, that the cause of action in the suit was the wrongful enjoyment of the 4 annas share by the 12 annas share-holders collectively as part of their family estate, and the decree which followed, being in effect one against the estate, was against those who were co-partners when it was passed and that the co-sharers were bound to contribute according to the shares they then held in the estate.

Held, also, that inasmuch as each payment so far as it went, stopped the running of the interest of the decretal amount, the benefit of that cessation of interest ought to go in relief only of those who made the payment and not of those who continued in default. Accordingly accounts were directed to be taken on the following principle, *viz.*, interest to be computed on the total principal of the judgment-debt to the date of the final extinguishment without regard to the sums from time to time paid on account, and interest at the rate on each amount so paid from the date of the payment until the final satisfaction of the decree to be credited in favor of the party on whose behalf it was paid, decree depending on the result.

Held, further, that the money in the Garo Hill Treasury not being held in joint account the sharers were not entitled to cre-

Contribution (*Contd.*)

dit for larger sums than those stood to their accounts without prejudice to their remedies for excess amounts claimed by them. JOTINDRA MOHUN LAHIRI *v.* GURU PROSUNNO LAHIRI. **31 I. A. 94 = 8 C. W. N. 625 = 31 C. 597 (P. C.).**

8 Appeal by one of several defendants—No appeal by plaintiff. 31 C. 643 Col. 1616 P. I.

9 Arrears of rent, sale for—Decree for contribution against several defendants—Appeal by one alone. 6 C. W. N. 794 Col. 1645 P. I.

10 Co-mortgagor— Charge — Limitation Act Art 132—Construction of Statute. 26 A. 227 Col. 704 P. I.

11 Co-mortgage—Charge, suit to enforce—Limitation. 1 A. L. J. 276 Col. 1935 P. I.

12 *Co-sharers making default — Revenue sale—Whether tort feasors—Purchase by co-sharers—Costs—Revenue sale set aside—Contribution between purchasers.*

When a revenue sale is set aside by a Civil Court on account of irregularities and one of the purchasers is saddled with the costs, he can maintain a suit for contribution against the other purchasers—Co sharers who default in paying Government revenue commit no tort against other co-sharers. If they commit no wrong in defaulting and are permitted to buy at the subsequent revenue sale, they commit no tort in buying benami. LALA RAMBEYAS LAL *v.* SHEOJI SINGH. **5 C. L. J. 64.**

13 Co-sharers—Suit for—Rent paid by one co-sharer for the entire holding—6 C W N 903 Col 322 P I.

14 Co-sureties—Mortgage—Sale of property of one or more out of several Co-mortgagors—26 A 407 Col 645 P I.

15 Co-owners—Improvement effected by co-owners of a hat to save the hat from forfeiture. 32 C 374 Col 328 P I.

16 *Costs—Suit against three defendants—Decree against all for payment of plaintiff's costs—Payment of entire costs by one defendant—Suit by him against his co-defendants for contribution—Maintainability.*

A, B and C, being defendants in a partition suit, were ordered to pay the costs of the Plaintiff therein. A was impleaded because he held a mortgage which had been executed in his favour by B over a portion of the property. Upon a warrant of attachment being issued against A, he paid the whole amount due in respect of the costs, and now sued B and C for contribution.

Held, that he was entitled to contribution. Fakire *v.* Tasadduq Husain, (I L R 19 All 462), distinguished.—SHAKUL KAMEED ALIM SAHIB *v.* SYED EBRAHIM SAHIB, **26 M 873.**

17 Defaulters. Effect of—Contribution. Suit for. Limitation. 3. C. L. J. 93. Col: 184 P. I.

18 Judgment debtor—Jurisdiction, suit for contribution arising out of satisfaction of a joint decree for costs. 3 A L J 6 = 28 A 292 Col 786 P I.

19 Judgment-Debtor—Joint decree. 4 A. L. J. 543 = A. W. N. 1907. P. 230. Col: 786 P. I.

20 Judgment-debtor. 26 M 373 *See contribution of costs No 16 supra.*

21 Judgement debtor—Construction of document—Oral agreement. 25 A 337 Col 203 P I.

22 *Joint wrong-doers—Suit for—Joint tort-feasors.*

The question as to whether as between persons against whom a joint decree has been passed there is any right of contribution at all depends upon the question whether the defendants in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. In that case no suit will lie. If the defendants in the former suit were not guilty of wrong in that sense but acted under a *bona-fide* claim of right and had reason to suppose that they had a right to do what they did then they may have a right of contribution *inter se* and the Court should inquire what share they each took in the transaction. 8 *T R* 18, 62 *A* and *E 57 at p 74—4 Bing Rep 66 1 M* and *W 504 L R App Cas for 1894 p 318*, *7 W R 384 5 Cal 720 13 Cal 300 referred to.* HARI SARAN MAITRA *v.* JOTINDRA MOHAN LAHIRI. **5 W N C P 393.**

23 *Joint wrong-doers—Contribution—Joint tort-feasors.*

In this case the plaint stated that defendant purchased one-third share of some lands contained in two *jamas* from *B*, widow of plaintiffs' brother, and that they did not pay their share of the rent, and that plaintiffs were obliged to pay the rent, The present suit was brought to recover the amount paid on their behalf to the landlord. It was contended for defendants that plaintiffs being tort feasors the suit did not lie, plaintiffs having wrongfully kept defendants out of possession.

Held, that plaintiffs' possession not being shown to be that of tort-feasors they were entitled to recover from defendants rent paid by them for the portion of the land purchased by defendants. MOHESH CHANDRA MUNDLE *v.* BOYDYA NATH VAITANDI. **6 W N C 88.**

24 Joint wrong-doers—Decree for costs—Jurisdiction 7 P. R. 1901 Col. 1064 P. I.

25 Of Labour Act—Artificial channel—Meaning of, Jala,—Customary supply of labour—Irrigation works. AMBALAVANA *v.* THE SECRETARY OF STATE **28 M 539.** *See Grant of Construction.*

26 *Mortgage—Equity of redemption purchased by a mortgagee from one of the mortgagors.*

Where a mortgagor died leaving three sons who became equally entitled to the equity of redemption, and one of the sons sold his one-third share in the equity of redemption to the plaintiff mortgagee.

Contribution (*Contd.*)

Held, that the plaintiff was entitled in a suit to realise his mortgage debt to give credit only for that which his vendor would have been liable to pay, namely, one-third of the mortgage debt. MUTTY LAL PAL *v.* NANDU LAL NEOGI, **12 C W N 745** =8 C L J 92.

27 Mortgage—Valuation of properties for the purpose of ascertaining their liability to contribution 2 A. L. J. 307—37 A. 549 Col. 651 P. I.

28 Mortgage—Purchaser of a portion of property—Charge. 2 A. L. J. 698 Col. 642 P. I.

29 Mortgage—Purchse by mortgagee—Order absolute—Notice—Contribution. 4 C. L. J. 317 Col. 642 P. I.

30 *Mortgage—Contribution—Prior and puisne mortgages—Sale of one of the properties subject to a second mortgage in execution of decree obtained on prior mortgage.*

The answer to the question, whether the mortgagee having himself purchased part of the mortgaged property can throw the whole burden of the mortgage on the remainder of the mortgaged property depends on the circumstances under which the purchase was made. Supposing *A.* and *B.* are mortgagors of certain property which they have jointly mortgaged to *C.* If *C.* the mortgagee himself, purchases the equity of redemption from *A*, it is clear that he cannot be permitted to throw on *B.*'s share the whole burden of his mortgage. In such a case *B.*'s share can only be saddled with the proportionate amount of the mortgage-debt. But if *C.*'s purchase was at a sale in execution of a decree obtained on a prior mortgage, the case is different.

Where property mortgaged under an earlier mortgage is sold in execution of a decree obtained on the mortgage and is thus swallowed up the subsequent mortgage must be satisfied out of the remaining property mortgaged with the subsequent mortgagee, the mortgagor cannot claim contribution against the owner of the property sold to satisfy the earlier mortgage. *24 Mad., 96, followed.* BOHRA THAKUR DAS *v.* THE COLLECTOR OF ALIGARH. **3 A L J 439=W N A 1906, p. 150=28 A 593.**

31 *Mortgage—Transfer of Property Act (IV of 1882), Section 82—Contribution—Prior and puisne mortgages—Sale in execution of decree on prior mortgage—Purchase by mortgagee of portion of property.*

When property subject to a later mortgage is sold in execution of a decree obtained on an earlier mortgage in a suit to which the second mortgagee was a party, the purchaser whether he be the decree-holder himself or an outsider, takes the property free of all claims under the later mortgage. BALDEO PRASAD *v.* SHEO DIAL. **3 A L J 141=W N A 1906, p 161.**

32 Mortgage—Suit for contribution—Annuity charged on land—Adverse possession —28 A 743 Col. 1380 P. I.

33 *Mortgage general—Execution of decree—Purchase by decree-holder of one of several mortgaged properties—Contribution in execution not allowed.*

A judgment-creditor, in execution of a mortgage-decree, which directs the sale of several properties, is entitled to execute the whole decree by sale of any of the properties, even though he has himself purchased some of the properties, in execution of another mortgage decree, against the same judgment-debtors. Any question of contribution which may arise by reason of the purchase by the decree-holder of some of the mortgaged properties, must be worked out, not in execution-proceedings, but in a separate suit properly framed and in the presence of all the necessary parties 4 C L R 154 *App.* 4 C L J 195 and 4 C L J 317 *doubted.* AMEER CHAND *v.* BAKSHI SHIVA PERSAD SINGH **4 C L J 573=34 C 13.**

34 *Mortgage-Marshalling—Contribution—Money decree—Sale—Purchase by mortgagee—Purchase of part by stranger—Decree for sale.*

Where a mortgagee brings mortgaged properties to sale for execution of a money decree subject to the mortgage and part is purchased by him and part by a stranger, no special equity arises between the mortgagee and the purchaser entitling the latter to insist on the satisfaction of the mortgage as far as possible from the properties purchased by the mortgagee. The debt must be considered extinguished to the extent of the proportion falling on the properties purchased by the creditor; and the purchaser is liable to pay the proportion of the debt falling on the lands purchased by him. So held by *Jenkins*, C. J. and *Candy* J., *Fulton* J. diss.

Per Fulton J.—Where the mortgagee himself sells the properties in execution of a money decree and in part purchases the property himself, a special equity arises and the mortgagee-purchaser should be considered satisfied to the extent of the value of the properties purchased by him. If the mortgagee purchased first, this result must follow but if the stranger purchased first, subject to the mortgage and then the mortgagee, the purchaser will have to pay the debt in proportion to his purchase. FAKIRAIYA *v.* GADIGAYYA. **3 B. L. R. 628.**

35 Mortgage—Suit upon—Parties—Contribution against purchasers. 5 C. W. N. 423 Col. 641 P. I.

36 Mortgage—Necessary parties—Contribution against an auction purchaser of a part of the mortgaged property purchased by mortgagee of the whole mortgaged property in satisfaction of his decree. 1 A. L. J. 564 Col. 566 P. I.

37 *Mortgage—Equitable claim.*

A claim for contribution between purchasers of different portions of mortgaged property is an equitable claim and in determining the amount of the claim an equitable

Contribution (*Contd.*)

view of all the circumstances attending the case should be taken. MAGNIRAM *v.* MEHDI HUSSEIN KHAN. **8. C. W. N. 30 ; 31 C. 95 at 104.**

38 *Parties -- Contribution -- Pleadings -- Agreement to make contribution--Agreement relied upon by plaintiff found invalid--Decree on general right.*

The plaintiff in his suit for contribution relied upon an agreement by which defendants had bound themselves to pay him fixed amount of contribution. The defendants did not deny their liability to contribute, but pleaded that the agreement was not valid. On appeal the suit was dismissed on the ground that it was bad for misjoinder and that the agreement relied upon by the plaintiff was not valid.

Held, that as all the parties liable to contribute were proper parties to the suit there was no misjoinder; and that the lower appellate Court instead of dismissing the suit should have determined the amount payable by the defendants. PERIYA AIYA *v.* MUTHU KANA RANA VENA VENKATACHELLUM CHETTIAR. **15 M. L. J. 24.**

39 Purchaser of equity of redemption—Suit for contribution.—3 N L R 92 Col 705 P I.

40 Purchaser—On auction—2 A L J 244=27 A 537—*See No 5 supra.*

41 Purchaser—Suit for contribution by purchaser—Decree for rent for a period anterior to sale. 6 C. W. N. 794. Col: 119. P. II.

42 Persons equally liable for payment of Government Revenue. 11 O C 279. *See Contract Act S 69 No 26 P II.*

43 Release on judgment debtor—Revivor —Execution against others—Contribution.—4 A. L. J. 405=A. W. N. 1907. P. 164. Col: 2023—P. I.

44 Representative -Payment of decretal amount by one of the representatives of the mortgagor -Charge—Contribution—9 C. W. N. 865. Col: 644. P. I.

45 Rent—Putni taluq—Mortgage—Sale in execution—Arrears of rent due previous to sale. 9 C. W. N. 670=32 C. 643. Col: 322. P. I.

46 *Suit for contribution of amount realised as revenue.*

Since the arrears of revenue on the entire estate realized by Government accrued after the date of the sale the plaintiff could not be regarded as bringing this suit as the representative in interest of his vendor. He was, therefore, entitled to claim contribution.

The claim of contribution generally arises in cases where the party seeking contribution has himself *paid* the amount in respect of which contribution is sought. THE MAHARAJA OF VIZIANAGARAM *v.* SRI RAJAH SETRUCHERLA SOMASEKHARARAZ. **13 M L J 83=26 M 686.**

47 Suit for contribution from co-sharer for money paid for Government revenue, limitation for—28 M 493 Col. 1934 P. I.

Contribution (*Contd.*)

48 Suit for contribution -Putni Taluq—Mortgage—Sale in execution—Arrears of rent due previous to sale. 32 C. 643 Col. 322 P. I.

49 Suit for contribution—Transfer in writing of a money decree to one of the judgment debtors. 10 B. L. R. 89—3 M. L. T. 175—32 B. 195 Col. 1502 P. I.

50 *Set off--Civ. Pro. Code—S. 111--Barred items, set off.*

Where in a suit for contribution by a co-sharer for a certain sum of money paid on behalf of his other co-sharers to discharge a decree for rent obtained against them jointly the latter (*i.e.*, the defendant) claimed a set off on account of previouse payments by them of similar decrees for the benefit of the plaintiff amongst others.

Held:—That no question of limitation arose as regards the claim for set off. The remedy might have been barred but the right to the debt was not extinguished. 6 C. 340 ref. to.—GAJADHAR MAHTO *v.* RAGHUBAR GOPE. **12 C W N 69.**

51 Small cause nature suit—Test--Second appeal 30 M. 212 Col. 786 P. I.

52 *Suit for*--Res judicata--*Civil Procedure Code (Act XIV of 1882), section 13—Suit for arrears of maintenance--Suit for contribution.*

An estate was transferred in various portions to several persons by way of sale and mortgage. One F. A., who had a claim for maintenance, brought a suit against the several possessors of the property. The Court discharged some of the defendants and passed a decree against the plaintiff and some others who were defendants in the suit. The plaintiff appealed against the decree making his co-defendants and F. A. respondents. The Court of appeal did not interfere with the decree and directed that because a joint decree had been passed against a few persons, if any of them was compelled to pay more than his proper share, he could call on the others to contribute whom he considered liable. Until the liability was apportioned, the appellant could not say that the decree was wrong inasmuch as it awarded more than his quota. The plaintiff now sued his co-defendans for contribution. Two of the defendants pleaded that the suit against them was barred under section 13 of the Code of Civil Procedure.

Held, that in the first suit brought by F A it was necessary for the Court in order to give the plaintiff his proper relief to decide the right of the defendants *inter se*. Had the Court finally decided the matter, the decision, in that case, would have been *res judicata*. In appeal, however, the Sub Judge advisedly and distinctly refused to decide the matter. Consequently there was no *res judicata* as to this point—MANIK CHAND *v.* RAJA TASADDUK RASUL KHAN. **2 O. C., 303.**

53 Surety to be indemnified by the

Contribution *(Contd.)*

principal. 26 M. 322 Col. 357 P. I.

Note 26 M. 322 read for 26 M. 222.

54 Transfer of Property Act—Charge—Purchaser of a portion of mortgaged property paying money to pay off a prior mortgage who actually supplies, pays the money 9 O. C. 259 (B.) Col. 598 P. I.

55 Voluntary payment—Assessment—Payment by A of assessment due on B's land does not give A a charge on such land 26 B. 437 Col. 1936 P. I.

Contributory negligence.

See Tort Negligence.

Convenience.

Redemption —Interest on mortgage debt —When interest ceases to run—Deposit by mortgage. 27 B. 23 Col. 649 P. I.

Conversion.

1 *Christian convert's right to inherit—Shanars.*

By custom among Shanars, conversion does not deprive the convert of his civil rights in the original family. He is not, therefore, deprived, by reason of his conversion, of his rights to inherit a share in his family property and of management.

Per Hunt, J.—Act XXI of 1850, may, with advantage, be adopted in Travancore Statute Book.

Per Sadasiva Aiyar, C. J.—I do not feel prepared to agree with my learned colleague, "that Act XXI of 1850 might be with advantage adopted in our Statute Book" in its entirety. I think, however, that, so far as the Hindu castes and classes lower than Sudras are concerned, it might be declared by statute that conversion to Christianity does not entail forfeiture of civil rights, except the rights to trusteeship of caste temples. But if such a new Act is passed, it should further declare that, not only does the convert not forfeit his rights of inheritance to non-converts, but that, reciprocally, the convert's properties can be inherited by his unconverted relations. MASANAMUTHU SIVANADUMA NADAN *v.* GOPALAKRISHNA PILLAI RAMASWAMI PILLAI, **22 T L R 246.**

2 *Of rent free grant into one at a favourable rate of rent—Resumption—Grant at favourable rate of rent, conversion of rent free grant into—Perpetual lease — Ejectment of grant-holder by notice under Rent Act—Possession, suit for.*

In 1837 *Sambat* B. made a rent-free *shankalap* grant to his *guru* R., of the whole of Pura Shiam Singh and R. and his descendants continued to hold it under the grant until about 1850, A. D., when the estate being held *kham*; the *chakladar* insisted on the payment of Rs. 416 a year as rent or revenue. This sum continued to be paid after H., the *talukdar* recovered possession and in 1871, A. D., he wrote to the then holders of the grant, a letter to the effect that the village of Pura Shiam Singh *Chak Bacheta* was granted as *shankalap gurudachchina* and that they were always to pay the rent and that he nor any one of his family would interfere. The defendant, the present *talukdar*, ejected the plaintiffs, the present holders of the grant, from the village by notice issued under the provisions of the Oudh Rent Act, 1886. Thereupon the plaintiffs sued the defendant for recovery of possession of the village and for a declaration that they were entitled to remain in possession until the grant at a favourable rate of rent was resumed. The Court of first instance gave them a decree on the finding that the original rent free grant had been resumed but that it was renewed. This decree modified by the Lower Appellate Court. The plaintiffs appealed to the Court of the Judicial Commissioner contending that the assessment of the land did not amount to a resumption of the rent-free grant but only to a modification of its terms.

Held that the letter written by H. did not create and was not intended to create a fresh grant and the assessment of rent on the land previously held rent-free did not constitute a resumption of the original grant, but merely modified its terms so that what was a rent-free grant became a grant at a rent of Rs. 416 a year, the other terms of the original grant remaining in force.

The letter of H. created no perpetual lease and the plaintiffs, at the time of their ejectment by notice, were holding the village at a favourable rate of rent.

Held, therefore, that they had been illegally ejected by notice under the Rent Act and were entitled to the relief prayed for. BALGOVIND *v.* RAMPAL. **4 O. C. 264.**

3 *Of stolen goods—Partnership—Managing partner receiving goods—Liability of the firm for damages—Measure of damages.*

Where the managing partner of a firm of piece-goods has received certain quantities of stolen properties with full knowledge of the character thereof, without the knowledge of the other partners and having sold some of the the goods, credited a portion of the value thereof in the books of the firm.

Held, that the managing partner's acts being within the scope of his authority, the firm is liable to the plaintiff, the real owner of the stolen goods, for damages for conversion the measure of damages being the full value of the plaintiff's goods that have come into the hand of the managing partner.—HURRUCK CHAND *v* GOBIND LAL KHETTRY, **10 C W N 1053.**

4 *Of Stolen Hundi—Suit on—Payment by drawee to wrong person—Conversion—Damages.*

If the drawee disregards a direction as to where and when the payment is to be made appearing on the face of the document and makes payment without due or any

Conversion (*Contd.*)

enquiry to a person who did not ever purport to have any concern with the person to whom payment was to be made, he makes such payment at his peril and is liable to pay damages to the lawful owner equal to the full amount to the *hundi*. RAI BAHADUR SAHU LALTA PERSAUD *v.* CHARLES CAMPBELL MCLEOD. **9 C W N 841.**

5 *Of wife—Mahomedan Law—Marriage, Dissolution of—Wife becoming a Christian.* Where a Mahomedan wife embraced Christianism and the husband sought to enforce a decree for restitution of conjugal rights that was passed before she became a Christian.

Held, that the decree could not be enforced inasmuch as the conversion of the wife had the effect of dissolution of the marriage.—IMAM DIN *v.* HASAN BIBEE, **85 P R 1906=148 P L R 1906.**

Converts

1 Co-parcenership between persons converted from the Hindu Religion—Difference between co-parcenership and inheritance, 31 B 25 Col 78 P I.

2 Joint family-Construction of compromise—Hindu Law—Effect of—Deed of compromise—Female's estate. 25 A. 546 Col: 486. P. I.

3 *Marriage—Divorce Act (IV of 1869), Section 7—Divorce—Marriage between Hindus—Converts—Nature of the marriage contemplated by the Act.*

The marriages contemplated by the Indian Divorce Act 1869, are, having regard to section 7 of the Act, those founded on the Christian principle of a union of one man and one woman to the exclusion of others and consequently the Act does not contemplate relief in cases when the parties have been married under the rites of Hindu law, a Hindu marriage not being monogamous one. 17 Mad., 235, followed. MAGANIA *v.* PREM SINGH. **8 B. L. R. 856.**

4 *Marriage—Hindu Law—Adoption—Gift of a son in adoption by a Hindu convert to Mahomedanism—Validity of such adoption.*

A Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism.

Quare, whether this holds good in the case of Brahmans, among whom the *Datta homa* ceremony is necessary. Plaintiff, a Rajput, whose natural mother was dead and whose natural father had become a convert to Mahomedanism, was given in adoption by his uncle to whom the natural father had given the necessary authority.

Held, that the adoption was valid. SHAMSINGH *v.* SANTABAI. **25 B. 551.**

5 *Effect of conversion on the rights of the descendants of the convert Act XXI of 1850 S. 1.*

There is nothing in the language of Section 1 of Act XXI of 1850 which debars Courts from extending their beneficial provisions to the heirs of a convert no less than to the convert himself.

Converts (*Contd.*)

The conversion of a Hindu to Muhammadanism does not entail the forfeiture of any rights to the ancestral property which his descendants may otherwise possess. MAHNA *v.* CHAND. **104 P. R., 1902 23 P. L. R. 1903.**

Conveyance.

1 *Of Law—Evidence—Endorsement on mortgage by the plaintiff that he was co-owner in the property mortgaged and that he consented to the mortgage.*

In 1855 the plaintiff's father sued the defendant's father for partition of the property in suit, and it was decided that the plaintiff's father was not entitled to share in the land in dispute. In 1879 the defendant mortgaged the land in dispute to a third party, and the plaintiff assented to the mortgage by an endorsement on the deed to the effect that he had half share in the land and having received one half of the mortgage-money he consented to the mortgage. On the expiry of the term of the mortgage the plaintiff sued to recover his share in the property.

Held that the endorsement merely proved the plaintiff's title against the mortgagee, but as against the defendant it was only a piece of evidence of title to be considered along with the rest of the evidence. 1 Bom. L. R. 700; S. C. L. R. 26 I. A. 175, referred to. SUBBAN SHASTRI *v.* JIVANBHAT. **4 B L R 25.**

2 *Document—Stamp Act Art. 23—Pressing factory—Partnership—Transfer of a share in consideration of a certain sum—Document—Release—Conveyance on sale of property.*

Where by a document, the executing party, purporting to be entitled to a share in a going pressing factory, transfers absolutely the whole of that share to the other person interested in the factory in consideration of a certain sum, the document is a conveyance on sale of property. HIRALAL NAVALRAM, IN THE MATTER OF, **10 B L R 730=4 M L T 145=32 B 505.**

3 Execution and Registration—Application to set aside sale under S. 310 A after application under S. 311 withdrawn—Jurisdiction to set aside. 5 O C 137 Col. 1546 P. I.

4 Meaning of—Havala—Letter by a debtor authorising payment to his creditor of money due to him (the debtor) by a third person. 27 B. 150 Col. 1889 P. I.

5 "Release"—Document executed by a benami purchaser professing to relinquish in favour of the real purchaser any claims which he might have in virtue of the purchase 24 A 372 Col. 889 P. I.

Co-obligees.

Suit by obligees, some of whom are minors, after the prescribed period of limitation. 25 A 155 Col. 1751 P. I.

Co-owners.

1 Abandonment—Co-sharers—When and whether long possession and enjoyment will constitute adverse possession. 120 P. R. 1908 Col 2057 P. I.

2 *Assignment of whole debt by a co-owner without objection by others.*

Where a co owner assigned the whole debt due to a shop to the plaintiff, and the other co-owner who was made a party to the suit did not question the assignment, it was held that, under such circumstances, the assignment was good for the whole amount. MALAI KOLANDAI CHETTY. v. ROYAR PILLAI. **3 M. L. T. 294.**

3 Adverse possession—Hindu Law—Possession of co-owner—Distinction of between the possession of a member of a Joint Hindu Family or of a bardar and that of a member of a Mahomedan Family. A. W. N. 1907 P. 195=4 A. L. J. 473 Col. 2059 P. I.

4 *Building--Suit for removal of building constructed by a co-sharer without the consent of others — Co-sharers — Joint land, building erected by a co-sharer on.*

Where a co-sharer constructs a building on land belonging to him and other co-sharers jointly without their consent, *held*, that the other co-sharers are entitled to have the building removed, if they have objected to it at the first possible opportunity and no great injury will thereby be caused to the co-sharer who has erected the building. 7 O. C. 336, A. W. N. 1908 P. 19, 2 A. L. J. 455, S. C. 270 *referred to.* BHIM SHANKAR DAT *v.* GANGA DAYAL. **11 O. C. 355.**

5 *Co-sharer cultivating joint waste land previously uncultivated---Other co-sharers entitled to a decree for joint possession.*

A co-sharer, who cultivates joint waste land (known as *banjar* land) previously uncultivated, cannot deny the rights of his co-sharers to joint possession of that land. 13 C. P. L. R. 153 R. The co-sharers who are thus entitled to a decree for joint possession, should pay their qouta of the expenses of bringing the land under cultivation, if a claim for the same is made by the co-sharer cultivating the land. RATTANLALL *v.* CHANDANSINGH. **4 N. L. R. 114.**

6 *Ejectment of one co-owner by another—Co-sharers--Joint property—Exclusion of co-owner—Suit by excluded co-owner for joint possession—Form of decree.*

The plaintiff, a co-sharer, wrongfully excluded by the defendants, other co-sharers from joint possession of property belonging to him and to the other co-sharers is entitled to a decree declaring that he is entitled to joint possession of the property and an injunction restraining the defendants, other co-sharers, from dealing with the property in any way to the exclusion of the plaintiff without his previous consent and directing that the plaintiff be restored to possession jointly with the defendants. W. N. All. 1894 p. 166, W. N. All. 1904, p. 199 *referred to;* W. N. All., 1894 p. 127, W. N. All., 1904, p. 194 *distinguished.* NANHI DEVI *v.* DAULAT SINGH. **2 A L J 331 = A W N 1905 P. 119.**

Co owners (*Contd.*)

7 *Exclusive dealing with joint property by one of several— Hindu Law—Joint property —Co-owners--Suit for khas possession of his share by one of them maintainable—Declaration of interest—Profits.*

Plaintiffs and the defendant were co-owners of certain lands. On the death of the tenant of that land, the defendant obtained exclusive possession of it and had his name recorded as owner in the mutation department. In a suit brought by the plaintiff seeking to be put in joint possession of his share, it was *held* that the plaintiff was only entitled to a decree for declaration of his interest in the land and for mesne profits. If he wanted physical possession of any portion of the joint property, his only course was to obtain partition by regular process of law. He was not entitled to any injunction restraining the defendant from dealing with the land in any way to the exclusion of the plaintiffs without their consent. Bhola Nath *v.* Buskin (A. W. N. 1894, p. 127); Ram Jatan Shukal *v.* Jaisar Shukal (A. W. N. 1894, p. 166); Rahman Chowdhuri *v.* Salamat (A. W. N. 1901, p. 48); Jagar Nath Singh *v.* Jai Nath Singh (I. L. R. 27 All. 88); Ram Sarup *v.* Gulzar Banu (A W N 1905, p. 160) and Watson & Co. *v.* Ram Chund Dutt (I. L. R., 18 Cal. 10) referred to and followed. Nanhi Devi *v.* Daulat Singh (A. W. N. 1905, p. 119) referred to. PHANI SINGH *v.* NAWAB SINGH. **A. W. N. 1905 p. 233=28 A. 161.**

8 Exclusive possession of co owners of joint property—Co-sharer possession—Whether Adverse possession. 5 A. L. J. 511 Col. 2055 P. I.

9 Express surrender of holding by tenant, right of co-owners--Unreasonable delay, what amounts to. 4 N. L. R. 120 Col. 1920 P. I.

10 *Joint possession suit-Co-sharers-Hindu Law--Joint Property—One co-sharer excluding other co-sharers from the property.*

In this case, the defendants who were co sharers of certain joint property did not allow the plaintiffs, who were the other co-sharers, to exercise their rights as joint owners to the property.

Held, that plaintiffs were entitled to a decree for joint possession of the property. Bhairon Rai *v.* Saran Rai (A. W. N, 1904, P. 106) followed. Watson & Co. *v.* Ram Chand Dutt (I L R 18 Cal 10) and Rahman Chowdhury *v.* Salamat (A W N 1901 p 48) referred to.—RAM CHARAN RAI *v.* KAULESHAR RAI, **27 A 153.**

11 *Joint property—Co-sharers—Trees planted with the consent of co owners—Suit for joint possession and removal of the trees—Form of decree.*

Where one of the co-owners planted a grove in joint land with the consent of his co-sharers and the latter brings a suit

Co owners *(Contd.)*

for a declaration of their right to the land, and for joint possession.

Held, that the only decree to which the plaintiffs are entiled is that declaring them to be the joint owners with the defendant of the land in dispute and they are as such joint owners entitled to an account of the profits of the land. No order can be passed for putting the joint owner into joint possession of the land.—RAM SARUP *v.* GULZAR BANU, **A W N 1905 p 160.**

12 *Joint property—Joint property—Co-sharer building on joint land without the permission of the other co sharers—Injunction.*

One of several joint owners of land is not entitled to erect a building upon the joint property, without the consent of the other joint owners, notwithstanding that the erection of such building may cause no direct loss to the other joint owners. 12 A 438, 18 A 115 R. LACHHANI *v.* GANGA DIN, **A W N 1908, 19.**

13 Landlords—Separate collection—Right of sharer to sue for whole rent making co-sharers defendants. 12 C W N 249 (P C) Col 159 P I.

14 *Khas possession—Some co-owner taking* khas *possession—Share of rent—Dispossession damages.*

Where one co-owner takes exclusive possession of land which has been through a tenant in the possession of all the co-sharers and had been yielding profits in the shape of rent to all of them, such co-sharer must compensate his other co-sharers for the loss of their share of the rents 18 C 10=17 I A 110 Expl. RAM SANKAR BHADURI *v.* JNANADA SUNDARI DEBYA, **5 C L J 267.**

15 *Khas possession—Right of co-owner to have partition—Agreement against partition invalid.*

There were four brothers jointly entitled to certain Zemindari property. One of the brothers died childless. One of the brothers brought a suit against the sons of the two others for partition. A compromise was entered into among the then defendants that their shares should remain joint. The plaintiff who was a defendant to that suit now applied under S. 110, Land Revenue Act, to have his share separated :—

Held, that the application was maintainable.

The right of a co owner to have partition of his share in incident to the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right, and therefore, not enforceable, CHANDAR SHEKHAR *v.* KUNDAN LAL. **5 A. L. J. 672=A. W. N. 1908 P. 259.**

16 *Mortgage—Joint family property—Co-owners two out of several—Want of family—Necessity—Validity of mortgage—Personal decree barred—Mortgage decree against mortgagors, if available.*

When two out of several co-owners of a joint family property execute a mortgage

Co-owners *(Contd.)*

of such property not for family necessity but for meeting their own debts, and without the consent of the other co-owners, the mortgage is not a valid mortgage of the family property; and if, in such case, the mortgagee allows the personal remedy against his mortgagors to be barred by time, a mortgage decree cannot be allowed even as against them. PALUKDHARY JHA *v.* BALJIT CHOWDHRY. **4 C. L. J. 543.**

17 *Mortgage—Declaration, right to—Rights in property effected—Subsequent conduct of defaulter.*

Where one of the share-holders of a property purported to mortgage the whole estate *held* the other share-holders had a right to the declaration that the defendant could not alienate their share and this, notwithstanding that subsequently to the suit the defaulter had paid of the mortgage-debt. SONABHAN BIBI *v.* NATHMAL KERASI. **8 C. L. J. 185.**

18 Position of—Common manager—Separate appointment for separate estates or groups of estate belonging to same co-owners. 11 C. W. N. 1143 Col. 131 P. I.

19 *Possession of joint property—Portion omitted by mistake—Fresh suit for partition or joint possession, if maintainable—Co-owner, Adverse possession by.*

Where, in a suit for the partition of joint property, by reason of a mistake of the parties which was shared by the Commissioner who was appointed to make the partition, a certain portion of the property was omitted from the report and the final decree did not deal with the lands comprised in that portion.

Held—That the effect of the decree was to leave uneffected the joint title and possession of the parties in the lands omitted in the decree.

That such lands may be partitioned in a subsequent suit at the instance of one of the parties.

A mere determination of the shares by the preliminary decree is not tantamount to partition.

The entry into and possession of land under the common title by one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all.

A co-tenant will not be permitted to claim the protection of the statute of limitation, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him. It must further be established that the fact of the adverse holding was brought home to the co-owner.

The possession of a wrong doer cannot be constructively extended over lands not actually in his possession. JOGENDRA NATH ROY *v.* BALADEB DAS MARWARI, **12 C W N 127=6 C L J 735.**

20 *Vendor and vendee—Rights of vendee of a share in mortgaged property when it*

Co owners *(Contd.)*

is redeemed in part or whole by his money—Amendment of plaint in further appeal.

Held, that when a vendee of a share in a joint property already mortgaged by all its owners redeems whole of it by his own money, he steps into the position of the original mortgagee, in respect of the shares of the other co-sharers, and acquires a charge thereon, and that the co-sharers have no right to take possession of their shares without paying, to the vendee, their quota of the mortgage-money.

Practice--Under the circumstances of this case, plaintiff was allowed to amend his plaint in further appeal. FAZAL DIN *v.* BUDHA, **64 P W R 1908**.

Co-ownership, prescription of.

Limitation Act—Hindu family, cause of action. 24 M 387 Col. 1750 P. I.

Co-parcenary.

Release by a co-parcener—Right of his son then in existence to recover his share in the family property—Right of an after-born son, in the property.

M, one of the co parceners in a Joint Hindu family consisting of his brothers and father, gave a release of his share in the family property in consideration of his receiving a certain sum of money. M. had a son born to him before the date of the release. The son then sued the co-parcenary to recover by partition his share in the family property, and it was awarded to him. After the dates of the release and of the partition decree, M had a second son born to him. This second son then sued the first son to recover his moiety of the ancestral property that had fallen to the latter's share:—

Held, that the second son was not entitled to any share in the property. SHIVAJIRAO MADHAVRAO *v.* VASANTRAO MADHAVRAO, **10 B L R 778**.

Co-parceners

1. *Pleading—Claim for exclusive possession—Decree for joint possession—Hindu law—Right of co-parcener to claim joint possession.*

When the plaintiff claims the property in dispute as exclusively belonging to him and the same is proved to be the joint property of the plaintiff and the defendant, a decree for joint possession of the property may properly be passed in favor of the plaintiff and a mere declaratory decree would not serve the ends of justice.

In the Bombay Presidency a Hindu coparcener may be granted a decree for joint possession of the joint property and cannot be compelled to bring a suit for partition. NARANBHAI WAGHJIBHAI *v.* RANCHHOD PREMANAND. **3 B. L. R., 598**.

Copy right

Infringement--Illustrations in catalogue

Copy-right *(Contd.)*

—Portion of catalogue protected—Puffing statements--Injunction.

The plaintiff is not prevented from suing to restrain the infringement of copy-right in certain illustrations in his catalogue, by the fact that the copy-right in some of the other illustrations in the same catalogue is vested in others. Lamb *v.* Evans [1892], 3 Ch. 462, followed. It is no defence to an action to prevent infringement of copy-right in a book, that the book contains inaccurate statements where the statements are in the nature of puffing statements, unless a strong case of fraud of the public has been made out. LAWRENCE *v.* BUSHNELL **12 C.W. N. 735=35 C. 463**.

Copy-Right Act XX of 1847.

See Cols. 54 to 56 P. I.

Copy of decree.

1. *Limitation Act (XV of 1877), Sections 5 and 12—Time requisite for obtaining copies of decree and judgment.*

The appellant applied for copy of decree on the 15th October 1898, the day next to that on which the decree was signed. The Court was closed from the 16th October to the 17th November 1888. The information as to the number of folios for copies required was supplied on the 18th November and on the same day the appellant put in the folios and the copy was ready for delivery on the 21st November. The appeal was presented on the 19th December 1898.

Held, that the appellant was entitled to a deduction of the period between the 15th October and 18th November, in calculating the period of limitation for his appeal. KALI SHANKAR BAJPAI *v.* BAIKANTA NATH SEN. **7 C. W. N. 109**.

2 Time requisite for obtaining copies—Decree remaining unsigned. 1 O. C. 184 Col. 1762 P. I.

Copies of documents.

Civil Procedure Code-- Stamp Act -- Extracts--Account books, 26 B. 622 Col. 889 P. I.

Copies of the judgment.

1 Application for review of judgment--Deduction of time spent in obtaining copy of the judgment. 2 O. C. 302 Col. 1762 P. I.

2 Different copies of the same judgment obtained by the appellant 10 C. 201 Col. 1764 P. I.

Copies supplied by post.

Delay--"time requisite"—Appeal 14 C. P. L. R. 1901 P. 40 Col. 1763 P. I.

Corporation.

1 *Hindu Law—Usage — Religious endow-*

Corporation *(Contd.)*

ment—Mutt—*Lunacy of head of* Mutt—*Effect of—Corporation sole—Practice—Second counsel on the same side.*

In the absence of any proof of custom the head of a *mutt* does not forfeit his position by the mere fact of his lunacy. It can only result in his power of action remaining suspended during the continuance of the distemper and the vicarious discharge of his functions being provided for in accordance with the established requirements of the institution.

The position and powers of head of *mutts* discussed.

A second counsel can be heard for the same party.

A third counsel is not a liberty to address the Court on behalf of the party entitled to the reply. VIDYAPURNA TIRTHA SWAMI *v.* VIDYANIDHI TIRTHA SWAMI. **M. L. J., 1904, P. 105=27 M 435.**

2. *Municipality—Bombay District Municipal Act (Bom. Act III of 1901)—Non-feasance—Negligence in performance of duty towards plaintiff—Suit for damages.*

The plaintiff, an inhabitant of Ahmedabad, having brought a suit against the Ahmedabad Municipality to recover damages sustained by him in respect of an injury caused to his horse and carriage in consequence of the neglect of the Municipality to repair a road.

Held that, as the default leading to the damage was a mere non-feasance, the suit must fail for the statute does not impose upon the Municipality a duty towards the plaintiff which they negligently failed to perform. ACHRATLAL *v.* THE AHMEDABAD MUNICIPALITY. **6 B. L. R. 75=28 B. 340.**

3. Bank of Bombay—Shareholder's right to inspect and take extracts—Object of such inspection 12 C. W. N, 825=8 C. L. J. 103=4 M. L. T 16=18 M. L. J. 355=5 A. L. J. 463=10 B. L. R 638=32 B. 466 Col. 9 P. II.

4. Suit by corporation—Plaint varified by principal agent as true to his information and belief 9. C. W. N, 608 Col. 1433 P. I

5. Irregularity cured—Insolvency—Creditor's application—Notice, posting up of 5 C. W. N. 91 Col. 1236 P. I.

6. Suit by or against aliens—Suit by foreign corporation—Probate vertification of plaint. 30. C. 103 Col. 1201. P. I.

7 *Power of directors—Ratification by share holders—Vital conditions of contract—Proof.*

It cannot be accepted as a correct view that because the Indian Companies Act and the Articles of Association of a particular corporation place no definite limitations up on the powers of the corporation in dealing with outside parties, therefore, the Directors are empowered to do anything that the act and the Articles do not expressly prohibit and are absolved from the necessity of observing the well established principles which should regulate their management of the corporation's affairs. Their general authority would undoubtedly extend to the performance of all acts reasonably necessary for efficient management.

The defendant, corporation, held not bound by the agreement in dispute entered into by the directors.

In every case of ratification by shareholders of an act *ultra vires* of directors there ought to be not a mere presumption of assent from notice of the unauthorized act and absence from a meeting called to legalize it, but proof of the actual assent of each share-holder, either with full knowledge of the character of the act to be adopted or with intention to adopt it at all events and under whatever circumstances.

Whether a particular clause in an agreement should be held to embody a condition vital to the contract must depend upon the intention of the contracting parties, and, if possible, that intention should be gathered from the terms of the agreement itself.

L. R., 7 *H. L.* 653; *L. R.*, 3 *H. L.* 263, *L. R* 7 *C. P.* 56, *referred to.* TARA CHAND *v.* THE GANESH FLOUR MILLS COY. **17 P. R. 1901=98 P. L. R. 1901.**

Corporation of Bombay.

1 Notice—Validity of—Date of purchase. 9 C. W. N. 337 Col. 195 P. II.

Co-sharers

1. *Absolute occupancy tenant—Surrender—Khud-kasht—Merger—Purchase in execution of decree.*

A co-sharer who purchases the holding of an absolute occupancy tenant becomes himself an absolute occupancy tenant. 21 C. 869; 94 C. 143 referred to. JAIRAM AND GOPI RAM *v.* BALAJI, MANSARAM AND JAIRAM. **14 C. P. L. R. 1901 P. 9.**

2. *Account—Hill leased by one of several co sharers owners thereof to cut and quarry stones in it—Suit by remaining co-sharers for account, damages and injunction for cutting and quarrying stones, maintainability of—Action of tresspass between co-sharer.*

The defendants, second party, were the plaintiff's co-sharers in a hill. They granted a lease to the defendant, first party, to cut and quarry stones from the hill. Hence the suit by the plaintiff for accounts, injunction and damages for cutting and quarrying stones from the hill.

Held, that the suit was not maintainable, inasmuch as the act of the defendants did not amount to ouster of the plaintiff, the cutting and quarrying stones was the proper mode of enjoying the hill, and the hill was not affected in any appreciable degree by the act of the defendants in cutting and quarrying stones.

Per Harington, J.—As between co-sharers, there cannot be any action of trespass

Co-sharers *(Contd.)*

unless there is an actual ouster ; there cannot be trover where there is no destruction of common property, and there cannot be any claim for account, unless there was an express or implied contract to that effect. Where co-sharer make use of the common property in the way in which it is proper to use it, no action in trover will lie, even though he should get more than his share from the common property. Every co sharer is entitled to all the profits which his own enterprise and industry enable him to get from the joint property, if he leaves it open to the other co-sharers, by a similar exercise of industry and enterprise, to appropriate to themselves profits from the joint property not less than their undivided share of the whole. Where a hill is quarried by some co-sharer, every stone, after severance, cannot be considered as the joint property of all the co-sharers 17 Q B 701 and (1872) L R 5 H L 464 *Refd to.*

Per Mookerjee, J.—In the case of immoveable property jointly owned, each co-sharer is, in theory, interested in every infinitesimal portion of the subject-matter, and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with the other. But it does not follow that every use of joint property by one co-owner renders him liable to an action for account to the other, when the use is perfectly legitimate and does not constitute an invasion of the rights of the co-sharer. If there is no assertion of hostile title, no exclusion or ouster, obviously an action of ejectment cannot lie ; if there is no destruction of the property, and no conversion, an action of trover is not the appopriate means of redress; nor does an action of account lie unless it is alleged and proved that the co-tenant has received more than his just proportion. In the case of mining properties, the only mode in which they may be profitably used is to take from them valuable ores, and if this is done properly by one co-tenant, so as not to interfere with the exercise, in a similar manner, of the equal right of the other co-tenant, no liability can be imposed upon the one to account to the other. Otherwise, there would be no mutuality, and enjoyment of joint property would be impracticable.

A tenant-in-common is not liable to his co-tenant for damages for use and occupation of the joint property, unless there is waste or an ouster of his co-tenants. When a tenant in possession prevents his co-tenant from obtaining, from the premises, such profits as they are capable of yielding, or takes possession of the whole and uses them as his own, and thereby makes a profit, he must account, either for the fair rental value or the profits, or be liable for mesne profits; for, one tenant is bound to account to another only as his baliff, under contract express or implied. Where one tenant-in-common occupies the joint property, without any assertion of hostile or exclusive title on his part, and without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account, for he has a right to such occupancy. Applying these principles to the facts of the present case, the plaintiff could not succeed; for, he did not complain of ouster or exclusion from the enjoyment of the joint property, nor was there the remotest suggestion that the defendant took more than his share of the total quantity of stones.

7 Q. B. 701; (1872) L. R. 5 H. L. 464; (1878) 25 Minn. 222—33 Am. Rep. 451; (1883) 64 Calif, 134—49 Am. Rep. 686; 24 Penn. 162 and (1890) 122 New York 153—14 Am. St. Rep. 488, Refd. to and F. (1873) 70 Illinois, 320; (1875) L. R. 20 Eb. 84 and (1890) 18 C. 10, Distd. 19 C. 253 and 7 B. 326, Expl. MOHESH NARAIN *v.* NAWBUT PATHAT, **1 C L J 437=32 C 837.**

3 *Adverse possession—Co sharer—Possession —Sir land—Dispossession—Lumberdar—Undivided village.*

Where a co-sharer has been for many years in exclusive and peaceable possession of *Sir* land in excess of his legitimate share he cannot under ordinary circumstances be deprived of such possession. 20 W. R. 168, 22 W. R. 74, 25 W. R. 313, 3 B. L. R. Ap. 67, 8. C. 708, 9 A. 661, 14 C. 189, 17 I. A. 110, 19 I. A. 48, 26 C. 553, 13 C P L R 153 referred to. PODAMSINGH *v.* SAHADEO SAO. **14 P. L. R. 1901 P. 76.**

4 Adverse possession—Burden of proof. 25 B. 362 Col. 2055 P. I.

5 Appeal by co-sharer landlord for rent. 7 C W N 908 Col. 145 P. II.

6 Apportionment of revenue assessment—Co-sharers—Mahal—Civil Courts — Jurisdiction. 14 C. P. L. R. 1901 P. 107 Col. 366 P. II.

7 *Arrears of rent—Agra Tenancy Act (II of 1901), S. 165—Co-sharer—Suit for rent—Settlement of accounts.*

The plaintiff represented a 12 anna share and the defendant a four anna share in a certain village. They were in exclusive occupation of the cultivated area of the village. The remaining uncultivated area was their joint property in the proportion of 12 to 4 and was not in the exclusive possession of either party An agreement was entered into which was recorded in the *Wajib-ul-arz* as follows: "If a co-sharer will cultivate waste land newly broken up, rent at the rate payable by tenants will be taken from him. The defendant having broken up and brought into cultivation, a certain portion of the waste land, the plaintiff sued for arrears of rent in respect of the same.

Held, that the defendant should be treated as the tenant of his co-sharer of the part so brought into cultivation, and that he should be liable to pay rent to the plaintiff in proportion to the shares in which the village was held. The suit was maintainable in the form it was brought, and it was not necessary for the plaintiff to sue

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for settlement of accounts.—HUB LAL *v.* RAM CHARAN, **3 A L. J. 472=A W N 1906 P 141**.

8 Building—Co-sharers—Construction on joint land-Mandatory injunction-Special damage—Question of law 2 A L J 455 Col 1231 P. I.

9 Building on joint land—Co-sharers—Way of necessity-Judgment-Decree, contents of—3 O. C. 901 Col. 259 P. II.

10 Common village land for tethering cattle, whether open to partition among proprietors MAKHAN SINGH *v.* ISHAR SINGH. **136 P R 1906** *See Partition.*

11 Dispossession by a co-sharer landlord —Limitation—Recognition of tenants title. 5 C W N 405 Col. 160 P. II.

12 *Ejectment—Agra Tenancy Act Ss. 167, 177 (e)—Ejectment—Defence that defendant is a proprietor—Question of proprietary title —Limitation Act—S. 5, appeal presented to wrong Court.*

In a suit for ejectment, the defendant pleaded that he cultivated the land as a co-sharer.

Held, that this defence raised a question of proprietary title and an appeal lay to the District Judge.

The appeal was, however, preferred to the Commissioner, who returned the memorandum of appeal to be presented to the District Judge. ...It was presented beyond time, but the Judge admitted it.

Held, that the Judge exercised a right discretion in admitting the appeal.

When a co-sharer cultivates more land than his share, he is not liable to ejectment as a tenant, but the proper remedy against him is by a suit for settlement of accounts. 2 A L J 176 R. INDAR LAL *v.* DEOJIT, **4 A L J 1=A W N (1907) 26**.

13 *Exclusive enjoyment—Joint property—One co-sharer dealing exclusively with joint property—Remedy of other co-sharers—Declaratory decree.*

One *C. B.*, who was a tenant of the parties to the suit, died without heirs. After his death one of the co-sharers took possession of the entire holding and proceeded to cultivate it. Thereupon the plaintiffs, the remaining three co-sharers, brought a suit to recover physical possession of three-fourths of *C. B*'s. holding and also claimed mesne profits of the land. A decree for joint possession of the holding and for mesne profits was passed in plaintiffs' favour.

Held, that the only decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land in question, and as such joint owners were entitled to receive from the co-sharer in possession an account of the profits. JAGAR NATH SINGH *v.* JAI NATH SINGH. **W N A 1904 p 194=27 A 88**.

14 *Exclusion of one, by another, from possession and enjoyment of joint property—Suit by for joint possession—Form of decree.*

The suit is for joint possession of land by a co-sharer, who has been wrongfully ousted from possession and enjoyment of the same by his co-sharers, on the ground that it is joint property and, as such, the plaintiff is entitled to joint possession.

Held, that the plaintiff, being a co-sharer, is entitled to joint possession of land in suit. The decree should declare that the plaintiff is entitled to point passesion of the land in suit, that the defendants are not entitled to exclude her from possession, and that it should contain an injunction restraining the defendants from dealing with the land in suit by cultivating them, by letting them to tenants or by recovering rents or profits to the exclusion of the plaintiff without his previous consent, and that the plaintiff should be restored to possession jointly with the defendants. A W N (1904) 199 F A W N (1894) 166 Refd to A W N (1904) 194 and A W N (1894) 127 Distd. MUSAMMAT NANNHI DEBI *v.* DAULAT SINGH, **2 A L J 256**.

15 *Expenses incurred in litigation—Liability of sharer not a party to suit.*

The co-heirs of a deceased Mahomedan were his mother and his two wives. The two wives executed a mortgage, which was upheld on the ground that the money secured by it was raised for the purpose of carrying on the defence of a testamentary suit, in which a will was propounded which purported to have been executed by the deceased. The mother was not a party to the proceedings.

Held, that the mother was not liable, either under an implied contract or on the ground of equity, to share the expenses of litigation though carried on *bona fide* in respect of the common property. 21 C 142 R 21 C 496 F. HALIMA BEE *v.* ROSHAN BEE, **17 M L J 439=2 M L T 468**.

16 Injunction-Judicial discretion of Court. —When the act of the defendant amounts to an ouster of the plaintiff from the possession of the joint property. 29 C 500 Col 450 P. I.

17 *Joint possession—Enjoyment of joint property—Right to joint possession—Suit relating to the joint property—Exclusion of a co-sharer in denial of his right.*

The defendants had, in defiance of the rights of the plaintiff, who was their co-sharer, seized possession of land appertaining to the joint estate; they were not cultivating any part of the land or carrying on any work thereon inconsistent with the joint possession of the plaintiff nor had they improved the lands by spending labour and capital thereon, nor was there any acquiescence by the plaintiff.

Held that even if the defendants had originally taken possession of the land for the purpose of cultivating indigo, that purpose having come to an end, they were not entitled to continue in exclusive possession of the land, and that the plaintiff was entitled to recover joint possession. It would

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be subversive of the rights of joint owners to hold that it is open to any co-sharer, who may appear first on the field, to seize possession of any land newly formed by accretion to the joint estate, and hold it to the permanent exclusion of the other co-sharers. Watson and Co. *v.* Ram Chand Dutt (I. L. R., 18 Cal. 10; L. R., 17 I. A. 110), Lachmeswar Singh *v.* Manowar Hossein, (I. L. R. 19 Cal. 253; L. R., 19 I. A. 48), and Madan Mohun Shaha *v.* Rajab Ali (I. L. R. 28 Cal. 223), referred to and distinguished. SURENDRA NARAIN SINHA *v.* HARI MOHAN MISSER, **33 C 1201.**

18 Joint possession—Before suit—Denial by one co-sharer of another's title. 28 C. 223 Col. 338 P. II.

19 Joint family—See Hindu Law—Joint family.

20 Joint tort feasors—Suit for—Co-sharers making default in paying government revenue. 5 C L J 64 *See Contribution No. 12.*

21 *Jurisdiction—Revenue Court—Rent Act (XXII of 1886), section 108, cl. (15)—Mortgagee —Co-sharer.*

In a suit for settlement of accounts under cl. (15), section 108 of the Oudh Rent Act, a mortgagee in possession is a co-sharer and therefore the suit was cognizable by the Revenue Court (Lachman gingh *v.* Ghasi, 15 All. 137, Ram Kishen Das *v.* Tonda, Sel. Dec. of Board of Rev., (1888) p. 13, followed). AZIZ-UN-NISA *v.* MOHAMMAD SAIED KHAN. **2 O. C. 64.**

22 Kabuliat—Suit for rent of land found by measurement to be in excess—Landlord. 7 C. W. N. 670 Col. 113 P. II.

23 Khas-*possession of land, suit for by co-owner in symbolical possession—Exclusive possession by other co-sharers, whether adverse —Cause of action—Mesne profits.*

Whether a plaintiff after obtaining the symbolical possession of a 10-anna share of some land, which was in the actual possession of other co-sharers, took no steps for obtaining actual possession or a partition but brought a suit for joint possession with his co-sharers and for mesne profits.

Held, that there being no subsequent dispossession of the plaintiff, the possession of the other co-sharers was not adverse to that of the plaintiff; consequently, no suit for joint possession would lie; but that the plaintiff was entitled to her share of the profits which the defendants received from the lands. 18 Cal. 10 followed. AMBA DEBYA *v.* JNANODA SUNDARI. **4 C. L. J. 254.**

24 *Liability of, for* Lambardari *dues—Rules for* Lambardars *framed under s. 220, Act XVII of 1876.*

A *Lambardar* is entitled to *Lambardari* dues from his co-sharers even though they collect separately and pay their respective states of Government Revenue direct. JASKARAN SINGH *v.* MAHARAJ SINGH. **3 B. R. 97=4 O. C. 148.**

25 *Liability of—Jurisdiction—Civil Court*

—*Suit by* Lambardar *against co-sharer for share of costs of litigation in connection with* zemindari—*Costs of suit for enhancement of rent—Liability of co sharers to* Lambardar *for—"Village dues and other expenses," meaning of—Rent Act XXII of 1886, S 108, cl. (16).*

The respondent was the *Lambardar* in a village and the appellants were co sharers. The respondent sued certain under proprietors for enhancement of rent. He then filed a suit in the Civil Court claiming from the applicants their share in the costs of the litigation on the ground that they were benefited by the enhancement. The applicants pleaded that the claim was covered, cl. 16, S. 108 of the Oudh Rent Act, 1886, and that it was not cognizable by the Civil Court. The Court of first instance upheld the objection, and returned the plaint for presentation to the proper Court. The respondent appealed and the Lower Appellate Court set aside the order of the Court of first instance on the ground that "village expenses and other dues" could not cover the costs of litigation.

Held, that, a suit for enhancement of rent was as much incident of the management of a *zemindari* as a suit for arrears of rent, and that the costs incurred in all such suits should be treated as costs incurred in the management of the *zemindari* and that as such they must be held to be covered by the words "village expenses and other dues" in cl. (16) of sec. 108 of the Oudh Rent Act, 1886.

Held, that the case was not cognizable by the Civil Court.—SUBBA SINGH *v.* BAKHTAWAR SINGH, **5 O C 298.**

26 Land revenue paid by co-sharer—Charge—Contribution—Voluntary payment. 26 B 437 Col 1936 P I.

27 Landlord and tenant—*See Landlords —Co-sharer.*

28 Land Registration Act—Rent. Suit for—Amicable arrangement between them to recover rent. 30 C 773 Col 62 P I.

29 Limitation for application by one—Execution decree—Bengal Tenancy Act Sch III R 6—5 C W N 763 Col 1998 P I.

29 (a) Mahot. 14 C P L R 1901 P 107 *See No. 6 supra.*

30 Mahal—Oral evidence—Secondary evidence. 4 O C 365 Col 198 P I.

31 Mahal—Proprietor—Right of pre-emption-Non-residence in village-MUNNU LAL *v.* MUHAMMAD ISMAIL **7 O C 284.** *See Pre emption.*

32 *Mahal—Pre-emption—Suit for—Holders of separate holdings and paying rents separately—Oudh Laws Act (XVIII of 1876), S. 9 cls. (2) and (3).*

The plaintiff, pre-emptor, sued the vendor and the vendee for pre-emption of lands sold in which the vendor had an under-proprietary interest. It was common ground between the parties that the would-be pre-emptor, the vendor and the vendee, were members of the same village community

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within the meaning of clause (3), section 9 of the Oudh Laws Act. The pre-emptor contended that they were also co-sharers of the whole *mahal.* The circumstances of the case were that several persons including the parties, obtained a decree for under-proprietary rights in separate and specific plots of land severally responsible for payment of rent.

Held, that the parties were only members of the same village community, but were not co-sharers of the whole *mahal*, which belonged to the superior proprietor, and consequently lots should be drawn for determination of the right of pre-emption since the vendee and the pre-emptor were equally entitled. (S. C.=No. 177 not followed); Mohammed Ismail *v.* Sirajulhaq, 3 O. C., 110 followed.—BADRI *v.* ABLADIN, **5 O C 399**.

33 *Partition—Joint property—Suit for possession—Form of decree.*

Where a co-sharer sues for exclusive possession and in the alternative for joint possession, the proper order to make, in case joint ownership is proved, is a decree declaring the rights of parties. A co-sharer is not entitled to a decree for joint possession. *W N All 1905 p 233 followed.* DHANRAJ PANDAIN *v.* SHEO RAJ PANDE. **A W N 1906 P 194**.

34 *Partition decree—Execution of decree—Right of defendant to apply for execution.*

A decree for partition is not like a decree for money or the delivery of specific property, which is only in favor of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought and such a decree when properly drawn up is in favor of each share-holder or set of share-holders having a distinct share. *3 Cal 551 relied on 23 Bom 184 and 188, 12 All 506 20 All 11 referred to.* WASDEO *v.* RUP CHAND & RAM CHAND, **13 P L R 1905 =23 P R 1905**.

35 Pre-emption—Proprietor—Share in *mahal* consisting of separate chak 9 C. W N 123 Col. 333 P II.

36 *Pre-emption—Rival pre-emptors—Compromise between first pre-emptor and vendee—Second suit for pre-emption by second co-sharer filed on the date of compromise—Decree for moiety of the property.*

On the date fixed for the settlement of issues in a suit for pre-emption brought by a co-sharer a decree for pre-emption based on a compromise was made in favour of the plaintiff. Before decree another co-sharer having equal rights with the plaintiff brought a suit for pre-emption in respect of the same property. The plaintiff in the first suit was made a defendant in the second suit. He contended that the second suit was too late and did not lie.

Held, that the compromise did not dispose of the suit, that the first suit being

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still pending when the second suit was brought, the second pre-emptor was entitled to a decree for pre-emption in respect of one half of the property sold. *7 All., 720 followed. W. N. All., 1886, p. 56 distinguished.* SALIG RAM *v.* KALI SHANKAR, **A W N 1905 P 50**.

37 *Pre-emption—Sale to stranger—Purchase by co-sharer.*

Where the property sought to be pre-empted, was sold to a stranger from whom it was again purchased by co-sharers who had concurred in the first sale and afterwards a suit for pre-emption was brought by another co-sharer.

Held, that the suit did not lie. The concurring co-sharers could not bring a suit for pre-emption, but that did not preclude them from purchasing and setting up the re-vesting of the property in themselves, by a genuine sale before the date of the suit. The object of pre-emption is to keep strangers out of the co-parcenary body of a village and so maintain the unity of the co-parcenary body. If before pre-emption proceedings are instituted, the property has found its way into the hands of co-sharers, there is no reason for allowing pre-emption which is a very weak right.—LIAKAT HUSAIN *v.* RASHID-UD-DIN, **3 A L J 794 =29 A 125**.

38 *Pre-emption—Grove-hold-Owner of land on which a grove stands, a co-sharer—Government revenue, non-payment of—Co-sharer, meaning of—Oudh Laws Act, S. 9.*

Held, that the owner of a plot of land in the village, on which there stands a grove, for which no Goverment revenue is paid, is a co-sharer, for the purposes of pre-emption, within the meaning of the Oudh Laws Act, 7 O C 284, R 28 A 246 Diss. RAM KISHUN *v.* NADIR HUSAIN. **10 O C 86**.

39 *Pre-emption—Oudh Laws Act (XVIII of 1876), S. 9, cls. (2 and 3) and S. 10—Mahomedan parties to suit—Mahomedan Laws—Notice.—*

The plaintiff, who was the proprietor of lands in village and *mahal* P., sued the vendees and vendors to enforce his right of pre-emption. The lands sold were in the same village and *mahal* The pre-emptor, and the vendors, who were Mahomdans were jointly liable in their persons and property for the land revenue of the *mahal.*

Held, (per Blennerhasset, A. J. C.) that a co-sharer of the whole *mahal* is none the less a co-sharer merely because he may have become so by agreement with Government and other individual instead of by inheritance or purchase from original owners.

Held, therefore, that the plaintiff was a co-sharer of the whole *mahal* under cl. (2) and a member of the village community under cl. (3), of section 9 Act XVIII of 1876 and that, as such, was entitled to pre-empt the land sold in *mahal* P.

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Following Select Case No. 148, *held*, that in Oudh, a Mahomedan who institutes a suit for pre-emption under chapter II, Act XVIII of 1876, is not bound to observe the strict requirement of the Mahomedan Law as to the immediate demand and the invocation of witnesses. The pre-emptor may prefer his claim within the period of three months from the receipt of notice under section 10 of the Act.

Held, per Spankie, (A. J. C.) that the pre-emptor and the vendors held the land of the village under one tenure and consequently were members of the village community, that the lands held by the pre-emptor represented his share in the tenure; and that he was, therefore, a co-sharer in the whole *mahal* within the meaning of clause 2, sec. 9, Oudh Laws Act, 1876, MAHOMMAD ISMAIL *v.* SIRAJ-UL-HAQ. **3 O. C. 110.**

40 *Profits, suit for—Mortgagee of co-sharer's share to be joined as defendant in a suit for profits.*

In a suit for profits by a sharer against another co-sharer, who has mortgaged his share to a third party, and when both mortgagor and mortgagee are in possession both may at the option of the plaintiff be impleaded as defendants. THAKUR BAKHSH AND ANOTHER *v.* BHAGWAN DIN AND OTHERS. **9 O. C. 142.**

41 Profitable lease—28 C. 223. *See No. 18 supra.*

42 Possession of one co-sharer is the possession of all—Adverse possession—Burden of proof. 39 P. L. R. 1906 Col. 2056 P. I.

43 *Possession of one—Pre-emption—Grove—Co-sharers in—Position of co-sharers after partition—Member of village community not residing in the village in which he has rights in land—Oudh Laws Act (XVIII of 1276), s. 9 clause (5).*

The plaintiff, the defendants and other persons jointly owned a grove; but on partition the plaintiff acquired a separate and distinct part of the grove from the defendant. The defendant sold their part; hence the suit for pre-emption on the allegation that the plaintiffs and the vendors were co-sharers, in other words the plaintiffs had a share in the grove as the sellers who sold their shares. The plaintiff did not reside in the village.

Held, that at the time of sale the plaintiffs and the vendors were not co-sharers in the grove.

Held, further, that the plaintiff was entitled to pre-empt as a member of the village community under S. 9, cl. (4) of the Oudh Laws Act because the expression "village community" includes persons having under-proprietary rights in land of the village, although they do not reside in the village. SYED RASHID-UD DIN *v.* WALI JAN BEG. **7 O. C. 19.**

44 *Profits - Agra Tenancy Act S. 201—Suit for profits—Receipt of profits within 13 years of suit denied—Plaintiffs, recorded co-sharers—Burden of proof.—*

The plaintiffs—recorded co-sharers—sued another co-sharer for profits. The defendant pleaded that the plaintiffs or their predecessors in title had not received profits within twelve years preceding the institution of the suit, and that the suit was time-barred.

Held, that it was not for the plaintiffs to prove by evidence of receipt of profits within twelve years that the right subsisted; but it was for the defendant, having regard to S. 201 of the Agra Tenancy Act, 1901, to rebut the presumption which the law raised in plaintiff's favour. I. L. R. 27 A. 136 ref. to. BANWARI LAL *v* NAIDAR. **1907 A W N 5, 4 A L J 27, 29 A 158.**

45 Rent—Landlord and tenant—Co-sharer landlords—Suit for rent. Maintainability of. 10 C. W. N. 787 Col: •158 P. II.

46 *Rent. Suit for—Parties—Collection of rent separately by co-sharer landlords—Right to sue jointly—Landlord and Tenant.*

An arrangement by which each co-sharer landlord collects his share of the rent separately is quite consistent with the continuance of the original lease of the whole tenure and a joint suit by all the co-sharers is not bad because the co-shares have been collecting their shares of the rent separately. 4 *Cal 96, 17 Cal 695 9 W N Cal 34, 10 W N Cal 787, 3 Cal L J 379 referred to.* AKHOY KUMAR MITTER *v.* GOPAL KAMINI DEBI. **10 C W N 952 =33 C 1010.**

47 *Rent—Landlord and Tenant—Co-sharer landlord—Rent decree — Private sale—Execution sale not affecting purcheser's rights.*

In a suit for rent by the several co-sharer landlords of a *jote*, all persons interested therein were made defendants and a decree obtained by the landlords in execution of which the *jote* was purchased by a third party. Another decree for the rent of the same *jote* was subsequently obtained by the same landlords against this purchaser who had in the mean time sold away his interest therein to a fourth party, the appellants before the High Courts.

Held that the execution sales cannot be viewed upon the same footing, for in the first sale, the decree having been obtained by making all, who represented the *jote*, parties to the suit, the entire plot passed to the purchaser, whereas the second suit for rent having been instituted only against the recorded tenant, who having already parted with all his right, title and interest in the *jote*, no longer represented it, the second sale passed nothing to the appellants, and the title of the purchaser under the second sale was valid and unaffected by the second rent decree. UMESH CHUNDER ROY *v.* GAUR LAL CHAUDHURY. **10 C. W. N. 1042.**

48 *Rent—Rate of rent—Decree by a co-sharer landlord, if.*

A decree by a co-sharer landlord is not admissible as evidence as to the rate of rent in a suit brought by another co sharer. ABDUL ALI *v.* RAJ CHANDRA DAS. **10 C. W. N. 1084.**

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49 *Rent—Landlord and Tenant—Co-sharers—Suit for rent against co-sharer.*

Where the plaintiff and the defendants, some of the co-owners of a zamindari, purchased certain holdings under the zamindari and were in occupation of separate portions of them—

Held, that in the absence of an agreement the defendants could not be regarded as tenants of the plaintiff in respect of the lands actually occupied by them and were not liable to pay him rent for the same. GIRINDRA CHANDRA PAL CHOWDHRY *v.* SREENATH PAL CHOWDHRY. **3 C L J 141=32 C 567.**

50 Right of—Partition of land—Resjudicata 2 O. C. 51 Col. 1032 P. I.

51 *Right of—Oudh Estates Act (I of 1869)—Settlement of Estate—A Talukdar, settled with on terms imposing a trust on him—Second Summary Settlement, 1858—Confiscation, effect of—Rights of the Government.*

A sanad holding talukdar, whose name has been entered in lists I and II, made in conformity with the Oudh Estates Act, 1869, holds the *taluk* subject to such trusts as have been validly created. At annexation, four descendants of a Mahomedan proprietor were entitled in equal shares to the ancestral estate, which, in 1858, at the second Summary Settlement, was settled with only one of the four who presented himself to the Settlement Officer. The settlement with him as *talukdar* which was then made was, however, made upon terms providing that the absent co-sharers on their return should obtain their shares. This accorded with his application expressing his willingness.

Held, that the question whether the *talukdar* had become a trustee for the plaintiff in respect of his share depended on the terms on which the estate had been granted to the *talukdar* by the Government at the second Summary Settlement, it having been at their absolute disposal as a consequence of the confiscation of March, 1858. The trust was not affected by the *sanad*. No special provision as to the co-sharers return or admision to share, had been deemed necessary by the Chief Commissioner, who authorized the settlement with the *talukdar* in reliance on his assurance. The right of the co-sharer, who returned in 1859, was accordingly established.—HASAN JAFAR *v.* MOHAMMAD ASKARI, **26 C 879=2 O C 199 =26 I A 229.**

52 *Sale in execution of decree—Civil Procedure Code (Act XIV of 1882), Section 310A.*

A person claiming under the Muhammadan Law a share in some immovable property, which has been sold in execution of a decree against his co-sharers, is not entitled to make a deposit under section 310A of the Civil Procedure Code. 23 Bom., 450; 29 Cal., 1; 21 Mad., 416, referred to. ABDUL RAHMAN *v.* MATIYAR RAHMAN. **3 O. C. 425.**

Co-sharers (*Contd.*)

53 *Separate possession of distinct plots by arrangement—Sale by a co-sharer—Purchaser's right to exclusive possession.*

When, by private arrangement amongst co-sharers, one of them is in exclusive possession of a certain portion of the *ijmali* land a purchaser of the right, title and interest of the latter, is entitled to be placed in the same position as his vendor.

An arrangement amongst co-sharers, like the above continues to be a good and binding arrangement, until the co-sharers themselves agree to give it up and come to some other arrangement, or until any one of the co-sharers demand a partition of the entire joint lands, either in Court or out of Court. KUMUDINI MAZUMDAR *v.* RASIK LAL MAZUMDAR, **11 C. W. N. 517.**

54 *Sub-division—Pre-emption — Right of priority — Relationship with vendor — Oudh Laws Act (XVIII of 1879), s. 9, cls. (1 & 2).*

Plaintiffs and one B sued separately for pre-emption in respect of the defendants' share in village K. The village was divided into two *mahals, viz.*, *mahal mustaqil* and *mahal ihtimali*. The *mahal mustaqil* consisted of two *pattis* known as I. B. and S. G. The plaintiffs had a share in *patti* I. B, and B had a share in *patti* S. G. B. was related to the vendors but the plaintiffs were not.

Held, that *patti* I. B. was a sub-division of the *mustaqil mahal* within the meaning of clause 1 of s. 9 of the Oudh Laws Act and that the plaintiffs had a right of pre-emption superior to that of B. in respect of that *mahal*. And under clause 2 of the section B had a better right than the plaintiffs in respect of the *ihtimali mahal* because B. was related to the vendors.

Clause 1 of section 9 means that amongst co-sharers in the sub-division who are related to the vendor or mortgagor priority is to be determined by nearness of relationship and that co-sharers in the sub-division who are not so related can claim under this clause but after those who are related, thus —nearly related—less nearly related—not related. SHEO NARAIN SINGH *v.* SHEO DAT SINGH. **7 O. C. 129.**

55 *Suit against co-sharers for possession of* shamilat *land and demolition of construction thereon blocking a road—Decree for joint possession when no such relief is prayed for —Interference by Court in second appeal—Blocking a road—Remedy of co-sharer against other co-sharers.*

A suit was brought for possession of a piece of *shamilat* land in an *abadi* and for demolition of a *chaupal* erected thereon by the original defendants on the grounds that a road used for carts and foot-possession was blocked up by the erection of the *chaupal* and that the plaintiff was put to inconvenience. The co sharers of the *patti* in which the land lay were made defendants in the suit. The defendants pleaded that they had built a house on the plot

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many years ago by permission of the *Lambardar* and that the *chaupal* in question was merely as addition thereto and that no road had been blocked up and no harm done to the plaintiff. The Lower Appellate Court found that the *chaupal* blocked up a road as alleged by the plaintiff and passed a decree in favour of the plaintiff for possession jointly with his co-sharers. In second appeal it was contended that the plaintiff having claimed exclusive possession was not entitled to a decree for joint possession.

Held, it was doubtful whether the plaintiff ever intended to claim exclusive possession; even if he did, the Court should not on that ground interfere in second appeal with the decree for joint possession if on other grounds the plaintiff is found to be entitled to such possession.

Held, the plaintiff was entitled to the relief prayed for as the damage done would not be remedied by a partition. KALLU *v.* GAYA DIN. **7 O. C. 362.**

56 *Suit by co-sharer for demolition of well constructed by a third person with the consent of other co-sharers—Remedy of non-consenting co-sharer against the person building with the consent of other co-sharer.*

Where a co-sharer has constructed a building on land jointly belonging to him and other co-sharers without their consent they are not entitled to have the building removed unless they can show material damage or unless they have taken measures in time to prevent construction of the building. Their remedy is by partition. So is the case with the construction of a well. MAHA SINGH *v.* BHOGA. **7 O. C. 336.**

57 *Suit by co-sharers against other co-sharer for contribution of revenue—Jurisdiction—Rent Act s. 108, (16).*

B. S., co-sharer, instituted a suit against the *lambardars* and co-sharers for contribution in respect of the payments made by him, on account of the arrears of revenue, after his appointment as *lambardar* had been ordered and in fulfilment of the condition under which that order was passed.

Held, that the suit fell under the provisions of clause (16) of section 108 of the Oudh Rent Act and the cognizance of the Civil Court was barred by that section—BALDEO SINGH *v.* HIMMAT SINGH. **3 O. C. 303.**

58 *Suit by co-sharer against lambardar for profits—Evidence of collection of actual amount of profits—Burden of proof. Rent Act S. 108 (15).*

The plaintiff sued a *lambardar* under S. 108, cl. (15). Rent Act, for his share of profits.

Held, that when the *lambardar* has filed his account and sworn to its being a true and full account, or has called the *patwari* who swears to the account produced by him being a true and full account, and

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the co-sharer disputes the correctness of particular items or wishes to charge the *lambardar* beyond what is admitted by the account, on the ground that he has collected more, or might, but for gross negligence or misconduct, have collected more than is admitted, it lies on the co-sharer to prove how much more the *lambardar* has collected or might have collected but for gross negligence or misconduct, than is admitted. The fact that in a particular year the *lambardar*, on his own admission, collected a particular percentage less than 100 per cent. is not any evidence that he collected more than he has admitted that he has collected or that he was guilty of gross negligence in not collecting more.—ARJUN SINGH *v.* GANGA BAKHSH. **4 O C 1.**

59 *Suit by a co-sharer for profits—Rent Act (XXII of 1886) S. 108 (15) — Presumption arising from non-receipt of share of profits within 12 years previous to the institution of suit—Adverse possession—Entry in the* khewat *--Sufficient proof of* prima facie *title to profits.*

The plaintiff sued the defendant under cl. (15), s. 108 of the Oudh Rent Act, 1886, for his share of the profits of certain estates for the year 1296 F. The defendant pleaded that the plaintiff, being out of possession of the share in question for more than 12 years had lost all rights in the share in question and that the suit was time-barred.

Held, that in such a case it is sufficient the plaintiff, in order to establish, *prima facie*, for his title to the share, to prove that his name stands recorded in the *khewat*, or register of co sharers prepared, kept and maintained by the Deputy Commissioner under Chap. IV Act XVII of 1876, and that it is not necessary that he should also prove that he has received profits at sometime within 12 years next before the institution of the suit.

Held, further, that from the fact that the plaintiff had received no profits of the share for 12 years, in the absence of evidence showing that it was owing to the denial of the plaintiff's title that she did not receive profits, an inference cannot be drawn to the effect that the defendant was in adverse possession. SITLA BAKHSH *v.* MUSSAMMAT UMED KUAR **1 O C 143.**

60 *Suit by one co-sharer against another for share of profits—Responsibility of co-sharer in undivided* patti *to another co sharer—Rent Act S. 108 (15).*

In this suit the defendant was the proprietor of half of a 5 biswa *patti* and the plaintiff was the mortgagee from him of the other half of the *patti*. The plaintiff sued to recover a certain sum of money alleged to be due from the defendant on account of her share of the profits for three years. It was admitted that there had been no division of tenants between the parties and that both collected rent from tenants. The Lower Appellate Court held that the defendant was not responsible for the rent which the plaintiff failed to collect, that he had

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not collected more than half and that each party had a right to collect his share, that is, to get half the rent of his holding. It was admitted that either the plaintiff or the defendant could have collected the whole of the rent due from the tenant so that either of them could have collected the rent which the plaintiff failed to collect.

Held, that the plaintiff was entitled to half the total profits of the 5 biswas calculated on the amount realized. The fact that the defendant did not obstruct or prevent her collecting was no reason for holding that he was entitled to retain the whole of the amounts he had collected, inasmuch as it did not exceed half the total rental of the *patti* for the three years —PARBATI *v.* KUAR BADHI SINGH. **4 O. C., 363.**

61 *Suit for arrears of revenue paid by one co-sharer for another—Rent Act S. 108 (16) 124 C. 124 D.—Revenue Court—Jurisdiction —Appeal to District Judge—Remand.*

The appellant and the respondent were co-sharers in a certain village. The plaintiff was compelled to pay the share of revenue payable by the defendant. The plaintiff sued the defendant to recover the money so paid by him. The plaintiff was the *lambardar* at the time the suit was instituted, but at the time he paid the money which he claimed in the suit, he was not *lambardar*. The Assistant Collector dismissed the suit on the ground that the plaintiff was neither *lambardar* nor a *pattidar* entitled to collect rent when money was paid and the suit could not lie therefore in a Revenue Court. On appeal the District Judge held that the plaintiff must be deemed a *lambardar* when money was paid and therefore the suit was cognizable by the Court of Revenue, and he remanded the case for trial on the merits.

Held, that the suit could not be said to be one by a *lambardar* for arrears of revenue payable through him by the co-sharers whom he represented, within the meaning of S. 108, cl. (16), Oudh Rent Act. The District Judge was, therefore, in error in holding that the suit was cognizable by a Revenue Court. But the suit, whether instituted in a Civil Court or in a Court of Revenue, was one in which the appeal would lie to the District Judge. The provisions, therefore, of S. 124C and 124D, Oudh Rent Act, were applicable.

Held, *further*, that the District Judge's order remanding the case could be upheld with reference to the provisions of S. 124D, Oudh Rent Act, though not on the grounds on which it was made.—UMA BAKHSH SINGH *v.* RAM SAHAI, **4 O C 261.**

61 a. *Suit for profits by co-sharers against* lambardar—*Non-liability of* lambardar *for profits of lands held by other co-sharers in excess of their shares—Rent Act S. 108 (15).*

The question for decision was whether the plaintiffs were entitled to recover from the defendant, who was the *lambardar*, in addition to their share of the profits of the *khalisa* lands, their shares of the *taufir* or profits of land held by other co-sharers in excess of their proper share.

Held, that it was not the duty of the defendant to have realized from each of the co-sharer the excess profits received by him, and divided the money so collected between the co-sharers, because a *lambardar* as such is not entitled to sue a co-sharer for the share of the profits of a part of an estate due to himself and the other sharers in the estate; and as no one of the co-sharers is under such circumstances, the tenant either of the *lambardar* or of the whole body of the co-sharers, the *lambardar*, could not sue any co-sharer for the profits of land held by him in excess of his proper share. The *lambardar*, therefore, in such a case as this, cannot be debited with those profits either as profits or as rent, on the ground that it was his duty to have realized them. R. A. R. No. 67, followed. The proper remedy for the plaintiffs was to have instituted a suit for the settlement of accounts and to have impleaded all the co-sharers therein as parties, SYED KHURSHED ALI *v.* NAWAB ALI. **1 O. C. 152.**

62 *Suit for rent paid by co-sharers on behalf of other co sharers—Revenue Act (XVIII of 1876), S. 219 cl. (f)*—Lambardar—*Rent Act (XVII of 1886) S 108(16)—Jurisdiction—Civil Court.*

The plaintiff, a co-sharer, in a sub-settled *Mahal*, sued the other co sharers for the amount which he had paid on their account to the agent appointed by the Deputy Commissioner to manage the *Mahal* on the superior proprietor making default in payment of the Government Revenue.

Held, that the provisions of S. 129, cl. (*f*), Oudh Land Revenue Act, 1876, were not applicable and the Civil Courts were not debarred from taking cognizance of the suit. The word *Lambardar* in cl. 16 S. 108, Oudh Rent Act, means a representative of the village community appointed under the rules framed under S. 220, Oudh Land Revenue Act, 1876.—PIRTHI SINGH *v.* AHMAD HUSAIN, **5 O C 392.**

63 Suit for rent—Remand —Appeal—Rent —Patics—Amendment of plaint—6 C W N 326 Col 1439 P I.

64 *Test of—Suit for—Oudh Laws Act, 1876 S. 9, cls. (2) and (3)—Revenue free land, suit for pre-emption, with respect to*—Nazul *or Government land held revenue free, whether constitutes a mahal with the rest of the village —Co-sharer, test of being a—Village community, member of, claim decreed as—Estoppel, elements necessary to be proved in order to constitute.*

The respondent brought a suit for pre-emption with respect to 25 and odd bighas of revenue free land situate in mauza C. The land formed part of an area of 126 and odd bighas recorded at the first settlement as Na-

Co-sharers (*Contd.*)

zul or Government land, for which no revenue was payable, and which had been sold by the Government to a private individual. After various transfers the appellant Bank purchased the land at an auction sale held in execution of its own decree, and subsequently sold it to the appellant *S* without giving the respondent, a sharer in the village, notice in the manner prescribed by S. 10 of the Oudh Laws Act. The respondent claimed to pre-empt both as a sharer in the village and as a member of the village-community under second and third clauses of S. 9 of the Oudh Laws Act. The defence was that the respondent was not entitled to pre-empt the property either under the second or under the third clauses of S. 9 and that he was estopped from making the claim as he had refused to purchase the property when it was offered to him by the Bank.

Held, that, as the land in suit was not in any way responsible for the revenue assessed upon the village, the respondent and the Bank were not co-sharers of the same mahal, and, therefore, the respondent could not claim to pre-empt the property under the second clause of S. 9 of the Oudh Laws Act, but that the respondent could pre-empt the property as a member of the village-community under the third clause of S. 9 and that it was not necessary that the vendor should be a member of the village-community.

Held, also, after reviewing the evidence that no case for estoppel had been made out. 5 O. C. 395 R. BANK OF UPPER INDIA *v.* MUNSHI ALOPI PRASAD. **10 O. C. 257.**

65 *Test of—Owner of plots of land in* abadi, *whether a co-sharer—Co-sharership, test of—Liability to be sold up for arrears of revenue—Right to pre-empt as a member of village community—Sale to a stranger without specification of shares.*

Held, that, where a person is the owner of plots of land in the inhabited area of a village, he is to be deemed, for the purposes of pre-emption, a co-sharer in the village; as the test of co-sharership is whether the land held by him would be liable to be sold in case of a sale or arrears of Government revenue 10 O. C. 86 Appr 26 A. 574 (P. C.) 16 A. 412 R. 28 A. 246 not F.

Held, further, that such a person could in any case be allowed to pre-empt as a member of the village-community. 7 O. C. 19 R.

Held, also, that where in a purchase a co-sharer associates with himself a stranger and there is no specification of the shares acquired by each of them, the co-sharer loses his preferential right to purchase and the whole property sold is liable to pre-emption. 7 O. C. 22 R. AULAD HUSAIN AND ANOTHER *v.* MUSAMMAT ZAINAB-UN-NISA. **10 O. C. 225.**

66 Valuation of suit for partition—Jurisdiction. 24 A 381 Col. 791.

67 *Vendor and Purchaser—Purchase by a co-sharer of part of joint property from his co-parcener—Subsequent partition of whole property—Part of property sold allotted to third person—Suit by purchaser—Covenant for title—Damages.*

The plaintiff and the defendant (with other persons) were co-sharers in certain land. In 1890, the plaintiff purchased a part of this land from the defendant by a registered sale-deed and took possession. In the following year, in a partition suit brought by the defendant against his co-sharers (of whom the plaintiff was one), a part of the land bought by the plaintiff was allotted to a third co-sharer and another part was allotted to the plaintiff himself, and in March 1896, execution of the partition decree, the plaintiff was deprived of the part allotted to the third co-sharer. In 1899, the plaintiff filed this suit, praying that the defendant might be ordered to make over to him other land in place of that of which he (the plaintiff) had been deprived, and also claiming damages. The first Court dismissed the suit. On appeal, the District Judge reversed that decree and awarded the plaintiff the defendant's share of land together with Rs 62 as damages.

Held, that the plaintiff was not entitled to damages. There was no title, express or implied, given by the defendant. The interest of the defendant in the land was well known to the plaintiff when he bought. The liability to partition as regards the land could not be removed by the seller (defendant) as was well known to the buyer (plaintiff).—SHIVRAM GOVIND DESAI *v.* BAL DAJI DESAI, **26 B. 519.**

68 *Where necessary parties—Rent Act S. 108 (15)—Suit for settlement of accounts—Civil Procedure Code, (Act XIV of 1882), S. 28—All co-sharers necessary parties—Misjoinder of parties.—*

The plaintiffs, who were sharers in a village, brought a suit against all the other sharers in the village for settlement of accounts.

Held, that the suit was properly framed and that there was no misjoinder of parties.

Held, further, that in a suit for the settlement of accounts, under sec. 108, cl. (15), Oudh Rent Act, all the co-sharers in the estate, whether it be a *mahal, thok, patti* or other sub-division of a *mahal* or village, to which the suit relates and in respect of which accounts are to be settled, must be joined as parties to the suit either as plaintiffs or as defendants.—THAKUR BAKHSH *v.* BHAGWAN DIN, **10 C 215.**

Co-sharers and Lambardar

1 Suit for profit—Adverse possession of a limited interest—Lease, additional area within. 27 A 436 Col 2063 P I.

Costs

1 Adjournment of—Review-Practice-Order to pay costs of—Power of Court to alter.

Costs *(Contd.)*

A W N 1902 P 98 Col 2029 P I.

2 *Appeal—Discretion—Second appeal.*

The Courts have full discretion as to costs, but that discretion must be exercised on general principles and not arbitrarily.

A second appeal lies against the order of costs passed by an appellate Court.

The Munsiff dismissed the plaintiff's suit but awarded no costs to the defendant. The defendant appealed as to costs but his appeal was dismissed. The High Court on second appeal ordered the plaintiff to pay costs of the defendants of all the three Courts. S. M. BHUGOBATI PAL *v.* MAHOMED ALLI. **7 C W N 647.**

3 *Appeal—Printing of unnecessary records.—* Costs of printing a large portion of the paper book found unnecessary for the trial of the case disallowed.—MAHESH NARAIN *v.* NAWAB PATHAK. (HARRINGTON, J.) **32 C 837 at 842.**

4 Appeal dismissed or accepted "with costs," meaning of. 18 P. R. 1907. *See Construction of decree No. 3.*

5 Appellant to pay in High Court—Plaint insufficiently stamped — Procedure Limitation. 2 C. L. J. 70. *See Col. 1440 P. I.*

6 Application—Emendment of plaint as to joinder of parties—Case almost finished A. W. N. 1905 P. 35. *See Col. 1392 P. I.*

7 *Application for leave to appeal to Privy Council—Costs—Execution—C. P. C. S. 583, 612.*

When a Division Bench of the High Court makes an order dismissing an application for leave to appeal to His Majesty in Council with costs, the order as to costs is to be enforced by execution in the lower Court, which passed the order originally. JOGENDRA CHANDRA SEN *v.* BIBEE WAZIDUNNESSA KHATUN. **11 C. W. N. 856=34 C. 850.**

8 Appeal as to—Discretion of the Court. A. W. N. 1905 P. 75 Col. 1068 P. I.

9 Appeal as to—Test whether the defendant is aggrieved—Expart decree. 9 C. W. N. 584 Col. 1321 P. I.

10 Appeal as to suit for possession of property against a person not in possession. 72 P. L. R. 1905 Col. 1068 P. I.

11 *Appeal as to—No principl involved.*

Quære—It is very doubtful whether an appeal will lie from an order for cost when no principle is involved. **28 C. 567 at 570.**

12 Appeal as to—Redemption—Tender of mortgage money—Interest in case where exact amount not tendered. BALDEO PARSHAD *v.* INAYAT KHAN. **6 O. C. 135.**

See Mortgage.

13 *Appellate Courts duty as to—Second appeal—Discretion.*

Per Subrahmania Aiyar, J. The High Court would not on second appeal disturb the order as to costs made in the Courts below in the due exercise of the discretion vested in them by law.

Per Davies, J. The High Court should set aside even on second appeal an order granting the plaintiff his costs on the whole amount of his claim when only a part of the claim was decreed, such order being opposed to the uniform practice of the Courts in the Madras Presidency which is to grant costs only on the amount decreed. 17 Mad., 293 *referred to.* PERIAKARUPPAN *v.* PALANIPPA. **13 M. L. J. 210.**

14 *Appeal to Privy Council dismissed in default—Costs of respondent. Power of High Court to award—Privy Council.*

Where the order granting leave to appeal to Privy Council provided costs of the application for leave to appeal to be costs in the appeal and the appeal was dismissed by the Privy Council for default of prosecution the High Court corrected the order and made the respondent's costs payable by the appellant. THE SECRETARY OF STATE FOR INDIA *v.* JANARDHAN GANPATRAO. **4 B. L. R. 947=27 A. 121**

15 Arbitration — General rule — Award silent as to costs—Appeal. 35 P. L. R. 1906 Col 1068 P. I.

16 Attorney's suit against client—Suit for dissolution of marriage—Damages. 28 C. 81 Col: 1069 P. I.

17 *Attorney and client—Right of executor to change attorney employed by testator—Costs—Liability of executor to pay.—*

Where an attorney is employed by several executors for the purpose of continuing an action instituted against the testator, any one of them may change the attorney on payment of all costs incurred in suit by that attorney.—5 *Bom. H. C. R.*, 163 *distinguished.* GIRINDRA KUMAR DUTT *v.* AMULYA CHARAN GHOSE. **6 C W N 306.**

18 *Attorney and Client—High Court (Bombay)—Rule 544—Taxation—Bill of Costs.*

Rule 544 of the Rules of the Bombay High Court does not empower a Judge to make an order on an attorney's application for taxation of his bill of costs for business not transacted in Court unless such order be by consent, and the Court has not any inherent power on which the jurisdiction can be rested 1 S and S 97 (1822) followed. *In re* FRAMJI CAWASJI MARKER, **10 B L R 76.**

19 Attorney's suit against client—Suits for costs—Limitation order for taxation of costs, effect of. 35 C 171 Col: 1779 P. I.

20 Awarded by decree—Mortgage decree—Order for sale—Costs if can be recovered from the mortgagor personally. 12 C W N. 364 Col: 693 P. I.

21 *Civil suit for costs of prosecution suit—Costs incurred in carrying on criminal prosecution—Damages for assault.*

A suit does not lie to recover expenses incurred by the plaintiff in carrying on the criminal prosecution of the defendant. 12 *All.*, *approved.* CHURAMONI DASI *v.* BAIDYA NATH NAIK. **32 C 429.**

Costs *(Contd.)*

22 Claim proceedings—Burden of proof —Suit for—U. B. R. 1905 P. 18 Col. 1527 P. I.

23 *Claim proceedings—Execution of decree —Attachment—Objection to attachment successful, but costs not allowed—Costs of objection not recoverable in separate suit.*

Attachment of certain property in execution of a decree being made, objections were put in by persons, who claimed the attached property as their own. These objections were successful, but, for some reasons not explained, the objectors were not allowed costs. The objectors instituted a suit against the decree-holder, recovered damages for unlawful attachment and the costs incurred in making objections.

Held that the costs claimed could not be recovered by means of a separate suit. 8 A. 452, 9 A. 474 F. SALIG RAM *v.* TIKA RAM, **A W N 1908, 18=5 A L J 140.**

24 Counsel's fees—Probate—Objection as to fee—Discretion—Appeal—Revision A. W. N. 1905 P. 83 Col. 1357 P. I.

25 'Costs in the cause'—Meaning of such order made in an interlocutory proceedings 25 B. 230 Col. 1069 P. I.

26 Criminal Prosecution, suit for costs of—32 C. 429 *See Costs No 21 supra.*

27 Collusion—Sale— Pre-emption decree against father—Suit by son to contest alienation after, decree in the pre-emption suit. 72 P. L. R. 1904 Col. 2116 P. I.

28 Court's power to extend time for payment of costs. 29 M. 370 Col. 1589 P. I.

29 Delay in filing suit—Costs—Compound interest. 53 P. L. R. 1904 Col. 344 P. I.

30 Contribution for costs—Arrears of rent—Suit for contribution severally and jointly. 10 O. C. 108 Col. 635 P. II.

31 Contribution for costs between co-defendants—Suit against three defendants—Decree against all for payment of plaintiffs costs—Payment of entire costs by one defendant. 26 M 373 Col. 637 No. 16 P. II.

Note—26 M. 373 read for 26 M. 8/3.

32 Counsels' fees=Objection as to fee—Fee out of all proportion to work—Costs. A. W. N. 1905 P. 83 Col. 1357 P. I.

33 Counsels' fees—Allowable on the withdrawal of a case under S. 373 C. P. C., (XIV of 1882). A. W. N. 1903 P. 12 Col. 1332 P. I.

34 *Counsels' fees—High Court Rules and Forms,* 1901, *Rule* 577—*Taxing Master's decision on a question of costs—Review by the Chambers Judge—Third Counsel's costs in a defended long cause—Practice as to retaining of Counsel and their costs—Cost of a third Counsel engaged to ask for transfer of case from one Judge to another—Practice.*

As a general rule the Judge in Chamber will not, on a review of taxation, interfere with items of taxation which are entirely within the Taxing Masters' discretion or go into details of such discretionary items; but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances.

Where two Counsels are already briefed in a case, and a third is instructed to make an application to transfer the case from one Judge to another, and the order making the transfer makes no provision as to costs, the costs should on taxation be refused between party and party, though they may be allowed between attorney and client.

A party to a defended long cause is entitled to appear by two Counsel. If both Counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one Counsel only throughout, the full refreshers of the conducting Counsel and a nominal refresher of 2 G Ms. of the other Counsel would be properly allowable against the opponent if ordered to pay costs. If the absent Counsel attends for portions of the time the case is at hearing, his refresher, proportionate to the time he attends would also be properly allowable, in addition to the full refresher allowed to the Counsel who attends and conducts the case.

Where a party to a defended long cause engages two Counsel he has a right to the services of at least one of them. He is under no obligation whatever to engage a third Counsel. If both Counsel find that they would owing to other engagements be unable to go in and conduct the case when it is called on it is obviously the duty of one of them to return the brief.

If three Counsel are engaged *before* the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party and which Counsel fees should go between attorney and client. A Solicitor engaging three Counsel is entitled to have his third Counsel's costs taxed between attorney and client if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third Counsel in order to safe-guard his clients' interests. If a third Counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so. BANOO BEGUM *v.* MIR AUN ALI. **32 B. 262.**

35 Decree for interest and costs—Mortgage of joint family property—Sons liability for d cree against father. RAMADHIN *v.* SHAMESHUR DUT. **4 O. C., 93.**—*See Hindu Law.*

36 *Difficulty as to jurisdiction—Plea of—Costs.*

The party by the act of whose counsel a difficulty in the case (here on the objection that a competent court had no juris-

Costs (*Contd.*)

diction) arises must pay the costs. 1902 A. C. 471 referred to. DAMAL *v.* SHRIPAT. **6 B. L. R. 301 at 303.**

37 Discretion of court—Exparte order when to be made—Pleadings—Inconsistent pleas—Set off—Duty of Appellate Court—Costs—6 B. L. R. 790 Col. 747 P. I.

38 Discretion of court—When plaintiff can be deprived of his costs. 27 M. 341 Col. 1069 P. I.

39 Dismissal for default—Restoration of suit—Order as to general costs in so restoring. 26 B. 201 Col. 1449 P. I.

40 *Divorce—Condonation of adultery—Adultery after condonation—Costs.*

In a petition for dissolution of marriage by reason of wife's adultery with co-respondents A and B adultery with B in October 1899 was proved but it was condoned in December 1899. Evidence of adultery with A in January 1900 held admissible in evidence.

Costs against A allowed, and against B refused on the ground that adultery with him was condoned. YOUD *v.* YOUD **28 C 221.**

41 Divorce—Costs between Attorney and client—Suit for dissolution of marriage—28 C 84 Col 1069 P I.

42 Divorce—Wife's costs—Suit for judicial separation by wife—29 C 619 Col 97 P I.

43 *Exparte decree, setting aside of—Carelessness of defendant to note date of hearing—Conditional order setting aside:—*

Where the defendants failed to note the date of hearing fixed in the summons and consequently did not appear at the hearing and an *ex parte* decree was passed, His Lordship thought it necessary to make the order granting the application to set aside the decree conditional on the applicant paying plaintiff's taxed costs by a certain day.—M E CARRON *v.* WELTI. **1904 A W N 227 ; 27 A 192.**

44 *Follow the event—Costs need not follow the event—Party succeeding guilty of fraud.*

Case where the party who succeeded in the appeal was not given costs in the first court as he was guilty of fraud.—TINCOWRY DEY *v.* FAKIR CHAND DEY. **7 C W N 180; 30 C 218.**

45 Form of security for costs—Immoveable property—Mortgage bond of—1 L B R 1900—1902 P 177 Col 1687 P I.

46 In redemption suit—4 O C 347 Col 465 P II.

47 Interest on costs—Interest for period between date fixed by decree for payment and date of realisation-ALLAHABAD BANK LD. *v.* SAYAD MOHAMMAD JAWAD. **2 O C 37.**

See Interest.

48. Interest on costs—Security for costs—Sale of properties given as security—Mortgage. 32 C. 494 Col. 603 P. I.

49 *Interest on—Order for costs in insolvency.*

It is not the practice of the Calcutta High Court to allow interest upon the decree or order sued on (here an order for costs) unless such decree or order provides for the payment of interest. ANNODA PRASAD BANERJEE *v.* NOBA KISSORE ROY (SALE J., O.C.J.) **9 C W N 952=33 C 560.**

See for other facts Col. 1924, P. I.

50 *Issues—Costs—Appeal—Suit for possession of property against a person not in possession—Trial of issues raised on grounds set up by defendant found to be flimsy and unsubstantial.*

The mortgagee sued the mortgagor for possession of the property mortgaged to him and impleaded one *G.* also as a defendant who resisted the plaintiff's claim along with the mortgagor. The suit against *G.* was dismissed on appeal on the ground that *G* was not found to be in possession of the mortgaged property and the Court ordered the plaintiff to pay *G*'s costs.

Held, that the order as to costs was wrong, the plaintiff was entitled to his costs against *G.* for he resisted the claim of the plaintiff on unsubstantial grounds and issues were framed and tried on the pleas raised by him. HIRA NAND *v.* RURE KHAN. **72 P. L. R 1905.**

51 Jurisdiction—Plea of—6 B. L. R. 301 at 303—*See No. 36 supra.*

52 *Jurisdiction—One of several unsuccessful defendants appealing—Courts power to pass decree against successful defendant in absence of appeal by plaintiff—Costs.*

Held, that, where the 1st court has decreed plaintiff's claim only against one or more of several defendants, the Appellate Court, simply on appeal by the unsuccessful defendant, or defendants, and without a cross appeal on behalf of plaintiff, has no jurisdiction to disturb that portion of the 1st Court's decree which is in favour of the successful defendant or defendants 46 P. R. 1892 followed.

Held also, that a Court has no jurisdiction to award cost of one successful defendant against another unsuccessful defendant in plaintiff's claim. JOWAHIR SINGH *v.* AMIN CHAND. **57 P W. R. 1908.**

53 Of litigation—5 O. C. 298. *See co-sharer No. 25.*

54 Liability for -Proceedings for revocation of a summary grant. 9 C. W. N. 190 Col. 309 P. II.

55 *Memorandum of objections where appeal withdrawn—Costs—Costs on memorandum.*

Quaere :—Whether, when an appeal is withdrawn by an appellant, the memorandum of objections filed by the respondent under S. 561, C. P. C., cannot be heard. 17 A. 518 referred to.

But the appellate Court has jurisdiction over the question of costs of the memorandum; and the proper order to make in the absence of any agreement between the parties, would be to direct the appellant to pay

Costs *(Contd.)*

the respondent the costs of the appeal as well as the memorandum of objections. PONNUSAWMY NADAR *v.* SOMASUNDARAM CHETTIAR. **4. M. L. T. 482.**

56 Minor plaintiffs' liability for costs—Minor plaintiff non liable to give security for costs. 18 M. L. J. 155 Col 695 P. I.

57 Mortgage—Application to recover costs from puisne mortgagee. 23 A. 439 Col. 690 P. I.

58 Mortgage decree—Costs if can be recovered from the mortgagor personally. 12 C. W. N. 364—8 C. L. J. 152—35 C. 431 Col. 693 P. I.

59 *Neutral party.*

Where a person not interested in the appeal is added as a party to satisfy the rules of procedure, but no notice is given to him that he need not appear, the costs of his appearance must be paid by the appellant who lost the appeal. IMMUDIPATAM TIRUGNANA *v.* PERIYA DORASAMI. **5 C. W. N. 217=24 M. 377 P. C.**

60 *No appeal—Compromise decree containing directions as to costs, appeal against, maintainability of.*

The compromise entered into between the parties in this case failed to make provision for the payment of costs and the Court of first instance supplied the omission '*suo motu*' directing each side to bear its own costs. On appeal by plaintiff against the order in respect of the costs, *held*, under S. 375, Civ. Pro. Code, the decree was final in respect of all the subject matter of the suit other than costs, and upon the principal recognised in Balkissen Dass *v.* Luchmeeput Sing. 8 C. 91 referred to. There could be no appeal against the direction as to costs. SIDHA GOPAL BRAHMIN *v.* PURAN. **2 N. L. R. 49.**

61 No appeal lies to Privy Council when two courts differ only as to costs. 10 O. C. 65 Col. 1601 P. I.

62 Officers—Jurisdiction of Court as to the award of costs. 4 B. L. R. 109—Col: 1067 P. I.

63 Order for depositing additional—Additional costs not entered in the decree, how recovered. 10 C. W. N. 234 Col: 1608 P. I.

64 *Order as to costs—Judgment.*

An order as to costs is not a "judgment" within the meaning of S. 15 of the Letters Patent, and is consequently not appealable—SARAVANA MUDALIAR *v.* RAJAGOPALA CHETTY. **17 M L J 569.**

65 Order as to costs—Appeal from order as to costs—Dismissal of suit for non-appearance—Restoration of suit to file an application of plaintiff—Order that plaintiff should pay the general costs of suit—26 B. 201 Col: 1449 P. I.

66 Order for—Application for time to summon witnesses—Adjournment—Costs not paid—6 O. C. 41 Col: 1550 P. I.

67 Omission of plaintiff to press issue—Remand by appellate Court for trial on the issue—Party liable for costs. 4 B. L. R. 818 Col: 1680 P. I.

68 Pleader's fees—Power of court as to costs. 6 C. L. J. 453 Col: 80 P. I.

69 *Practice—Costs of Counsel—Costs of third Counsel in a defended long cause—Party and party costs—Attorney and client costs—Practice governing the allowing of costs—Taxing Master's decision—Review by the Chamber Judge—High Court Rules and Forms, Rule 577:—*

As a general rule the Judge in chambers will not interfere with items of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items, but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference; and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances. Where a party to a suit has already briefed two counsel for hearing and a third is instructed to make an application to transfer the case from one Judge to another, the costs shall be, in the absence of any order making the costs in the case, disallowed between party and party, though they may be allowed between attorney and client. A party to a defended long cause is entitled to appear by two counsel. If both counsel attend throughout the hearing and the other party is ordered to pay costs of the suit their brief fees and full refreshers would be allowed on taxation against the losing party. If the suit is conducted by one counsel only throughout the full refreshers of the conducting counsel and a nominal refresher of the other counsel would be properly allowable against the opponent if ordered to pay costs. If the absent counsel attends for portions of the time the case is at hearing, his refresher proportionate to the time he attends would also be properly allowable in addition to the full refresher allowed to the counsel who attends and conducts the case. When a party to a defended long cause engages two counsel he has a right to the services of at least one of them. He is under no obligation whatever to engage a third counsel. If both counsel find that they would, owing to other engagements, be unable to go in and conduct the case when it is called, it is obviously the duty of one of them to return the brief. A party is at liberty at any time to employ a third counsel, but this right of employing a counsel must be allowed to work hardship on the losing opponent. If three counsel are engaged before the hearing it will be for the Taxing Master to consider the fees and refreshers of which two he will allow between party and party and which counsel fees should go between attorney and client. A solicitor engaging three counsel is entitled in the event of his recovering costs from the opponent, to have his third counsel's

Costs *(Contd.)*

costs taxed between attorney and client if he proves express authority from his client or if he proves that some peculiar contingency arose which made it necessary for him to engage a third counsel in order to safeguard his client's interest. If a third counsel is added after the hearing of the suit has commenced such addition must be at the cost of the party doing so.—BANAS BEGAM *v.* MIR AUN ALI. **9 B L R 983.**

70 *Practice—Executor. Duty of—Accounts. Filing of—*

It is the duty of an executor to file the accounts of his administration and of the receipt and expenditure of moneys. It is wrong on his part to compel any person interested in the estate to come before the Court to ask for the order for filing the accounts.

An executor who does not file his accounts is guilty of breach of duty to that extent and generally will have to bear the costs of the proceedings held for compelling him to file the accounts.

It is the right of every person who is interested in the estate of a deceased person to see that the accounts are proper, and he has the privilege to compel the executor to file the account. But this right is not to be exercised in a frivolous and useless or vexatious manner without just cause, and the Court must see whether a party comes before the Court properly and within a reasonable time or whether he allows years to elapse before he applies to the Court. *In re* JETHA PADAMSI. **7 B L R 451.**

71 *Pre-emption—Decree in pre-emption suit—Payment into Court—Costs—Set off.*

A judgment, dated the 24th September, 1904, in favour of the pre-emptors under a foreclosure decree directed payment, within two months, of Rs. 2,100, together with the costs, if any, incurred by the purchaser in obtaining the order absolute. The corresponding decree contained the words "together with the costs of the purchaser in the foreclosure case, if any." The decree also awarded the plaintiffs a sum of Rs. 117-4-0 as costs. The Rs. 2,100 was paid within the time fixed. On the 24th February 1905, the judgment-debtors claimed that they were entitled to be restored to possession, and that the suit must be deemed to have been dismissed, inasmuch as the costs, amounting to Rs. 25-12-0 of the proceedings relative to the order absolute had not been deposited.

Held, following *Ishri* v. *Gopal Saran* (I. L. R. 6 All. 351), that the Rs. 117-4-0 could be set off against the Rs. 25-12-0 that the Rs. 2,100 deposited was therefore in excess of the actual sum payable under the decree and that the judgment-debtors' claim failed. *Jaggar Nath Pande* v. *Jokhu Tewari* (I. L. R. 13 All. 223), referred to. PARMANAND RAOT *v.* GOBARDHAN SAHAI.—**3 A. L. J. 804 = A. W. N. 1906 P. 198 = 28 A. 676.**

72 Pre-emption—Jurisdiction—Notice—Amount to be entered in—Interest—SAKINA BIBI *v.* ABDUL HAFIZ. **2 O. C., 103.**—*See Pre-emption.*

73 *Suit for Partition of joint property—Costs, appeal as to—Appeal when maintainable—Proprietors and lessees interests—Costs up to the preliminary decree—Rateable distribution—Costs, subsequent to preliminary decree, by whom to be borne—Lessor and lessee, liabilities of, to pay costs—Apportionment.*

An appeal will lie upon a question of costs, when a matter of principle is involved 12 C. 179, 12 C. 271 ref.

As the plaintiff in a partition suit commences it for his own advantage, convenience and security, and as the defendant, as joint owner, holds his undivided share always subject to the right of the plaintiff to demand partition, the parties must each bear their own costs of the suit, up to the stage of the preliminary decree, and the costs of the partition should be divided between the parties in proportion to their respective shares in the estate 12 W R 160 R. 17 Ves; 1 White and Tudor 181, 216; 27 Beav. 632; 2 Drury and Walsh 700; 2 Ir. Ch. Rep. 324; 12 Ir. Ch. Rep. 205, *cited* 21 C. 904, *Distd.*

If, however, there has been a frivolous contest, the party, by reason of whose opposition unnecessary costs are incurred, may be made liable 7 ch. div. 367 R.

A lessee, who accepts a lease of a share in joint property, does so with full knowledge that the subject matter is liable to partition, and if he finds himself a defendant in a partition suit, it is by reason of his own voluntary act, and, in such a suit, each party must bear his own costs up to the first hearing or preliminary decree, and the costs of the partition should be borne by the parties in the proportion of their interests. If the lessee took no part in the partition proceedings, and neither claimed nor obtained the benefit of a separate allotment, he could not be called upon to contribute to the costs of the partition. But if he did, the costs must be borne by him rateably with the other parties, according to his interest in the premises.

A permanent lessee may be regarded as a purchaser and will be entitled to similar privileges and subject to similar liabilities.

The costs of the partition should, as between the lessor and the lessee, be borne by them in proportion to their respective interests in the share covered by the *mokurari* (lease) 2 Jones (Ir.) 803; 10 Ir. Eq. Rep. 479 R. 2 Cox. 27 *explained and distd.* NAWAB DILDAR ALI KHAN *v.* BHOWANI SAHAI SINGH **5 C L. J. 612 = 34 C. 878.**

74 Petitioner succeeding — Petitioner guilty of a false statement in his petition—Effect on his right to costs—In re Taja Noora 4 B. L. R. 768 at 773.

Costs *(Contd.)*

75 *Privy council practice—Mortgage—Redemption—Accounts—Accounts between two mortgagees one of whom redeems the other—Decree on previous mortgage—Interest, rate of—Privy Council, practice of—Objection to suit not taken in Courts below.*

The appellant sued as mortgagee of a certain property under a mortgage dated 5th September 1886 The respondent had, in a suit on an earlier mortgage of 1884, purchased in 1890 the rights of the mortgagor in the same property, and was also holder of a decree of 29th June 1891 in a suit on another mortgage of the same property dated 4th October 1882, which provided for compound interest in default of payment. To that suit, the persons from whom the appellant derived title were parties. The decree of 29th June 1891 gave interest not in terms of the bond but at a reduced rate. It being settled that the appellant should redeem.

Held (reversing the decision of High Court) that in the accounts between them the respondent was only entitled in respect of the mortgage of 4th October 1882, to interest at the reduced rate allowed by the decree of 29th June 1891, and not to compound interest in terms of the mortgage bond. An objection that the claim on the 5th September 1886 might and should have been enforced in the suit in which the decree of 29th June 1891 was given, and could not be made the subject of a fresh suit, was not allowed to be taken on appeal to the Judicial Committee, not having been raised in either of the Courts below. The record of the case having been received in December 1900, but the case not set down for hearing until September 1903, the Judicial Committee directed the Registrar to disallow to the appellant any costs occasioned by his delay in prosecuting the appeal. KEDAR LAL MARWARI *v.* BISHEN PERSHAD. **8 C W. N. 609=31 C. 332 (P. C.)**

76 *Redemption suit—Mortgage—Usufructuary mortgage—Lease executed next day—Redemption of mortgage independently of charge created by lease—Loss of security in part, mortgagee's acquiescence in.*

The day after the execution of a usufructuary mortgage, the mortgagor executed a *kabuliat* in favour of the mortgagees whereby the former was put in possession of the mortgaged property on a certain rent which was to be a charge on the property. The terms of the lease did not correspond with the terms of the mortgage.

Held, that the two documents could not be interpreted as representing one indivisible transaction. They are separate and independent transactions and the mortgagors were entitled to redeem the usufructuary mortgage, independently altogether of any consideration of the subsequent *kabuliat* and the provisions contained in it and cannot be compelled, as a condition precedent to redemption, to pay off the charge created by the *kabuliat*. Shortly after the mortgagees were placed in possession by virtue of the usufructuary mortgage, another party obtained a decree for pre emption in respect of one of the villages mortgaged and dispossessed the mortgagees. The effect of this was that the security of the mortgagees was diminished by the loss of this village. The mortgagors apparently remained with the remainder of the lands in their possession for several years and took no steps to recoup themselves for the loss of that village.

Held, that the mortgagees could not claim interest in lieu of the rent and profits of the property of which they were dispossessed. TAJJO BIBI *v.* BHAGWAN PRASAD (I. L. R. 16 All. 295) and RAJAH PERTAB BAHADUR SINGH *v.* GAJDHAR BUKSH (L. R.. 29 I. A. 148) referred to.—KHUDA BUKHSH *v.* ALIM-UN-NISA, **A. W. N., 1904 p 273.**

77 *Redemption suit alleging mortgage discharged—Mortgage deed, construction of—Accounts—Sum found due to the mortgagee.*

Where in a suit for redemption, a mortgagor alleges entire discharge of the mortgage and it was found otherwise, the Privy Council ordered that the costs of the suit were to be borne by the plaintiff mortgagor. BANARSI PRASHAD *v.* RAM NARAIN. (LORD MACNAGHTEN.) **30 I. A. 65, 25 A 287 P. C.**

78 Redemption suit—Transfer how to be effected — Pleadings — Family arrangement—Implement of contract to transfer. 24 M. 377 (P. C.). Col. 585 P. I.

79 *Rent Act (XXII of 1886), S. 145—Execution of decree—Costs — Civil Procedure Code (Act XIV of 1882), S. 206.*

In interpreting the words " unless the decree is for a sum exceeding Rs. 500 " in section 145, Rent Act (XXII of 1886), the costs awarded in the decree to the decree-holder must be included in the calculation of the sum decreed.—RAJA UDAI PARTAB ADIA DAT *v.* UDIT PANDE, **1 O. C. 144.**

80 Respondents failure to furnish security for—Order rejecting application for rehearing of appeal dismissed under S. 549 of the C. P. C. (XIV of 1882) not appealable. 5 A. L. J. 109 Col. 1654 P. I.

81 Suit by a witness for his expenses for giving evidence in proceeding under S. 145 of Criminal Procedure Code—Implied contract—Refusal of Magistrate. 8 C. W. N. 179 Col. 329 P. I.

82 Suit dismissed on preliminary ground —Declaratory suit by a remote reversioners—Existence of nearer reversioners. 32 C. 62 Col. 437 P. I.

83 Second appeal against order of costs only—Civ. Pro. Code Act XIV of 1882 S. 584 —8 O C. 251 Col. 1244 P. I.

84 Second appeal. 7 C. W. N. 647. *See costs No. 2 supra.*

85 Suit prolonged on defendants objection unfounded—Partition suit, decree in

Costs *(Contd.)*

infants, none-parties, how far found. BAZIR ALI v. HAFIZ NAZIR ALI. **13 C. W. N. 153**. *See partition.*

86 Security for costs—Sale of properties given as security—Mortgage—Interest on costs 9 C. W. N. 372—32 C. 494 Col. 603 P. I.

87 *Security for—Delay—Taxation.*

An application for security for costs already incurred and estimated costs of appeal should be made promptly. BHOBONATH LAHIRI v. RADAPROSAD LAHIRI. **5 C. W. N. 119.**

88 *Testator's estate in a suit for construction of will.*

The costs of the entire litigation should be paid out of the estate where difficulty has been created and litigation, in a manner, rendered necessary by the act of the testator, viz by reason of the ambiguity or inconsistency in the provisions of his Will. L R 7 H L 364 followed. SRINIBASH DAS v. MONMOHINI DASI. **3 C. L. J. 224.**

89 *Trial of case to determine—Practice.*

It would be inappropriate and contrary to the practice of the High Court to investigate the merits of a case merely to determine of the incidence costs MITHALAL v. CHUNILAL. **4 B. L. R., 816.**

90 Taxation of—Written statement compliance with order requiring written statement to be filed—Appeal—Decree—10 M. L. J. 30 Col. 122 P. I.

91 Taxation of—Bill of costs—Practice In re Framji Cawasji Markar. 9 B. L. R. 1014—*See High Court Rules (Bombay).*

92 *Transfer of Property Act IV of 1882 S. 90, 96 and 97—Costs—Mortgagee holding a single decree on two mortgages—Appropriation of sums.*

Held, that costs decreed are recoverable under S. 90 of Act IV of 1882 30 M. 464; 14 C. 185; 20 A 523 referred to.

Held further, that S. 97 of Act IV of 1882 applies directly only to proceedings under S. 96 of the said Act.

Held also, that, where a mortgagee holds a single decree on two mortgages, he cannot be precluded, whether by the alleged analogy of S. 97 or otherwise, from appropriating sums recovered by him in execution towards the satisfaction of whichever mortgage he finds most convenient JWALA SAHAY v. DHANAU. **11 O. C. 377.**

93 *To be set off—Pre-emption—Suit for.*

The plaintiffs sued the defendant for pre-emption and obtained a decree conditional on payment of a certain sum within a certain fixed period. The plaintiffs paid the amount within that period and attached a part of it on account of costs due to them under that decree.

Held that there is no specific provision in the Code of Civil Procedure applicable to the case, but that under the Rule of Justice, Equity and Good Conscience, the plaintiffs (decree holders) were entitled to an equitable set off.—BALDEO PRASAD v. BALDEO SINGH, **3 O C 323.**

94 Usual rule—Mesne profits—Assessment of—Landlord and tenant, combined position of 30 C 536 Col 152 P II.

95 Usual rules—Discretion of Court—Admission of debt by defendants—Suit filed after such admission—Appeal 27 M 341 Col 1069 P I.

96 Witnesses—Suit for costs in giving evidence in proceeding under S. 145 of Criminal Procedure Code—Implied contract—Resjudicata. 8 C. W. N. 178 Col. 329 P. I.

97 Withdrawal of suit with or without—Liberty to file fresh suit—Permission. 32 B. 345 Col. 1588 P. I.

98 Wrong Relief—Land sold for arrears of revenue—Holder of a money decree suing owner and purchaser alleging the latter and was a trustee for the owner. 14 B. L. R. 135 Col. 1525 P. I.

Co-tenancy.

1 Account—Hill leased by one of several co sharers owners thereof to cut and quarry stones in it. 32 C. 837 Col. 656 P. II.

2 Adverse possession—Co-sharers—Tenants in common—Presumption from. 29 B. 300 Col. 2056 P. I,

3 Contribution—Improvement effected by co-owners of a hat from forfeiture. 32 C. 374 Col: 328 P. I.

4 Cutting wood on common land—Mortgage—Mortgage of interest in tenancy in common by one of two co-tenants.—28 M. 208 Col: 1840 P. I.

5 Co-sharers—Adverse possession—Suit by a co-sharer against lambardar for his share of profit. 27 A. 436 Col: 1969 P.I.

6 *Dispossession—Decree for joint possession —Illegal dispossession.—*

Where one of the joint-owners of immoveable property in execution of a decree obtained by him for exclusive possession in a suit to which the co-owner was not a party ousted, the co-owner, there is a dispossession, and the latter is entitled to be restored to joint possession. 26 A. 588 F. B. foll. ; 27 A. 88 ; 1901 A. W. N. 48 dist.—RAJA RAM MISRA v. LALJI MISRA. **2 A. L. J. 481.**

7 Dispossession—Joint possession suit—Co sharers—Hindu Law—Joint property.—27 A. 153 Col: 648 P. II.

8 Dispossession—Exclusion of one, by another, from possession and enjoyment of joint property—Suit by.—2 A. L. J. 256= A. W. N. 1905 P. 119. *See Co-sharer No 14.*

9 Dispossession—Form of decree—Exclusive dealing with joint property by one of the co-owners—Remedy of others—27 A. 88 *See co sharer No 13.*

10 Ejectment suit—Adverse possession—Onus—Tenants in common 5 B L R 742 Col 1966 P I.

11 Exclusive possession—Hindu Law—Joint property—Co-owners suit by khas pos-

Co-tenancy *(Contd.)*

session of his share by one of them maintainable 28 A 161 Col 648 P II.

12 Exclusion from participation—Hindu Law—Partition—No ground for refusal—Tenant in Common—Partition a matter of right. 24 M. 441 Col. 1931 P. I.

13 Injunction — Mandatory injunction—Specific Relief — Injunction refused upon unsubstantial ground. 27 A. 688 Col. 1239 P. I.

14 *Injunction—One of the tenants laying drain pipes under the property held in common—Right of the co-tenant to restrain him—Injunction.*

The plaintiff sued to restrain the defendant who had commenced to lay a drain pipe, for the purpose of carrying off the drainage from his premises, under the surface of a piece of land which was held by the defendant in common with the plaintiff.

Held, that the act of the defendant was not an infringement of the rights of the co-tenant giving rise to a cause of action, because the laying of the drain and the incidental temporary interference with the soil could not be regarded either as an ouster or destruction or even an act of waste. One tenant-in common cannot maintain an action against the other for a temporary removal of the subject-matter of the tenancy-in-common, the party removing it having the same time an intention of making a prompt restitution.—MOHAN CHAND *v.* ISHAKBHAI. **3 B L R 89; 25 B 248.**

15 Injunction—Building on joint land Co-sharers. Right of—Way of necessity—Judgment 30 C 901 *See Co-sharers No. 9.*

16 Injunction—Judicial discretion of court—Where the act of the defendant amounts to an ouster of the plaintiff from the possession of the joint property. 29 C. 500 Col. 450 P. I.

17 Joint possession—Co-sharers—Trees planted with the consent of co-owners—Form of decree. A. W. N. 1905 P. 160 Col. 649 P. II.

18 Joint possession—Illegal ouster of joint owner—Suit for recovery of joint possession 26 A. 588 Col. 352 P. II.

19 *Joint possession—Claim by undivided co-sharers.*

A co-sharer in an undivided *mahal* is entitled to get from Civil Court a declaration of his rights as a co-sharer and the extent of those rights. With interior constitution of a *mahal* and with the possession of the land of the *mahal* by the several co sharers the Civil Court has no concern, it can declare rights but it cannot go on to partially eject one co-sharer for the benefit of another. RAHMAN CHAUDHARI *v.* SALAMAT CHAUDHARI. **W. N. A. 1901 P. 48.**

20 Partition—24 M. 441—*See Co-tenancy No. 12 supra.*

Partition—Hindu Law—Purchaser of

Co-tenancy *(Contd.)*

portion of property belonging to a joint Hindu family.

It is competent to the purchaser of property belonging to a joint Hindu family to have if he is so desirous, a portion only of the property which he has purchased, partitioned: he is not bound to include in his suit for partition the whole of the property which he has purchased. Srimati Padmamani Dasi *v.* Srimati Jagadamba Dasi (6 B. L. R., 134), followed.—RAM MOHAN LAL *v.* MUL CHAND. **A. W. N. 1905 P. 169=2 A. L. J. 700=28 A. 39.**

22 *Party-wall—Beams, insertion of in the party wall—Posts, insertion of, in the party wall—Rights of co-sharers.*

The plaintiff filed a suit to obtain a mandatory injunction directing the defendants to remove a beam and wooden supports that were alleged to have been inserted in the back wall of her house. It was contended by the defendant that the wall in question belonged to him and the plaintiff jointly, which the plaintiff did not admit. The wall in question was found to be a party-wall of the parties.

Held, that in such cases where one of the owners of a party-wall in constructing his house inserts beams and pillars into his side of the wall, the other owner has a right to complain in case only when the alleged acts amount to his ouster or to a destruction of the party-wall and as that was not established, the claim must be rejected. KALISHANKAR PITAMBER *v* BAI KASHI. **6 B L R 683.**

23 *Refusal—Landlord and tenant—Refusal by some of joint landlords to sign puttah—Right of others to sue them for damages.*

When there are joint Inamdars all of them must join in granting a puttah and rent cannot be recovered under Section 7 of the Rent Recovery Act unless such puttah has been granted.

When one of several landlords refuses to sign a puttah which entails loss to others and the refusal is not justifiable he is liable in damages to other landlords. MATHURESWARA BHATTAR *v.* KARPURA KUTTI BHATTAR. **13 M L J 222.**

24 Relation between tenant in common—Collection of rent by one tenant in common—Onus on plaintiff. 27 M at 475, 477 Col. 315 P II.

25 *Right of suit of one to eject a trespasser.*

One co-owner may sue to eject a mere trespasser when his object is to remove an intruder from the joint property without at the same time claiming any portion of it himself. 7 C 414 ref. to.—PATESWARI PRATAP NARAIN SINGH *v.* KUDRA NARAIN SINGH. **1 A L J 543.**

26 Right of suit—Principal and Agent—Suit—Damages—Erroneous view of evidence 30 C 207 Col 1240 P I.

27 *Right of suit—Landlord and Tenant—Ejectment—Service tenure—Right of some of*

Co-tenancy (*Contd.*)

the joint landlords to eject tenant.

In the case of tenants originally let into possession of land as tenants by all the co-sharers in the zamindari, in order to justify any individual co-sharer in seeking to eject them, it must be shown that the tenancy so created by all the co-sharers has been determined by all of them; the law will not permit a single co-sharer to take separate and independent action for the purpose of determining, even so far as his own share is concerned, a tenancy which has been created by common consent of all the co-sharers. (SYED) GHOLAM MOHI-UD-DIN HOSSEIN *v.* (*Mussammat*) KHAIRAN. 8 C. W. N. 325=31 C. 786.

28 Rent suit—Co-sharers suit for entire rent—Landlord and Tenant—Decree for share of rent not allowable—Pleadings. 31 C. 707 Col: 270 P. II.

29 Rent suit—Joint landlords—Agreement to pay rent separately—Maintenance of suit —Contract, recission of, 9 C. W. N. 34 Col: 120 P. II.

30 Rent suit—Suit for rent of land found by measurement to be in excess—Co-sharer —Landlord. 7 C. W. N. 670 Col. 113 P. II.

31 Rent suit—Suit for rent by co-sharer landlord. 7 C. W. N. 908 Col: 145 P. II.

32 *Rent suit—U. P. Tenancy Act S. 198 —U. P. Rent Act, S. 148—Suit for rent—Co-sharer defendants—Plea of tenant, payment to one co-sharer in good faith—No decree against a co-sharer defendant.—*

The defendant, a tenant, pleaded in answer to a suit for arrears of rent that he had in good faith paid rent to another co-sharer of the village who was also made a defendant to the suit. The co-sharer defendant admitted having received the entire rent from the tenant.

Held, that no decree could be given against the co-sharer defendant in this suit, and that the proper remedy of the plaintiff was by a suit for profits or settlement of accounts against the co-sharer defendant who had realized rent in excess of his rent share.

Held, also that this was not a suit to which S. 198 U. P. Tenancy Act II of 1901 applied. S. 198 of the New Act differs from S. 148 of Act XII of 1881 in this that under the provisions of the New Act the question of payment to a third person shall be enquired into when in any suit against a tenant the defendant pleads that the relation of landlord and tenant does not exist between the plaintiff and himself.—NABUAN BIBI *v.* GAYA DATT. 1 A. L. J. 707.

33 *Title deeds of—Hindu Law—*Stridhan *—Succession—*Sapindas*—Alienation by widow to next reversioner.*

To a woman's technical *Stridhan*, the younger brother of her husband is entitled to succeed in preference to the son of a brother of her husband.

A study of *Nilkantha's* method of dealing with the *Smriti* text leads to two conclusions, first, that whenever any of those texts containing an enumeration of persons or things is intended to lay down their order or priority, he, generally speaking, makes it a point to say so expressly: secondly, according to *Nilkantha* no text containing such enumeration should be interpreted as laying down the order of the persons or things enumerated unless there is some word necessarily indicative of order or priority either in the text itself or in some other text referring to the same subject-matter.

When deeds relate to two or more portions of an estate or to an estate which is held by tenants-in-common, if any one of the interested parties gets possession of the deeds, none of the other parties can get them from him: for no one can show a better title to have them than he has. This rule of law applies only where all the parties have equal rights.

A Hindu widow can, during her lifetime, convey the estate absolutely to him who is the next reversioner and thereby accelerate the reversionary succession.—HUNSRAJ MORARJI *v.* BAI MOGHIBAI. 7 B. L. R. 622.

Co-tenant.

1 Right of—Account—Hill leased by one of several co-sharers owners thereof to cut and quarry stones in it—Action of tresspass between co-sharer. 1 C. L. J. 437=32 C. 837 Col. 656 P. II.

Co-trustee.

1 Application by, for registration—Refusal by the Revenue authorities—Suit, maintainability of. 12 C. W. N. 441 Col. 61 P. II.

Council

1 Limitation—Appeal filed after the expiry of limitation period—Delay due to appellant's being misled by council's advice. 3 A. L. J. 218=28 A. 414 Col. 1730 P. I.

Counsel.

1 *Address—Notes taken by the Judge of—Evidence—Practice.*

The notes taken by the Judge of Counsel's address are good evidence that when counsel was addressing the Judge he did say what the Judge has noted. But if there is any real contention as to the correctness of the notes, it would be open to the other side to prove that they were not correct. R. D. SETHNA *v.* MIRZA MAHOMED SHIRAZI, 9 B. L. R. 1042.

2 Audience—Right of Vakil and Counsel. 30 C. 986 Col. 2073 P. I.

3 *Authority of counsel—Withdrawal of an appeal—Revocation of authority—Notice to the*

Counsel (*Contd.*)

opposite party.

Counsel has authority to withdraw an appeal unless his authority has been revoked and the revocation notified to the opposite side. 64 L J. Ch. 785, 3 C. W. N. 694, 25 L. J. C. P. 303, 26 L. J. C. P. 97, 29 L. J. Ex. 382, 35 L. J. Q. B. 133, 46 L. J. Ch. 254. 57 L. J. Q. B. 49, 64 L. J. Ch. 785, 14 M. I. A. 203, 57 L. J. Ch 850, 13 A. 272, 13 C. 115, 27 C. 428 referred to. MT. LAXMI *v.* JAIRAM (MINOR) SAKUWAR BAI GUARDIAN AND OTHERS **15 C P L R 73.**

4 *Certifying Counsel.*

In certifying counsel the Court should have regard to the following considerations :--(1) Whether notice has been given by either side of the intention to employ counsel. (2) Whether the matter to be dealt involves the consideration of complicated facts or merely of simple facts. (3) Whether there arises any substantial question of law which has to be argued and discussed. ZULEKABAI *v.* AYESHABAI. **7 B L R 753.**

5 Charge of professional misconduct. 9 B L R 3—34 C. 129 P C Col 347 P I.

6 Compromise of, suit by--Ratification of --Procedure to set aside--6 C W N 82 Col. 1203 P I.

7 *Counsel's fee originating summons certifying counsel--Taxation of costs--Practice.*

In an originating summons, parties are entitled to instruct counsel, and without any certificate the costs of one counsel must be allowed on taxation. FATMABIBI *v.* SHAIK HASAN. **9 B L R 1071.**

8 *Not able to appear—Return of brief by junior counsel—Practice—Suit, dismissal of, for absence of counsel. C P C S. 102, 103, 117 (Act XIV of 1882).*

S. 102 and 103, Civil Procedure Code, (1882), do not apply when the plaintiff is present in Court, though the counsel whom he has instructed to conduct his case are not present when the case is called on for hearing. Under such circumstances, the Court hearing the case should proceed under S. 117 of the Code.

If there is a chance of neither of the two counsel briefed in a case being able to attend when the case is called on, one of them must return his brief in good time. In case of dispute, it is the duty of the junior to return the brief or to make arrangements for some other counsel to attend till he can come in. ESMAIL EBRAHIM *v.* HAJI JAN MAHOMED, **10 B L R 1172.**

9 Refusal by counsel to urge question of law—Mere admission of law not binding on party--7 C L J 152 Col 152 P II.

10 Plaintiff in short causes—Counsel drafting plaint—Counsel's fees. 10 B L R 969 Col 1435 P I.

11 Non-appearance of counsel—Suit dismissed in default—No sufficient cause for default 10 B L R 904 Col 1454 P I.

12 Non-appearance of--Pleader unable to argue appeal for records being with his leader who was absent—Dismissal of appeal, for default—Procedure. 26 M 267 Col 1656 P I.

13 Omission to argue question of law or abandoning a point—Power of court to go into question—RAMSARAN SING *v.* KHAKHAN SINGH. **11 C W N 340** *See Pleadings.*

14 Practice as to costs--Costs of third counsel in a defended long cause. 9 B. L. R. 987 *See Costs No 73.*

15 *Witnesses--Counsels giving evidence on behalf of their clients--Court--Practice.*

The Court will not allow counsel conducting cases to give evidence on behalf of their clients, in respect of matters with which they were acquainted before they were retained. R. D SETHNA *v.* MIRZA MAHOMED SHIRAZI, **9 B. L. R. 1044.**

Counsel and client

1 Advocate and client—Recovery of fee paid by client for professional services to Advocate—Revision. 25 A. 509 Col: 1330 P. I.

2 *Custom — Succession — Hindu Law — Daughter's son—Nephew—Goldsmiths of Saharanpur—Counsel and client—Client not bound by Counsel's admission on question of law.*

Held, that in the absence of proof of a special custom, the parties, Hindu goldsmiths of Saharanpur, trading at Dagshai, were governed, in matters of succession, by Hindu law, under which a separated nephew is excluded by a daughter's son--100 *P. R.*, 1901, C. A., No 257 of 1900, *referred to.*

A Counsel cannot bind a client by an admission on a question of law.—98 *P. R.*, 1889, *followed.* BARROO *v.* MAKHAN. **61 P R 1903=134 P L R 1903.**

Counsel's fees.

1 Probate—Costs—Objection as to fee—Fee out of all proportion to work—Discretion A. W. N. 1905 P. 83 Col. 1357 P. I.

Counterfoil.

1 *Pyatpaing--Certificate of report of transfer of interest in a revenue holding--Revenue Register IX, foil and counterfoil.*

The counterfoil of Revenue Register IX is a report of a fact affecting an agricultural holding and should be signed by the owner of the land. When so signed it is admissible in evidence The foil, commonly known as the "pyatpaing" is merely a certificate, signed by the thugyi, that such report has been made. It is not usually signed by the owner of the land, and is then not admissible in evidence to prove the report. MAUNG CHEIK *v.* MAUNG THA HMAT. **1 L. B. R. 1900-1902 P. 260.**

Counterpart.

1 Where there is discrepancy between

Counterpart. (*Contd.*)

lease and its counterpart, presumption is that lease is correct. BAIDYA NATH DUTT *v.* KAMINIKANT GUPTA. **6 C. L. J. 572.** *See Lease.*

Courses open to applicant.

Removal of attachment—Dismissal of application—Courses open to applicant. 1 L. B. R. 1900-1902 P. 70 Col. 1450 P. I.

Court.

1 Accounts between Mortgagor and Mortgagee. 26 B. 363 Col. 262 P. I.

2 *Abuse of process—Inherent of Court to prevent—Restitution.*

When an order has been improperly or fraudulently obtained from a Court, as soon as the Court is appraised of the fact, it will recall the order on the ground that no Court will tolerate an abuse of its process. The Court has inherent power to do so. 6 C. W. N. 710 ref. to. When there has been a wrong done by an order of Court which has been set aside on appeal, the Court executing the decree without express authority of law is competent to put the parties in the position which they occupied before that order. It is not only competent to a Court of appeal but it may be its duty under certain circumstances to take notice of events which have happened since the order challenged in appeal was made. UDIT CHOBEY *v.* RADHIKA PRASAD UPADHYA. **6 C. L. J. 662=3 M. L. T. 41.**

3 *Court acting as arbitrator*—Exra cursum curiæ.

In the course of a suit for recovery of possession of some land, the parties who owned different shares of a Pergunnah came to an agreement to the effect that they should ask the Court to decide the question of title on the basis of the *thakbust* map only, and the plaintiff *said* he would abide by that decision. The Court decided accordingly and held that "the *thak* map itself showed that the plaintiff's predecessor and his co-sharers were disputing about the land and the survey map showed that it was newly formed *char* land, and that in such circumstances the *thak* map could not be held sufficient evidence of plaintiff's title."

Held—That in deciding the question on the basis of the *thakbust* map, in accordance with the agreement of the parties, the Court acted as arbitrator, and hence no appeal lay from that decision. KUMAR SARADINDU ROY *v.* BHAGABATI DEBYA CHOWDHURANI. **10 C. W. N. 835.**

4. Adjudication by collector binding on courts—Powers of Court as to documents not put in evidence—131 P. L. R. 1906 Col. 883 P. I.

5 Administration of trust by court—Trustee authorised to appoint successor. 9 C W N 239 Col. 2032 P. I.

6 Alteration of contract by court—13 P. R. 1905 Col. 258 P. I.

7 Commission to enquire into the charges against Moharaja of Panna—No Court—Court—Meaning of. 8 C. W. N. 811=32 C. 1 P. C. Col. 47 P. I.

8 Competent to pass final decree 18 M. L. J. 23 Col. 1607 P. I.

9 Discretion of—Mistake of law or fact—Delay in seeking performance. 27 A. 678 Col. 407 P. I.

10 *Duty of Court to amend the plaintiff appropriately—Suit for damages, Title to land sought to be established in—Payment of additional fees.*

This suit was one for damages for defendant's wrongfully harvesting and removing crops from plaintiff's lands. The plaintiff's title to the lands themselves was in dispute. The question for decision was whether a plaintiff, whose title to lands is in question, can frame his suit for a minor relief alone so as to avoid payment of higher Court-fee and whether such a plaintiff can be compelled to amend his plaint and pay the higher fee.

Held, that in pursuance of a uniform course of decisions of the High Court of Travancore, the Court ought to ascertain the real object of the suit and, when it does ascertain, as it did in this case, that the object of the plaintiff is to evade payment of a higher Court-fee by framing his suit as for a minor relief only, to compel him to amend his plaint and the pleadings and to pay the higher duty, having regard to the value of the subject-matter of the suit. MATHOONI THOMMEN *v.* RAMAN NARAYANAN, **21 T L R 1.**

11 Duty of Court—Provision of Probate and Administration Act, proper compliance with—26 B. 792 Col: 519 P. I.

12 Duty of Court—In the appointment of guardian——Feeling of parents—Minors wishes and welfare. 2 A. L. J. 81 Col: 807 P. I.

13 Discretion of Court when liable to review or appeal. 1 L. B. R. 1900—1902 P. 313 Col: 1726 P. I.

14 *Executing a decree--Execution of a decree--Stay of the execution of a decree--Extension of time--Jurisdiction.*

A Court executing a decree is bound to execute it in the shape in which it was passed and has no authority to stay the execution of any portion thereof. *22 W R 460 23 W R 30 referred to* PARKHIT *v.* CHAMRA AND JAGBANDHU. **15 C P L R 153.**

15 Fraud—Sale after sanction of Court—Misrepresentation. 29 B. 615 Col: 1533 P. I.

16 Of first instance—Power to add parties—1 L. B. R. 1900—1902 P. 252 Col: 415 P. I.

17 Inherit Power—Power of Court to correct its own mistake—Amendment of sale certificate. 12 C. W. N. 1097 Col: 1075 A. I.

18 Inherit power of Court—High Cour

Court *(Contd.)*

—Power of, to direct stay of order appealed against—3 C. L. J. 29 Col: 1278 P. I.

19 Inherit power of Court, to stay or dismiss vexatious suits—Discretionary power of Court in granting declaration. 28 M. 500-Col. 428 P. I.

20 Inherit power of Court—Duty of set right wrong done to suitor. 5 C. L. J. 611 Col: 1066 P. I.

21 Inherit power of Court—Duty of Court, to relieve parties against injustice caused by its own acts on oversight. 7 C. L. J. 59 =3 M. L. T. 90=12 C. W. N. 326=35 C. 209 Col: 1766 P. I.

22 Inherit Jurisdiction to prevent abuse of process.—28 M. 28 Col: 1195 P. I.

23 *Inherit power of Court to set aside—Ex parte order—Execution of decree—Conditional decree—Notice to opposite party in passing order—Ex parte order, Limitation.*

It is an elementary principle of law that (in the absence of any special legislative rule excusing notice) no order should be made in favour of one party against and to the prejudice of another unless that order has had an opportunity of showing that it should not be made. The Court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside upon a proper case being substantiated. Bibee Tulsiman *v.* Harihar Mahato (9 C. W. N. 81), followed. When a conditional decree is made, the plaintiff, on default by the defendant, should apply to the Court which passed the decree on notice to the defendant by motion or notice or by rule for an order absolute. Then if and when such an order is obtained, application may be made in the usual way for execution of that order according to provisions of this Code. On the plaintiff's applying on notice for such order, the Court will determine the question if necessary directing the issue to be tried on evidence, whether there had been any default or not. If the defendant be found in default, the plaintiff will be entitled to an order absolute, and should thereafter apply to execute that order. The plaintiff obtained a conditional decree on the 21st June 1905, for ejectment unless the defendant preformed certain conditions. The parties were at contest whether the conditions were performed or not. On the 31st August 1905, the plaintiff, without notice to the defendants, applied for and obtained an order for execution of the decree by ejecting the defendants and ejected them. Thereupon the defendants applied and obtained a rule on the 1st December 1905 for stay of execution and for setting aside, modifying or reviewing the order.

Held, that the application was not barred by limitation.—S. M. SUDEVI DEVI *v.* SOVARAM AGARWALA, 10 C. W. N. 68.

24 Inherent power of Court to set it aside—Exparte decree made under S. 90 T. P. Act. ABDOL SATTAR *v.* SATYA BHUSHANDAS. 35 C. 767.

See T. P. A. S. 90.

25 Inherit power of Court to set aside order exparte—Order absolute for sale or foreclosure. 9 C. W. N. 81—32 C. 253 Col. 670 P. I.

26 *Inherit powers of, to compel repayment of money improperly taken out of Court—Contempt of Court—Execution of decree—Civil Procedure Code. S. 230—Attachment before judgment of debts due to defendant—Subsequent sale of debts—Collection of debt by purchaser—Application to compel to disgorge—Limitation.*

The plaintiff attached before judgment certain debts due to the defendants, but the defendants subsequently sold those debts to third parties, who collected them in defiance of the order of attachment. The plaintiffs obtained a decree and applied to the Court to compel the third parties to disgorge the debts collected by them.

Held, that this was not an application in execution of a decree, but an application to the Court to exercise its inherent power of punishing for contempt of Court and therefore the rules of limitation provided for applications for execution of decrees were not applicable to it. GODU RAM *v.* SURAJ MALL. A. W. N. 1905 P. 9=2 A. L. J. 16 =27 A. 378.

27 *Inherent power of Court.*

Every Court has an inherent power to restrain legal practitioners from conducting proceedings openly dishonourable or unfair as to amount to a scandal. No legal practitioner of any description, who has mainly conducted the case of one party in the first Court, should be allowed to act against that party in a subsequent stage of the same case either in the first Court or in the Court of appeal. Where a Counsel is retained to appear in a second appeal only, the engagement ends with the appeal, and he can appear and plead for the opposite party in any subsequent second appeal, though arising out of the same cause. 12 C. P. L. R. 35 followed. UGRI BHOI *v.* SHRIDHAR KULTA: 1 N. L. R. 52.

28 Inherent power to revise—Applicability of, to execution proceedings—Decree meaning of, 3 C L J 276 Col 907 P I.

29 *Issues raised by—Evidence Act, 1872 Section 115—Pleadings—Duty of Court, parties and pleaders*

If by his conduct a person of full age under a mistake as to his age permits himself to be represented as minor and allows his mother to manage the family property and to execute a deed on his behalf as his guardian as well on behalf of other members of the family, he is estopped from denying his liability under the deed.

The responsibility of clearly perceiving and raising points which arise upon the pleadings and the evidence and the proper adjudication of which is essential for the ends of justice rests on the Court as much as

Court (*Contd.*)

on the parties and their pleaders. NATHUBHAI RASIKDAS *v.* MULCHAND KRISHNAVALLAB. **3 B L R 535.**

30 Inspection of documents--Judgment--Appeal--Letters patent, clause 15--4 B L R 342 Col 1273 P I.

31 *Inspection of documents to order restitution--Civil Procedure Code (Act XIV of 1882), Sections 562, 564—Remand—Decision of case not on preliminary issue—Remand under Section 562, by consent of parties—Appeal against order of remand—High Court. Duty of—Waiver.*

Per Subrahmanya Aiyar, J.—A remand in contravention of section 564 of the Code of Civil Procedure is a violation of a mandatory provision of the law which makes the order of remand illegal and one that ought to be set aside at the instance of a party entitled to object to such a procedure.

The doctrine that consent does not give jurisdiction applies where the Court has "no inherent jurisdiction over the subject-matter," and does not apply to violation of rules of procedure though they are more than irregularities.

The doctrine does not apply to an illegal order of remand so that if a remand is made at the request of both parties the same cannot be set aside at the instance of any of them, although it may be contrary to the provisions of section 564 of the Civil Procedure Code.

A suit for compelling the acceptance by the defendant of a patta for a certain year was decreed, the defendant's contention that the rent was payable in money under an express contract being held not proved. The defendant appealed and the District Judge on appeal disagreed with the Original Court on the main question and held that the contract set up was proved. The case was remanded under section 562 of the Civil Procedure Code with the consent of the parties. The plaintiff appealed to the High Court and it was stated on his behalf that he was desirous of obtaining the decision of the Court on the question as to whether the finding of the District Judge that the contract alleged by the defendant was established was correct, and if the decision should be against him it was not intended to object to the remand.

Held, per Subrahmanya Aiyar J, that the decision of the District Judge must be upheld, for the finding could only be interfered with by the High Court for reasons warranting interference in second appeal, and there were no such reasons to be found in the case. And though the order of remand was more than an irregularity it was not necessary to set it aside for the parties had given their consent.

Per Moore, J.—That the order of the District Judge was illegal. The consent of parties did not validate it. And the District Judge should rehear the appeal. THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE *v.* RAMASAMI REDDI. **M L J 1905, p 236.**

Court (*Contd.*)

32 Inherent, of courts to remoke order passed on suppression or mis statement of material facts or on misrepresentation. IN RE RATANSEY ARJOON DAVARKAR. **7 B L R 961**—*See Jurisdiction.*

33 Meaning of—Jurisdiction of High Court to enquire into the validity of Acts passed by Local Legislative Councils--Court of Justice. 27 B. 424 Col. 1199 P. I.

34 Mortgagor and mortgagee, accounts between—26 B. 363—*See No. 1 supra.*

35 No appeal--Appeal to Privy Council--Act of the Governor-General of India in Council--Act of State. 32 C. 1 Col. 48 P. I.

36 *Necessity to permission of--Receiver. Suit against—Consent of Court, condition precedent—Fresh suit on same cause of action during pendency of first suit.*

Held, that the consent of the Court to an action to be brought against a Receiver appointed by the Court is a condition precedent to the right of the party to sue and that can not be rectified by an application to the Court for permission to continue an action wrongly brought without the permission of the Court.

That leave to institute a fresh action against the Receiver in respect of the same cause of action should not be granted until the existing action was withdrawn or dismissed. PROMOTHA NATH GANGULI *v.* KHETRA NATH BANERJEE. **9 C. W. N. 247.**

37 Power and duty of—Application to summon witnesses made late. 2 O. C. 34. *See Col. 1473 P. I.*

38 Power to appoint—Lunatic—Suit by or against—Practice. 54 P. L. R. 1905 Col. 1627 P. I.

39 Power to call for—Stamp—Reference to Chief Court, when may be made—Adjudication by collector binding on courts. 131 P. L. R. 1906 Col. 883 P. I.

40 Power to grant relief—Subject-matter of the suit—Suit on bond for personal decree—Charge given by compromise embodied in the decree. 16 M. L. J. 354 Col. 1593 P. I.

41 *Power of—Extension of the time fixed for compliance of a condition laid down in the decree.*

B sued the defendant for damages for malacious prosecution. During the pendency of the suit, he died and his son, the plaintiff was brought on the record as his representative and his suit was decreed. The District Judge upheld the decree and in his judgment said, "I direct that on (the plaintiff) Bharath Prasad's taking out Letters of Administration to the estate of Bed Nath within three months from this date, the decree of the Subordinate Judge, be affirmed and the appeal of Sita Ram (defendant) be dismissed with costs. In case Barah Prasad fails to obtain Letters of Administration within the period named above, the suit, in the Court of the Subordinate Judge, will be directed to be dismissed

Court (*Contd.*)

with costs and Sita Ram's appeal will be decreed with costs." The District Judge's judgment was dated the 10th September, 1904, and the plaintiff applied for grant of Letters of Administration on the 22nd November, 1904. On the 12th December, 1904, he made another application to the District Judge for an extension of the period fixed by the Court's judgment of the 10th September, 1904, up to the date on which Letters of Administration may be granted to him. The District Judge accepted the plaintiff's affidavit upon the point why he had been unable to present his application for Letters of Administration at an earlier date and extended the period for compliance of the condition laid down in the decree by two months from that date. 31 C. 75 and 4 O. C. 108, 17 C. 512 and I. A. 687 referred to.

Held, that the District Judge had power to extend the time laid down in the decree. SITA RAM *v.* BHARATH PRASAD. 8 O. C. 241.

42 Power to extend time—Mortgage—Order absolute for sale. Pendency of appeal, no ground for refusal of. 10 C. W. N. 910 Col. 684 P. I

43 Power to receiving—Execution of decree—Surety—Notice to surety—Executing court may issue notice. 29 B. 29 Col. 1370 P. I.

44 Power to review—Appeal—Dismissal of—Jurisdiction. 4 C. L. J. 566 Col. 1655 P. I.

45 Power of to undo a wrong in execution and to restore what was taken wrongfully in the commission of the wrong. 2 C L J 537 Col 1370 P I.

46 *Power of court to settle a scheme—Mosque, Mahomedan—Foundation—Right of worship—Exclusive right of a class—Law of Mauritius—Charter of incorporation obtained by a portion of congregation disregarding the right of the rest—Remedy of the latter—Unincorporated religious association—Right to sue—French Civil Code—Ordinance 6 of 1838, Arts. 210, 212—Sanction of Government—Criminal association—Suit to set aside scheme of management—Crown, if necessary party—Prerogative.*

In 1852-53, some Mahomedan merchants of Mauritius purchased certain properties, purporting to act on behalf of the whole Mahomedan congregation of the place, and founded a mosque. Thereafter, from time to time, adjoining properties were bought and added to the mosque by Mahomedan merchants, purporting to act in the same way on behalf of the whole Mahomedan community. In 1877 and on subsequent dates, several purchases of properties were made by Cutchee merchants purporting to act on behalf of the Cutchee Mahomedans alone, but this practice was not consistently followed in later times, and though the Cutchees, being the richest members of the congregation, contributed individually in proportion to their means, considerable contributions were also made in the aggregate

Court (*Contd.*)

by the Hallaye and Soortee Mahomedans. The administration of the affairs of the mosque was left mainly if not entirely, in the hands of Cutchee Mahomedans, because they were leading merchants, but not because they belonged to that particular class of Mahomedans. In 1893, 93 Cutchees executed deeds, forming themselves into a society (which they subsequently had incorporated) consisting of Cutchee Mahomedans alone and excluding the other classes for all future time from membership of the society and the management of the mosque, for which purpose they appointed a committee of management out of their own body with extensive powers of selling and letting properties other than the mosque and its accessories. All the properties they declared to have vested exclusively in the society.

Held, that a portion of the congregation had no right, by forming a new association, to transfer all the property to the new association and exclude the rest of the congregation from membership and from participation in the management of the affairs of the mosque. The charter of incorporation obtained by the defendants did not legalise their position, as the only association which could claim to be legalised was the congregation on whose behalf the mosque had been founded.

That the rule laid down in the French Civil Code (which is in force in Mauritius), that a religious community does not constitute a "civil person" and cannot, without being authorised by the State, hold property, has not always been carried out to its logical conclusions, and the Court will grant relief to aggrieved members of an unauthorised religious community against their fellow-members.

That, having regard to the existing law of Mauritius, the Court, in setting aside the deeds and the scheme of management set up by the defendants, could not proceed to frame a new scheme of management such as would be entirely free from legal objections. In the absence of any reason to fear that the restoration of the *statu quo ante* would lead to maladministration, this should be left to the congregation to be settled amicably, and to be given effect to, by obtaining a charter of incorporation.

That, in a suit by some of the aggrieved Hallayes and Soortees to set aside the deeds set up by the defendants, the Crown was not a necessary party, as the law of Mauritius does not require that the Crown should be impleaded, and the prerogatives of the Crown would not be affected by the decision in the suit.

That, in any case, the objection, that the Crown had not been made a party, ought to have been taken in the lower Court.

Quære—Whether a congregation, formed for the purposes of prayer and religious worship, requires the sanction of the Go-

Court *(Contd.)*

vernment so that, without such sanction, it becomes an illegal association, in the sense of being criminal, within the meaning of arts 210 and 212 of the Ordinance 6 of 1838? IBRAHIM ESMEAL *v.* ABDOOL CARRIM PEERMAMODE. **4 M. L. T., P. 25=13 C. W. N. 26 (P. C).**

47 *Power to affect partition – Property alienated to third party by co parcener — Method of partition.*

It is within the power of the Court in effecting a partition, if, in its opinion, it can be done with due regard to the interests of the co-parceners, to allot to the share of one co-parcener the property which that co-parcener has alienated to the third party, and the Court will endeavour to do so. 25 M. 690 (715) R. MUNUSAMI MUDALI *v.* VEERABADRA MUDALI. **17 M. L. J. 617**

48 *Power of court to inspect documents—Evidence Act Ss. 123, 124 and 162—Income Tax Act (II of 1886), Ss. 14, 26 and 38—Statements before Income Tax Collector—State documents—Official communication—Privilege—Officer's liability to bring documents—Court's power to record evidence—Validity of reasons for non-production—Disclosure to Court—No breach of official confidence—Documents produced on process of law.*

Statements made before the Income Tax Collector do not relate to affairs of State and so are not governed by S. 123 of the Evidence Act.

The Income Tax Collector, summoned to produce, is bound to produce book in his possession, in spite of the Rules made under S. 38 of the Income Tax Act, forbidding disclosure 13 Camp. 327. 2 Madras Sessions 1863, 26 B. 281 (284), *R and Appr.* ; L. R. (1900) Ch 347, *D.*

Under S. 162 of the Evidence Act, a witness should not decline, to bring documents to Court on the ground. of privilege under the same section, the Court has power to inspect the documents for the purposes of deciding objections regarding production or admissibility.

The provision relating to the non-disclosure of information, given or obtaining "in official confidence," does not apply to the production of documents in a Court of Justice.

Rule 15, framed under S. 38 of the Income Tax Act, is meant only for the guidance of the Income Tax Officers, and not for the preclusion of and evidence being given in a Court of Justice.

Orders under S. 14 or S. 26 of the Income Tax Act, determining the amount of income tax are not privileged documents.

Documents produced or statements made under process of law cannot be said to be made or given "in official confidence." VENKATACHELLA CHETTIAR *v.* SAMPATHU CHETTIAR. **4 M. L. T. 317.**

49 To relieve parties. 7 C. L. J. 59. *See No. 21 supra.*

50 Of second appeal, power of—Substitution of parties. 1 L. B. R. 1900–1902 P. 350 Col. 1395 P. I.

51 Settlement—Jurisdiction of Settlement Court—Decree of Extra Assistant Commissioner reversed, verbal instructions by a Superior Settlement Court. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v* THAKUR MOHAR SINGH. **9 O. C. 301.**

See N. W. P. Revenue Court Act XVI of 1865.

52 Settlement officers—No Court 26 A. 382 Col. 1756 P. I.

53 *Suit for possession—Declaratory decree—Power of Court to make declaratory decree—Suit for possession by alleged next reversioners on ground that their mother, who held a woman's estate in immoveable property, was dead—Failure to prove mother's death—Dismissal of suit so far as possession was concerned, and declaratory decree made as to plaintiff's title.*

The plaintiffs brought a suit for certain immoveable property as the next reversionary heirs of a deceased Hindu, and the only relief they are claimed was possession on the allegation that their mother, who had succeeded to a woman's estate in the property, was dead.

Held, that on the finding by the Court that the evidence failed to establish the fact of the mother's death, the suit should have been wholly dismissed. Other allegations made in the plaint that alienations made by the alleged mother were not justified by legal necessity, and that the plaintiffs were really her sons, which were both denied, were merely argumentative steps towards the only decree sought, namely, possession; and under the circumstances the Court was not entitled to make a declaratory decree in the plaintiffs' favour on those allegations after the failure of the sole cause of action. WALIHAN *v.* JOGESHWAR NARAYAN. **7 C L J 44=10 B L R 9=12 C W N 227=17 M L J 226=2 M L T 509=14 B L R 101=35 C 189 (P C.)**

54 Withdrawal of suit without permission of Court—Subsequent suit based on different title—Compromise on behalf of a minor by his guardian *ad-litem* without permission of Court—Validity of. 3 P. R. 1905 Col. 1479 P. I.

Court-fees.

1 Accounts—Suit for—Valuation Court-fees. 12 M. L. J. 66 Col. 23 P. I.

2 Accounts—Suit for—Property laid in Munsiff's Court as originally valued. 25 M. 543 Col. 108 P. I.

3 Appeal—Decree Memorandum of appeal, amendment of. 30 C. 516 Col. 1280 P. I.

4 *Appeal—Decree payable by instalments. Memorandum of appeal—Court-fee.*

The first Court granted a decree payable by instalments conditionally upon the defendants furnishing security.

Held, that the proper fee on a memorandum of appeal by the defendants against the condition imposed was ten rupees

Court-fee (*Contd.*)

the condition imposed was ten rupees. *10 M. 187, 19 C. 272 referred to.* RAI SAHEB BEHARI LAL AND OTHERS *v.* SETH NANHE LAL. **14 C. P. L. R. 1901 P. 172.**

5 *Appeal, Memorandum of.*—

G., A. and K. were co-defendants in a suit. K. valued his appeal at a certain amount and in accordance with such valuation, paid full Court-fee on his memorandum of appeal. G. and A. filed a separate appeal valuing it at the same amount, but paid a Court fee of Rs. 2 only on their memorandum of appeal.

Held, that their memorandum was not sufficiently stamped.—GHAZANFAR ALI KHAN *v.* RAM DAYAL, **3 O. C. 164.**

6 *Appeal from order refusing to make order absolute—Transfer of Property Act (IV of 1882) S. 89—Mortgage suit—Compromise decree—Ad valorem court-fee.*

Ad valorem Court-fee on the value of the appeal should be paid on the memorandum of appeal from an order refusing an application for an order absolute under S. 89 of the Transfer of Property Act 25 C. 133 *referred to*, CHARU CHANDRA MITTER *v.* BHAGIRATH PERSAD, **12 C. W. N. 1028.**

7 *Appeal—Grounds as to costs—Court Fees Act (Act VII of 1870)—S. 28.*

Where a memorandum of appeal includes objection to the disallowance of costs by the decree appealed against Court-fee on the amount of the costs claimed is also payable. 19 Mad. 359, *referred to.*

Second paragraph of section 28 of the Court Fees Act is applicable to a memorandum of appeal insufficiently stamped and received through mistake or inadvertence of the officer of the Court as properly stamped. 12 *All., 129, explained, 15 All., 65* and *19 Cal., 747 referred to.* DEBENDRO MOHAN RAI *v.* SONA KUAR. **W. N. A. 1901 p. 21.**

Appeal Court fee.

8 On appeal against order rejecting appealable as a decree, 84 P. R. 1901 followed.

When such application seeks a declaration with consequential relief the appeal against the order rejecting the application is chargeable with *ad valorem* court fee. FIRDAUS KHAN *v*: DARE KHAN. **109. P. L. R. 1902.**

9 *Decree against mortgaged property. Mortgage—Purchase of equity of redemption—Money kept in deposit for mortgagee—Liability of vendee—Court-fees.*

Where a decree was passed only against the mortgaged property and the plaintiff appealed for the defendant to be made also personally liable, the Court, without laying down any general rule, considered the Court-fee paid on the memorandum of appeal, *viz* Rs. 10 as sufficient.

A vendee of equity of redemption, who

Appeal Court fee (*Contd.*)

withholds the mortgage-money from the vendor in order to pay it to the mortgagee, cannot be considered a trustee of the mortgagee, so as to become personally liable to pay the amount withheld by him to the mortgagee, and the money so withheld cannot be treated as money received for the mortgagee's use, nor can the vendee be said to be agent of the vendor. By virtue of a statement in the sale-deed that the account is kept 'amanat' and the vendee will pay it to the mortgagee, represents the mortgagor and not the mortgagee.—*Butter* v. *Butter, 5 Ves., 534 Waring* v. *Ward, 7 Ves., 332; Earl of Oxford* v. *Lady Rodney, 14 Ves. 417* In re *Errington Ex parte Mason, L. R. 1894 Q. B. 11 I. L. R., VI Bombay, 463 30 P. R., 1888, 95 P. R. 1895 referred to.* MUHAMMAD SADIQ *v. Musst.* SAHIB BIBI, **64 P. L. R. 1902=54 P. R. 1902.**

10 *Declaration, suit for, that a decree was fraudulent—Further relief—Court-fee how to be assessed—Plaint originally correctly framed—Subsequent amendment, defective—Restoration by appellate Court—Specific Relief Act S. 42.*

It is necessary for the plaintiff to ask not only for a declaration that a decree obtained against him was fraudulent, but also for a consequential relief, *viz*, either to have the fraudulent decree set aside or to have a perpetual injunction granted to restrain the decree-holder from executing it 25 C. 49 F.

A suit for a declaration that a decree obtained against the plaintiff was fraudulent, with a consequential relief, should ordinarily be valued at the amount for which the decree sought to be set aside was obtained 11 C. W. N. 705 F.

Where the plaint was originally correctly framed, but by reason of an unfounded objection as to deficiency of Court-fees taken by the defendant, the plaintiff withdrew his prayer for consequential relief, which resulted in the dismissal of the suit on the ground of its not being maintainable, the High Court in second appeal allowed the plaint to be amended and restored to its original form. THAKUR PROSAD *v.* PUNSINGH. **8 C. L. J. 485**

11 Document to set aside—Court fees Act S. 7 (IV) C. and Sch II Act 17 (C). 2 L. B. R. 1904 P. 266—*See Col. 107 P. I.*

12 Damages, suit for—Title to land sought to be established in—Payment of additional fees—Duty of court to amend the plaint appropriately. 21 T. L. R. 1—*See Court No. 10.*

13 Deficiency—Suit to set aside sale and attachment—Practice—Proper Court fee not paid on plaint—Appeal. 14 M. L. J. 144 Col. 113 P. I.

14 Deficiency—Order absolute for sale of mortgaged property, application for—Decree—Execution. 29 C 651 Col 680 P I.

15 Deficiency—Hindu Law—Injunction to restrain waste by life tenant, Court fees—Money value of relief. 2 A L J 84—27 A 406 Col 127 P I.

Court-fees *(Contd.)*

16 Deficiency paid on expiry of limitation period—Application—Application for leave to sue in *forma pauperis* filed within limitation period 59 P R 1903 Col 1721 P I.

17 Deficiency paid on expiry of limitation period—Pre-emption suit—74 P R 1903 Col 1411 P I.

18 *Evasion of payment of Court Fee—Remedy.*

If a plaintiff can evade the Act, he may. The remedy lies in procuring an amendment of the Act and not in refusing the relief to which the plaintiff is entitled as of right.—KUNJ BEHARI *v.* KESHARLAL. **6 B L R 475.**

19 How calculated when appellant seeks to escape payment of a sum from respondent—7 O C 345 Col 1314 P I.

20 How calculated on cross-objections on appeal—Suit for redemption—2 O C 87 Col 114 P I.

21 *Insolvent debtor's Act—Appeal from order in—Court Fees—Fee payabe on memorandum of appeal filed under Section 73 of 11 and 12 Vic., Cap. XXI.*

The words 'in all other cases' in article 18 in Schedule A of the table of fees prescribed by the Madras High Court under the authority conferred by 24 and 25 Vic. Cap. 104 section 15 cover a Memorandum of Appeal presented under section 73 of 11 and 12 Vic. Cap. XXI, and the fee payable is Rs. 50 irrespective of the value of the subject matter of the appeal. LILADHARA VIAS *v.* OFFICIAL ASSIGNEE OF MADRAS. **24 M. 160.**

22 Insufficiently stamped plaint -- Suit instituted when plaint presented and not when Court fee is paid. 15 M. L. J. 219 Col. 1934 P. I.

23 Insufficiently stamped plaint owing to requisite stamp not being procureable in time--Stamp procured later on during the day but not filed owing to Court rising early 104 P. R. 1905 Col. 100 P. I.

24 Mesne profits--Court fees on mesne profits accruing after institution of suit. 6 O. C. 351 Col. 120 P. I.

25 Mortgage suit — No personal decree prayed for. 7 B. L. R. 191 Col. 109 P. 1.

26 *Non-payment of--Order by first Court to pay additional Court fees—Non-payment—Pleadings non-liability to pay—Suit dismissed—Appeal—Discretion of Court to allow payment.*

Where a suit was dismissed for non-payment by plaintiff of additional Court fees ordered by the Court to be paid, the Appellate Court refused to grant further time. MAHOMED TAKIBUDDIN BUDDI *v.* THE COLLECTOR OF THE 24 PERGANNAHS. **6 C. W. N. 157.**

27 *Partition decree—Execution by defendant—No liability of defendant to pay Court fee.*

The appellant was a defendant in a partition suit and he claimed execution in his favour of the decree therein and the lower Court ruled that on his "paying the Court-fees the matter will be sent to the Collector for partition. The decree itself imposed no such terms.

Held, that no Court-fee was payable. NAWAB MIR SADRUDIN *v.* NAWAB NURUDIN. **6 B. L. R. 834.**

27 (a) Pauper suit — Sale of recover, claims of rival purchaser. 25 M. 733 Col. 1632 P. I.

28 *Pauper suit, withdrawal of—Payable to Government.*

In the case of such withdrawal the plaintiff must be directed to pay to the Government the court fees, which he would have had to pay if he had not been permitted to sue as a pauper. 15 B 77, 18 B 461 distd. on the ground that there the cases had been settled by amicable settlement and the ruling in 15 B. 77, so far as it puported to cover cases of failure without formal adjudication, was an *obiter dictum.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* NARAYAN BALKRISHNA KULKARNI. **29 B. 102.**—*See for other facts Col. 1591 P. I.*

29 Partition suit--Remand, appeal. A. W. N. 1908 P. 40 Col. 1673 P. I.

30 *Partition suit—Valuation--Computation--Court-fees—Relief sought--Change in the mode of enjoyment—Enforcement of a disputed right.*

The valuation for the computation of Court-fees of a suit for partition depends upon whether the relief sought is merely a change in the mode of enjoyment of the property or the enforcement of a disputed right. 4 C. L. R. 417, 8 C. 757, 20 C. 762, 20 M. 289, 22 B. 351, 18 B. 209, 21 M. 234 referred to. SRIPATI AND OTHERS *v.* SHRIDHAR. **15 C. P. L. R. 1902 P. 120.**

31 Payment of for set off claimed in a written statement 10 C. W. N. 199 Col. 1446 P. I.

32 *Payment of Court-fees by pauper subsequent to filing of his application--Suit by Pauper--Limitation.*

A suit must be held to be instituted by a pauper, who, before the enquiry into his pauperism is finished, pays into Court the required Court-fee on the plaint, on the date when he presented the application to sue as a pauper, if he is found to be a pauper on the day when he presented the said application. AMJAD ALI *v.* SURFARAZ ALI. **4 O. C. 250.**

33 *On plaint--Ejectment suit. 1 L. B. R. 1900-1902 P. 303 Col. 111 P. I.*

34 *Pre-emption suit--Separate Court-fees not paid, dismissal of suit in respect of grove only. Zemidari and grove, grove not appurtenant.*

Plaintiff brought a suit for pre-emption of a zemindari share and a grove, which was said to be appurtenant thereto, and paid Court-fee on five times the Government revenue on the zemindari share. The Courts

Court-fees (*Contd.*)

below found that the grove was not appurtenant to the zemindari and dismissed the suit as insufficiently stamped, no Court-fee having been paid on the grove.

Held, that the suit should not have been dismissed *in toto*, but only in respect of the grove, if it was found that it did not appertain to the zemindari. ROHAN SINGH *v.* BHAU LAL. **4 A. L. J. 403=A. W. N. 1907 P. 163.**

34 a. Practice—Consideration of cases. 29 C. 140 Col. 124 P. I.

34 b. *Probate duty—Court-fees—Stock not transferable in India—Assets in India.*

No probate duty can be demanded on stock which is not saleable or transferable until it has been transferred in England and the Bank of England register to the executor or legatee. IN THE GOODS OF MAJOR GENERAL MILLET. **51 P. R. 1902.**

35 Purchase by mortgagee in execution of decree of mortgaged property—Value of property for purpose of. 33 C. 1133 Col. 134 P. I.

36 Reference to Hindu Law—Conveyance—Havala—Letter by a debtor authorising payment to his creditor of money due to him (the debtor) by a third person 27 B 150 *See Col 889 P I.*

37 Right of crown—Pauper's suit—Right of government—Crown debts have preference over other debts. 10 C W N 857 Col 1633 P I.

38 *Suit instituted before Settlement Officer without Court fee—Transfer to Civil Court—Court-fee on plaint if leviable—Court fee on plaint—Reg. III of 1872 S. 5, 8—Settlement.*

No institution Court-fee need be paid when a suit, which was instituted before a Settlement Officer under the provisions of Reg. III 1872 without Court fee, was transferred to a Civil Court under S. 5 of the Regulation. BIBEE GOLAP KUMARI SAHEBA *v.* MD. KADIRUDDIN. **12 C W N 917.**

39 Suit for administration of trust—Trust—C P C S. 539—2 A L J 591—28 A 112 Col 1221 P I.

40 Suit by tenant against landlord and interest—32 C 263 Col 116 P I.

41 Suit for—Mortgage—Court fee in a suit to redeem property subject to more than one deed of mortgage 7 O C 152 *See Col 112 P I.*

42 Suit for a declaration that the defendant had no right to mortgage joint property—Cause of action-Declarating decree. 50 P. L. R. 1904 Col: 340 P. II.

43 Valuation—Partition suit—Separate suit barred. 15 C. P. L. R. 1902 P. 106 Col: 1033 P. I.

44 Written statement claiming set-off. Whether chargeable as a plaint in a cross suit—Set off—Mortgage. 8 C. W. N. 174 Col: 1414 P. I.

45 *Written statement of defendant claiming set-off—Does not require Ad valorem Court-fee—Appeal—Civ. Pro. Code, Act XIV of 1882 S. 588 (7).*

Held, that *ad valorem* Court-fee is not required on a written statement in which defendant does not allege any definite and ascertained sum to be due to him and does not pray for passing any decree therefor, but merely pleads that he is entitled to get from the plaintiff damages arising out of the transaction on which plaintiff's claim is based, and that the amount of such damages may be set off against the said claim 9 Bur. L. R. 285 (F. B)—Opinion of Banerji J, 8 C. W. N. 174 F; 8 A. 376; 13 B. 672; 15 M. 29 & 8 C. W. N. 174 Diss; 7 A. 284 & 15 A. 9 R. BHAGAT SINGH *v.* DEVI DIAL, **80 P. W. R. 1908=180 P. L. R. 1908=85 P R. 1908.**

Court-fees Act (VII of 1870).

1 *See Act VII of 1870 (Court fees Act) Cols. 98 to 138 P. I.*

2 *S. 7—Court fee—Suit for possession under lease, whether it is a suit for specific performance.*

A suit by the lessee of land compromised in a lease is not a suit for specific performance of the contract of lease and the Court-fee payable on the plaint is the same as in a suit for possession. But the memorandum of appeal must be stamped according to the value of the relief asked for, which may be the lease money. GHULAM SABIR *v.* NARAIN PRASAD. **5 A. L. J. 534=A. W. N. 1908.**

3 *S. 7 (1)—Procedure—Relief granted which was not asked for by the plaintiffs—Appeal—Court-fee.*

The plaintiffs in a suit for sale on a mortgage were granted by the first Court a relief for which they had not asked and which could not properly have been granted to them without an amendment of the plaint. On appeal by one of the defendants the appellant was made to pay an additional court-fee corresponding to the relief granted to the plaintiffs. The plaintiffs respondents were also required to make good the deficiency in the court fee paid in the first Court. This the plaintiffs declined to do unless the decree was confirmed in its entirety.

Held, that the plaintiffs were not entitled to retain the full benefit of the first Court's decree nor liable to pay the additional court fee; and the appellant might on application to the proper authority obtain a refund of the excess court-fee which he had been erroneously compelled to pay. INDAR SEN SINGH *v.* RIKHAI SINGH, **5 A L J 18=A W N 1908 P 31=3 M L T 165=30 A 103.**

4 S. 7 (IV) (b)—Cancellation of deed—Amount of Court fees to be paid on appeal—150 P. R. 1908 Col: 437 P. II.

5 S. 7 (IV). (c). Suit for removal of Mutwalo and Imam of a Mosque—Plaintiffs

Curt-fees (*Contd.*)

not seeking possession of the Mosque properties for themselves—37 P W R 1908 Col: 1801 P. I.

6 *S 7 (IV) (c)* and Art. 17 (6) schd, II—*Registration Act, S. 77—Suit—Valuation Act, S. 8—Suit for registration of document under S. 77 of Registration Act does not fall for purposes of Court fees within S. 7 cl. (4) c of the Court-Fees Act, but under art. 7 (6) of schd. II of the Act—Such suit to be valued for purposes of jurisdiction on the value of the property.*

A suit for registration of a document under section 77 of the Registration Act is not, for the purposes of payment of Court fees, a suit for a declaratory decree with consequential relief within section 7 clause (4) c of the Court Fees Act, but is a suit in which it is not possible to estimate at a money value the subject-matter in dispute, within article 17 (6) of schedule II of the Act. The Court-fee payable in such cases. is a fixed fee of 10 rupees. Juntoo *v.* Radha Couto Doss, (I. L. R., 8 Calc., 515), followed. Savarimuthu Pillai *v.* Alagiam Pillai, (12 M. L. J., 88), followed. The question of valuation for purposes of jurisdiction is not in such cases to be decided under section 8 of the Suits Valuation Act. The value in such cases will be the value of the interest created by such document. Ramakrishnamma *v.* Phagamma, (I. L. R., 13 Mad., 56), followed. RAMU AIYAR *v.* SANKARA AIYAR. 17 **M L J 573=3 M L T 73=31 M 89 (F B).**

7 *S. 7 IV (f.--Administration suit--Valuation for Court-fee--Valuation for jurisdiction--Suits Valuation Act, S. 8--Lower Burma Courts Act, S. 2 (h), 25, 28.*

In an administration suit the Court-fee on the plaint should be computed *ad valorem* on the estimated value of the share claimed by the plaintiff, under S. 7, iv (*f*) of the Court Fees Act; the value for purposes of jurisdiction is the same, under S. 8 of the Suits Valuation Act, 1887.

The Court to which the appeal lies is determined by the value of the suit (*i. e.*, the share claimed by the plaintiff) under S. 28 of the Lower Burma Courts Act, 1900. 17 C 680, Diss. 18 B 209, F. 7 B 125, 7 B 535, cited and F. 12 A 506, R. MA MA *v.* MA HMON. **4 L B R 279.**

8 *S. 7 V (c)--Suits Valuation Act (VII of 1887), S. 3 (1) Rules under—Rule 1 (c)—Court-fee--Garden—Fruit Garden*

Held, that, for purposes of Court-fee and jurisdiction, a fruit garden is a "garden" even though the garden land is assessed to revenue. SIRI DHAR *v* AMAR NATH, **34 P W R 1908=61 P L R 1908.**

9 *S. 7 (V) (e) and 9--Possession of house --Decree on payment of value of improvements —Appeal—Jurisdiction--Valuation for Court-fee and appeal--S. 39, Punjab Courts Act, 1884.*

The petitioner sued for possession of a house, which he valued at Rs. 90, in the Court of a Munsiff of the first class, and

Court-fees (*Contd.*)

obtained a decree for possession, on payment of Rs. 635—7—0, value of improvements to the house by the defendant. He appealed to the District Judge against so much of the decree as awarded compensation for improvements, and the District Judge held that he had jurisdiction and that the Court-fee must be made up to Rs. 650 and, on failure to make up the Court-fee, dismissed the appeal.

Held, that, the subject-matter of the suit being a house, the market value of the house as found by the first Court for Court-fee determined the course of an appeal under S. 39 of the Punjab Courts Act, 1884; that the District Judge had no jurisdiction to entertain and hear the appeal, and, that, under S. 7 (V) (*e*) of the Court-Fees Act read with S. 9 of the Act, the valuation for the purposes of Court fee and for jurisdiction should be the same 6 P R 1904 (F B) & 72 P R 1899, F; 3 P R 1893, 33 P R 1884, (F B), 23 M 84, 101 P R 1900, R; 1 P R 1887, 44 P R 1888 (F B), 169 P R 1888, and 16 P R 1903 (F B) Explained. ABDUR RAHMAN *v.* CHARAG DIN, **129 P L R 1908=23 P W R 1908=19 P R 1908 (F B).**

10 *S. 7, cls. 5, 11 (E)—Suit against landlord and other persons claiming under him by lessee of melvaram rights falls under S. 7, cl. V, and not under cl. XI (E):*

A suit by the lessee of melvaram right to recover possession from his landlord and others claiming through the landlord falls within section 7, clause V of the Court Fees Act, as a suit for possession of land. Such a suit does not fall within section 7, clause XI (E), as clause XI applies to suits between tenant and landlord only, and the wording of clause XI (E) makes it applicable only to persons in actual physical occupation and not to persons having the melvaram rights only. Farzand Ali *v.* Mohanth Lal Puri, (I L R 32 Calc 263), followed. PALANIAPPA CHETTI *v.* SITHRAVELU SERVAI **17 M L J 474=3 M L T 8=31 M 14.**

11 *S. 7 (e) cl. IX p. Sch. 1 Art. 1--Applies to appeals in mortgage suit--Court fee payable on subject matter in dispute in appeal.*

Held that the Court fee in an appeal arising out of a suit for foreclosure is payable on the subject matter in dispute in appeal and not on the principal money secured by the mortgage. 27 A. 447 and 20 M. 367 *followed.* IN THE MATTER OF THE PETITION OF MAHADEO PRASAD. **5 A. L. J. 531=A. W. N. 1908 P. 247=4 M. L. T. 448.**

12 S. 7 V. (*a*) and (*d*)—Revenue payable estate—Suit for possession of share in--Court-fee on plaint "Definite share" if must also be separately assessed with revenue-12 C. W. N. 990 Col. 581 P. II.

13 S. 9, 19 P. R. 1908. *See No. 9 supra.*

14 *S. 17--Alternative reliefs for distinct causes of action--Fees payable on.*

Court-fees *(Contd.)*

Held, that S. 17 of the Court Fees Act applies not only to a case in which the plaintiff claims alternative relief in respect of different claims of action. *Neela Kandhan* v. *Anantha Krishna Aiyar*, 30 M. 67 followed. 7 O. C. 152 15 B. 82 ref to. JAWAHIR SINGH *v.* BALDEO PRASAD. **11 O. C. 173.**

15 *S. (19) (c)—Succession Act X of 1865—Ss 242 and 234—Amending Act VIII of 1903—Application for extension of certificate—Revocation of the grant of probate.*

An application for probate to have effect throughout the Province of Sind was granted. But the testator also left some money due from a Life Insurance Company, the head office of which was situated at Bombay; and the Company refused to pay the money as the probate had no effect in Bombay.

Held, on an application for the extension of the probate to the whole of India.

(1) That no extension could be ordered inasmuch as the preliminaries required by Act VIII of 1903 had not been complied with, and that those preliminaries were not mere empty formalities.

(2) that the grant might be annulled under S. 234, Expln. 4, of Act X of 1865, in order that a fresh grant might be applied for, which will be exempt from further Court-fee under S. 19 (c) of the Court Fees Act, 1870. APPLICATION BY ELIZABETH A. DESOUZA FOR PROBATE OF WILL OF ALFRED JAMES DESOUZA UNDER ACT X OF 65, **1 S. L. R. 177.**

16 *S. 19 (c)—Letters of administration* de bonis non—*Court fee.*

In this case Letters of Administration had previously been issued in respect of the whole property in respect of which letters are now asked for. The full fee chargeable on the property at the value there placed upon it was levied.

Held, that no further Court-fee was leviable on a subsequent grant of letters of administration under S. 229 of the Indian Succession Act, in respect of an unadministered portion of the estate, although the value of the property might have increased in the meantime. SAMUEL BALTHAZAR—*Petitioner.* **4 L. B. R. 255.**

17 *Sch. II, Art. 17—Partition suit—Fixed fee or* ad valorem *fee.*

A suit for partition of joint property is governed by Sch. II, Art. 17, Cl. VI of the Court Fees Act, and the plaint is properly stamped, if a Court-Fee of ten rupees is paid upon. A mere denial on the part of the defendant as to plaintiff's title and possession does not convert the suit into one for declaration of title and recovery of possession; the plaintiff is entitled to maintain a suit for partition, if his possession to some part of the joint property is admitted or established, but if it is established that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay *ad valorem* Court-Fees upon a plaint appropriately framed for the purpose. BIDHATA RAI *v.* RAM CHARITER RAI. **13 C. W. N. 37=6 C. L. J. 651=3 M. L. T. 33.**

18 Sch. II Art. 17 *(i)*—Stamp on the plaint—Declaratory suit. 7 C. L. J. 36 *(P. C.)* Col. 1524 P. I.

Court of wards.

1 Act IV of 1899 (Court of Wards) Madras —Regulation Collector — Decree Collector—Construction of the Acts and rules thereunder. THE REGULATION COLLECTOR OF UTHAI MALAI ESTATE *v.* SUBBIER. **4 M. L. T. 321.** *See Act IV of 1890 (Court of Wards) Madras.*

2 Appointment — Conflict between Administrator-General and Court of Wards. 10 C. W. N. 241 Col. 517 P. I.

3 *Central Provinces Government Wards Act of 1885 and 1899 S. 3—Family property taken possession of by Government owing to disqualification of head of the family—Other members of the family are not thereby wards of Government.*

The question for decision in the suit was whether, when the head of a family is declared to be disqualified and when, in consequence of such declaration, the whole of the family property is taken under the management of the Court of Wards each and every member of the family becomes a Government ward.

Held, there is nothing either in the Central Provinces Government Wards Act of 1885 or in the Act of 1899 which would justify such a view. By S. 3 of the Act of 1885 a Government ward is defined to mean 'any person of whose property or of whose person and property the Court of Wards may, for the time being, have the superintendence under this Act.' But the Court of Wards could only assume the superintendence of the property of a landholder, who was disqualified to manage his own property; this disqualification, which formed a condition precedent to pay assumption of superintendence under the Act was a personal disqualification and the Court of Wards had no authority to assume the superintendence of the property of other members of the family who were not disqualified. Consequently, the other members of the family did not become Government wards. THAKUR HIMANCHAL SINGH *v.* KUAR PRATAB SINGH LODHI, **1 N. L. R. 97.**

4 *Disqualified Proprietors—Land Revenue N. W. P. Land Revenue Act (XIX of 1873), S. 205 B—Attachment of property of disqualified proprietor—Profits accruing after the release of the corpus of the property by the Court of Wards.*

Held, that the prohibition contained in the second paragraph of S. 205B of Act XIX of 1873 does not apply to the rents and profits of property which may accrue after the release of the *corpus* from the superintendence of the Court of Wards. Himanchal Singh *v.* Jhamman Lal. (I. L. R., 22 All.

Court-fees (*Contd.*)

364), referred to.—JHAMMAN LAL *v.* HIMANCHAL SINGH, **A W N 1901 P 183 = 24 A 136.**

5 Disqualified Proprietors—Capacity of disqualified proprietors to contract. 25 A. 195 Col: 253 P. I.

6 Disqualified Proprietors—Ratification of contract caused by undue influence—Borrowing money without sanction of Court of Wards.—5 O. C. 256 Col: 267 P. I.

7 *Disqualified Proprietors—Land Revenue Act (Oudh) S. 174—Execution of decree—Disqualified proprietor, debt contracted by Court of Wards, property under management of.*

While his property was under the management of the Court of Wards, a disqualified proprietor contracted a debt, on account of which the appellants obtained a decree against the respondent, as his representatives, after his death.

Held, that the provisions of S. 174, Act XVII of 1876, barred execution of the decree against the property, which at the time the debt was contracted, was under the superintendence of the Court of Wards. RAM PARSHAD AND OTHERS *v.* MUSAMMAT MUNA KUAR AND OTHERS.—**4 O. C. 28.**

8 Lease—Manager. Power of, to grant lease—Contract—Voidable contract-Landlord and tenant. 10 C. W. N. 126 33 C. 273 Col: 70 P. I.

9 Power of, to make such commutation —Benefit of estate—Onus—Substitution made by court of wards if binding and upon whom. 6 C L J 727 Col. 177 P. II.

10 *Powers of—Oudh Land Revenue Act, 1876, Section 161, 162, 166 and 172—Award —Award in excess of powers of arbitrators.*

The Court-of-Wards has all the ordinary powers of a guardian over a ward's property, supplemented by certain additional powers given by stature. It is not within the power of a guardian or the Court-of-Wards to make a voluntary alienation in perpetuity of his ward's real estate, and it is open to the ward on attaining the age of 21 years to challenge the validity of such a transaction.

An award which goes beyond the order of reference is void to that extent. RAJA MOHAMMAD MUMTAZ ALI KHAN *v.* SAKHAWAT ALI KHAN. **5 W. N. C. 681 = 23 A. 394 (P. C).**

11 *Power of—XIX (N. W. P. Land Revenue Act), sections 194 (g) and 203—Act (Local) No. III of 1899 (Court of Wards Act) sections 9, 35 and 47—Power of Court of Wards to sell property under its superintendence.*

The estate of a Muhammadan lady, named Hawa Begam, was at her own request taken under the superintendence of the Court of Wards under section 194, clause (*g*), of Act No. XIX of 1873. This was in 1896. In 1902 the Court of Wards sold a portion, as was alleged, without her consent.

Court-fees (*Contd.*)

Held, on suit by persons claiming title through Hawa Begam to recover the property so sold, that the Court of Wards was under the circumstances entitled to sell, even without the owner's consent, and that its direction could not be questioned in any Civil Court.

Semble that if the property had been placed under the superintendence of the Court of Wards, under S. 9 of Local Act No. III of 1899, and if the sale had been made without the consent of the proprietor, otherwise than on the ground set out in the concluding paragraph of S. 35, the sale would have been a bad sale and the Civil Court could have entertained a suit to question the power of the Court of Wards to sell. MOHSAN SHAH *v.* MAHBUB ILAHI. **4 A. L. J. 495 = A. W. N. 1907 P. 196 = 29 A. 589.**

12 Pre-emption—Customary right—Hindu of Bihar—Pleadings—Right of Pre-emption, assertion of—Manager of adult female under Court of Wards—Right and duties of. 35 C. 575 Col. 71 P. II.

13 *Right of usufructuary mortgagee dispossessed by Court of Wards—Possession restored on Ward's death—Pro-notes for arrears of rent, executed by tenants in favour of Court of Ward's manager, handed over to mortgagee, without endorsement, suit on—Ss. 18, 43, 55, 57, Act I of 1902 (Madras).*

If the Court of Wards, which, under direction of the Local Government acting under S. 43 of Madras Act I of 1902, has dispossessed a usufructuary mortgagee of the mortgaged property and has administered the estate itself and on the death of the ward, takes no action under S. 57, its power of superintendence ceases *ipso facto* and the property ceases to be the property of a ward within the meaning of S. 43. So in accordance with cl. (2), S. 55, the usufructuary mortgagee is entitled to be replaced in possession of the mortgaged property. He regains the right to collect the rents and profits, the effect of S. 43 being not to turn the usufructuary mortgagee into a simple mortgagee.

Where the Court of Wards, on the death of the disqualified proprietor, releases the property from its superintendence and hands over to the usufructuary mortgagee, who was dispossessed under S. 43 of the Act, *inter alia*, certain promissory notes executed by tenants, for arrears of rent (due on the mortgaged property), in favour of the Court of Wards' manager.

Held that, he having been replaced in possession of the mortgaged lands in accordance with S. 55 (2), is entitled to sue on those pro-notes without obtaining an endorsement from the Court of Wards, because, on the death of the ward, the power of the Court of Wards having ceased, there was no one who could legally endorse the notes.

Property in a promissory notes may also pass by "operation of law." SOWCAR LODD GOVINDA DOSS KRISHNA DOSS

Court-fees *(Contd.)*

YARU *v.* LEPATI MUNEPPA NAIDU, 4 M L T 341.

14 *Trespass—Court of Wards, "Proprietor,"—Infant if proprietor, when estate vested in executrix — Residuary legatee, Court of Wards Act (IX of 1879, B. C.)—Notice of suit, when necessary—Code of Civil Procedure (Act XIV of 1882), S. 424—Injunction, if notice necessary—Jurisdiction—Cause of action—Immoveable property within jurisdiction —Acquisition by executrix—Mal-administration, who to determine—Trespass, under order of higher official, who liable for—Power of Court of Wards to override wishes of testators—Possession, disturbance of—Remedy injunction or ejectment action.*

The Court of Wards can take possession only of an estate of a minor, if he can be said to be the proprietor thereof within the meaning of the Court of Wards Act, and has no right to take over an estate from an executrix in whom the estate is vested in law, until the infant beneficiary becomes the proprietor.

A residuary legatee does not become the "proprietor" of the estate until the administration has been completed and the residue ascertained and made over by the executrix to him.

The Court of Wards Act was never intended and the language thereof does not warrant the construction that it should have power, to override private rights, such as the wishes of testators and proprietors generally in desiring and directing that their estate should vest in and be managed by an executor or in creating a trust *inter vivos* for the benefit of an infant.

When public officers are sued not in their admitted official capacity but as individual trespassers, no notice under S. 424 of the Code of Civil Procedure is necessary.

Even in a case where such a notice would be otherwise necessary, so far as the suit sought relief by an injunction to restrain the commission of an act, no notice under that section would be necessary.

An acquisition by an executrix for an estate, out of the assets of the estate, is a part thereof, even if the acquisition has taken place after a declaration by the Court of Wards taking over the management of the estate.

The High Court may entertain an action in respect of immoveable property, provided that a portion of such property is within the jurisdiction.

Where, although but a portion of the estate regarding which certain declarations and injunction are sought in an action is within its jurisdiction, the High Court has power to grant the same declarations and injunction as regards the whole estate.

Where there had been an undoubted disturbance of plaintiff's possession, some rents having been collected and appropriated by the defendant and the plaintiff's establishment directed to obey the order of the defendant, but, no mutation of names having been effected, the rents had been collected and money-orders cashed in the name of the plaintiff and her establishment taken over by the defendant in the plaintiff's absence and without her consent, to which the plaintiff at once protected, and, she also made certain collections on her own behalf.

Held, that the possession of the estate had really remained in the plaintiff; and, there had been a continuing trespass for which the plaintiff was entitled to have an injunction, and it was not necessary for her to institute an action in ejectment against the defendant.

It is not for the Court of Wards to determine whether there has been mal-administration of an estate by an executrix, and on its own determination, take possession thereof on behalf of an infant residuary legatee, before the administration is complete.

It is not essential that the defendants should all actually commit trespass to be liable to the plaintiff; a trespass committed by a subordinate officer under orders from the superior officers is in substance the act of them all and both the subordinate as well as the superior officers are liable to the plaintiff as tresspasser. GANDA SUNDARI CHAUDHURANI *v.* NALINI RANJAN RAHA, 12 C. W. N. 1065.

Court of wards Act IX of 1879 (Bengal).

1 See Act IX of 1879 (Bengal Court of Wards Act) Cols. 499 P. I. and Col. 69 to 71 P. II.

2 Trespass—Court of wards, what estate can be taken possession of by proprietor. 12 C. W. N. 1065. *See Court of Wards No. 14.*

Court of wards Act XVII of 1885 (Central Provinces Act).

See Col 368, 369 P. II.

Court of wards Act XXIV of 1899 (C. P. Act).

See Col. 374 P. II.

Court of wards Act III of 1899 (U. P. Act).

See U. P. Act III of 1899.

Court of wards Act IV of 1899 (Madras Act.

See Madras Act (IV of 1899).

Covenant.

1 Against alienation—Lease—Assignment —Forfeiture of lease. PARAMESHRI *v.*

Covenant (*Contd.*)

VITTAPPA SHANBAGA. **26 M. 157**. *See Landlord and Tenant.*

2 *Collateral—Promissory Note—Collateral covenant not to sue for limited time, no bar to suit—Indorsee with notice of covenant may sue.*

A collateral covenant not to sue for a limited time on a promissory note does not suspend the right of action on the note and cannot be pleaded in bar to an action on the note. The payee of a promissory note executed an agreement in the following terms. "You will ever from the 1st of May be paying interest to me on account of the (promissory) note for Rs. 5,000 executed this day by you in my favour, the interest for every month being sent on the first of the next month. I shall take the above Rupees five thousand from you after giving *jivanamsam* (Maintenance money) to my mother-in-law, and obtaining a release bond : or I will take the said rupees five thousand after the lifetime of my mother-in law".

Held that this agreement was only a collateral covenant not to sue for a limited time and was no bar to an action by an endorsee with notice of the agreement. SOMASUNDARAM CHETTIAR *v.* NARASIMHA CHARIAR. **16 M. L. J. 103=29 M. 212.**

3 Pay in mortgage debt — Combination of simple and usufructuary mortgages—Right of mortgagee to decree for mortgage money and for sale. 27 M. 526 Col. 603 P. I.

4 Pre-emption for—Mortgage with right of pre-emption in favour of mortgage—Assignment of equity of redemption. 24 M. 449 Col 414 P. I.

5 Pre-emption—Stipulation as the price to be paid by the pre-emptor. 27 A. 12 Col. 355 P. II.

6 *Personal covenant—Pre-emption Heir—Purchaser.*

A covenant between vendor and purchaser that if the purchaser ever sold the property the vendor should be given the first refusal is a purely personal covenant not binding on the heir of the purchaser. NOBIN CHANDRA SOOT *v.* NABAL ALI KHAN. **5 C. W. N. 343.**

7 *Personal—Mortgage-deed—Construction of deed—Usufructuary mortgage-deed containing a personal convenant to pay—Covenant does not give a right of sale.*

Where a mortgage is in other respects a usufructuary mortgage, the insertion therein of a personal convenant to pay the mortgage on debt demand unaccompanied by any hypothecation of the property, the subject of the mortgagee cannot alter the character of the mortgage and give the mortgagee a right to sell in the event of non-payment. 21 A. 4 followed. KRISHNA BHAI CHAND *v.* HARI JANARDHAN, **10 B. L. R. 615.**

8 Quit enjoyment—Vendor and purchaser—Sale of property—No title in vendor to part of property sold—Suit by purchaser for damages—Cause of action—26 B. 750 Col: 1855 P. I.

9 Repair—Breach—Continuing breach—Usufructuary mortgage. 3 B. L. R. 156 Col: 339 P. II.

10 Renewal of lease for—Covenant to run with land—Lease from the mortgagor in possession—Paramount title of the mortgagee against mortgagor and lessee. 6 B. L. R. 995 *See Col: 1586 P. I.*

11 Sale of mortgage—Document-Mortgage, whether sale followed by agreement to reconvey amounts to. 16 M. L. J. 106—29 M. 307 *See Col. 546 P. II.*

12 Transfer of Property Act S. 55 (1) j—Mortgage—Sale deed—Covenant for title—Covenant for quiet enjoyment. 6 B. R. 832 Col: 592 P. I.

Co-widows

1 Alienation by one—Hindu Law—Champerty and maintenance—Public policy, conveyance opposed to. 8 C. W. N. 408—31 C. 433 Col: 386 P. II.

2 *Alienation by one—Hindu Law—Alienation by widow—Costs of litigation—Arrangement between co-widows—Adopted son—Right of the adopted son to set aside the alienation.*

A Hindu died leaving him surviving two widows, C. and B. The two widows after a time found that they could not agree. C. (the senior widow) passed a document to B. (the junior widow) on the 17th July 1879 whereby C. gave B. possession of certain lands, houses, etc, for her maintenance. Under this arrangement, B. was to carry on the *vahivat* of the same according to her pleasure as long as she might live, and the son, who might be adopted by C, would at B's death be entitled to "whatever moveable and immovable property there is." In 1883 and again in 1885 B. sold portions of this property to meet certain expenses necessarily incurred by her in litigation. C. adopted the plaintiff in 1894 and she died in 1895. B. died in 1902. Some time before her death, the plaintiff filed a suit against the defendants, purchaser from B, to recover possession of the property alienated by B.

Held, that, under the agreement of 1879 B. had authority from C. to do any act necessary for the due and proper management of the property, and one of those acts was to pay the costs of the litigation, and that, therefore, B. had implied authority from C. to alienate the property to meet these costs.

Held, further, that under the cirumstances of the case, the burden of proof lay upon the plaintiff to show that C. did not consent to the sale.—MAHADEVAPPA *v.* BASAGAWDA, **7 B. L. R. 258=29 B. 346.**

3 *Alienation by one—Hindu Law—Co-widows—Transfer by one of them. Effect of.—*

Though one of several co-widows, who

Co-widows *(Contd.)*

is not the managing member on behalf of all, cannot charge the inheritance, even when the transaction is for the benefit of the estate, yet the transfer will bind her own interest in the property during her lifetime. VADALI MAMIDIGADU *v.* KOTIPALLI RAMAYYA. **26 M. 331.**

4 Mortgage by senior widow—Necessity—Litigation expenses—Burden of proof—Suit against widow and reversioner as his son. 14 M. L. J. 139 Col: 1227 P. I.

5 *Mortgage by--Hindu Law -- Alienation --Widow--Legal necessity--Litigation expenses —Burden of proof.*

For the purpose of determining whether or not there is legal necessity justifying an alienation by a Hindu widow either by way of mortgage or sale, it must be shown by the creditor that the necessity actually existed and that there were no other funds available.

Costs of litigation are a recognised head of legal necessity but that does not mean that a widow engaged in litigation has an unlimited power of borrowing. BHIMARADDI *v.* BHASKARGANGADHAR. **6 B L. R. 628.**

6 *Partition between co widows—Mode of partition and enjoyment—Hindu Law.*

The fact of a co-widow having obtained Letters of Administration of her husband's estate and not having completely administered the estate is no bar to the maintenance of a suit for partition by the other widow.

A co-widow has not an unqualified right to claim partition of her husbands' estate, such partition cannot affect the rights of her co-widow to succeed to the estate after her nor can it affect the rights of any of the other reversionary heirs of her husband.

The partition that is to be effected as between co-widows, must be so made as not to effect any permanent change in the property to be divided such as might affect the interests of the reversionary heirs.

Held, that in the circumstances of the case the relief of separate possession was the only proper and effectual mode of securing to the plaintiff the enjoyment of her distinct right to an equal share of the benefits of the estate.

That the plaintiff was entitled to partition of her husband's estate and to separate possession of her one-half share thereof. MUSSAMMAT DAL KOER *v.* MUSSAMMAT PANBAS KOER. **8 C. W. N. 658.**

7 Partition--Hindu Law--Suit by one of three widows against her two co-widows for partition of widows estate in their late husband's property. 24 M. 441. *See Col. 1931 P. I.*

Creation of Wakf.

Mahomedan Law—Waqf—Endowment—Power of Shia to create valid waqf by will —Admissibility of evidence—Statements as to heirs made in accordance with practice of public office—Proof of legitimacy of heirs named in such statements.

Creation of Wakfs *(Contd.)*

By the law of the Shia sect of Mahomedans, as well as by that of the Sunni sect, a valid *waqf* can be created by will. Agha Ali Khan *v.* Altaf Hasan Khan, (I. L R 14 All. 429), dissented from. A series of statements extending from 1860 to 1890 by a wasiqadar made in accordance with the practice of the wasiqa office, a department under Government, as to who were her heirs, and made at a time when no controvercy on the subject was in contemplation, and letters written by her, in reply to inquiries by the wasiqa officer, explaining and confirming such statements, was *held* to be admissible in evidence in support of the legitimacy of such heirs, and under the circumstances, to be conclusive in their favour.--BAQAR ALI KHAN *v.* ANJUMAN ARA BEGAM. **7 C W N 464=30 I A 94 =25 A 236 (P C)**

Creditor.

1 Conveyance in favour of creditors—Debtor's whole property conveyed—Validity of—Vesting of property in official assignee 4 B L R 154 on appeal 4 B L R 647—28 B 765 Col 483 P II.

2 *Conveyance to trustees for the benefit of creditor—Assignment by debtor of all his property to creditors- Act of Insolvency—Insolvency Act S. 9.*

Held, that the assignment by a debtor of all his property for benefit of all of his creditors is in itself an act of insolvency within the meaning of S. 9 of the Indian Insolvent Act. KURSONDAS RAMDAS *v.* MAGANLAL KANKUCHAND. **4 B L R 94.**

3 Dying leaving will but without executors—Payment of interest. 4 M. L. T. 325 Col. 621 P. II.

Note—4 M. 335 read for 4 M. L. T. 835.

4 *Frame of suit by creditor—Executor de son tort—Liability of, under Hindu Law, when there is a legal representative--Power to pay own debt out of assets—Consent of heir to such payment, how far a defence to creditor's action--Creditor, form of suit by.*

Where A on the death of B pays off a debt due to C by B which he had guaranteed, and later on in the same day, removes goods belonging to B's estate, A becomes liable as *executor de son tort.* The Rule of English Law, that no liability as *executor de son tort* can arise when there is another personal representative, does not apply in Magaluri Garudiah *v.* Narayana Rungiah, (I. L. R., 3 Mad. 359), referred to. An *executor de son tort* cannot plead *plene administrasit* if he retains the assets for his own use or pays his own debt. In this case, A became a creditor of the estate when he paid off the debt, and when he removed the goods, he paid a debt due to himself and not to C. Where there is an *executor de son tort,* a creditor may sue for his debt and is not confined to an administrative action. NARAYANASAMI PILLAI *v.* ESA ABBAYI SAIT. **28 M. 351.**

Creditor (*Contd.*)

5 *Gratuitous transfer of immoveable property—Discharge of debt—Assets.*

A creditor who is defeated or delayed by a gratuitous transfer of immoveable property is entitled to avoid such transfer unless it is proved that at the time the transfer was made the transferor possessed available assets over and above the property transferred sufficient for the discharge of his debt. 13 C. P. L. R. 180, 4 M. H. C. R. 84, 10 C. 616; 9 L. J. ch. 241; 39 L. J. ch. 689; 61 L. J. P. C., 72; 22 C. 185; 13 B. 297; 27 B. 146 referred to. SETH MOHANLAL *v.* BALMAKUND MANAGER OF THE SHRINE OF MURLIDHARJI. **17 C. P. L. R. 1904 P. 24**

6 His right—Receiver—Liability of estate in his charge to creditors—Lien—Bania's Lien on goods. 30 C. 937 Col. 8 P. II.

7 His right to sue on accounts—Novation—Hundies in satisfaction of account 28 P L R 1903=7 P. R. 1903 Col. 313 P. I.

8 *His right to appropriate payments—Unlawful transactions.*

Quaere.—Whether a creditor is entitled to appropriate payments made in respect of unlawful transactions. 1 K. B. 715 Distinguished. ETHIRAJULU NAIDU *v.* LAKSHMINARASIMHAM CHETTY. **4 M. L. T. 326.**

9 Position of—Administration of estate by Court—Right of creditors—Land in Court—9 C. W. N. 167 Col: 2031 P. I.

Creditor and debtor

1 Jurisdiction of Court—Suit based on contract—Place where payment to be made—Return of plaint to be presented to proper Court. 7 B. L. R. 993 Col: 707 P. I.

2 Discharge of principal—Discharge of surety. 1 L. B. R. 1900—1902 P. 150 Col: 356 P. I.

Criminal misappropriation

1 By administrator—No express finding—General observation in judgment, effect of—3 M. L. T. 394 *See Col. 2040 P. I.*

2 *Son's liability for father's debts—Son liable for father's misappropriation when such misappropriation amounts only to a breach of civil duty.*

Where an undivided Hindu father misappropriates money received by him for the purpose of being paid to others in the course of a transaction entered into by him for the benefit of the family, and under circumstances which constitute such misappropriation a mere breach of civil duty and not a criminal act, the undivided son's interest in the joint family property is liable for the repayment of the monies so misappropriated to the person entitled to be paid. McDowell & Co. *v.* Raghava Chetty (I. L. R., 27 Mad., 71), distinguished. KANEMAR VENKAPPAYYA *v.* KRISHNA CHARIYA. **17 M L J 613=3 M L T 353=2 M L T 529=31 M 161.**

Crops.

1 *Punjab Alienation of Land Act (XIII of 1900), Section 2 (3) (b), (d)—Crops—Land.*

Sub-clauses (*b*) and (*d*) of section 2 (3) of the Punjab Alienation of Land Act do not refer to things material, such as crops, but refer to incorporeal rights. NUR MUHAMMAD *v.* TILOKA MAL. **130 P L R 1904.**

2 Fictitious landlord and tenant—Standing crops. Seizure of—32 C 459 Col 1811 P. I.

3 Standing crops—Execution of decree, delivery of land—Appeal from order of execution—3 L B R 1906 P 129 Col 1509 P I.

4 Standing crops—Suit to recover rent in kind—Duty of officer appointed to divide produce or appraise standing crops—26 A 285 Col. 1007 P. I.

Cross appeal.

1 *Jurisdiction—Valuation of appeal—Cross-appeals involving claim to upwards of Rs. 10,000—Appeal triable by two Judges—Court of Judicial Commissioner—Oudh Courts Act (XIV of 1891), S. 8, proviso, (2).*

In two suits to set aside mortgages, one for Rs. 14,000 and the other for Rs. 8,000, the amount in dispute exceeded Rs. 10,000. The plaintiff and the defendant both lodged appeals in both cases. These four appeals were to succeed or fail according to the decision of the question whether the mortgages were voidable or not.

Held, that, so much of the decree as was appealed from in each of the four cases involved indirectly a claim to an amount upwards of Rs. 10,000 and therefore under section 8, proviso (ii), of the Oudh Courts Act, 1891, the appeals were triable by two Judges.—DURGA BAKHSH *v.* MIRZA MOHAMMAD ALI BEG, **8 O C 96.**

Cross claim.

1 Cross claim—Suit between principal and agent—138 P L R 1901 Col 1445 P I.

Note 138 P L R 1901 read for 188 P L R 1901.

2 Cross claims under the same decree—Execution. 5 C. W. N. 497 Col 1504 P. I.

Cross decrees.

Cross decrees—5 C. W. N. 497 Col. 1504 P. I.

Cross examination.

1 *Cross examination prolonged unnecessarily—Commission. Witness examined by.*

Where it was shown by affidavits that there had apparently been a prolonged and unnecessary cross examination of a witness, who was being examined on Commission, the High Court ordered the cross-examination to close within a date fixed in the order. The Registrar was directed to telegraph the effect

Cross examination *(Contd.)*

of the order to the Commissioner if necessary. SURAJ PROSAD v. STANDARD LIFE INSURANCE COMPANY. 30. C. 625.

Cross objections.

1 Cross objections maintainable only regarding the principal appeal—Separate appeal with respect to separate orders passed on separate appeals. 10 O. C. 214 Col. 1664 P. I.

2 Enforcement of contract by one not party to it—Privity of contract—Cross objections filed within one month from service of summons—Appeal. 5 O. C. 235 Col. 1663 P. 1.

3 Suit for redemption—Court fees—Cross objections on appeal. C. P. C. S. 561 2 O. C. 87. *See Col. 114 P. I.*

4 Cross objection against co-respondents. 30 C. 655 Col: 1661 P. I

Crown

1 *Grant in lieu of Palanquin allowance is prima facie grant of revenue.*

A grant, which purports to be a grant only of the royal share of the revenue given in commutation of cash theretofor payable as a Palanquin allowance, must be construed strictly in favour of the Crown, and is *prima facie* a grant only of the revenue. BALWANT RAMCHANDRA NATH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. 7 B L R 497=29 B 480.

2 Grant made by a Government officer on behalf of the crown is maintainable—Suit for grant. 26 M. 268 Col: 924 P. I.

3 Grant—Co-owner not joined as party—Land resumed by Government and re-settled with heirs of former properietor—30 C. 811 Col: 69 P. II.

4 *Lands—Disposition of crown lands.*

A disposition of crown lands in 1865 by the Governor in Council might be invalid by reason of the failure to observe the formalities prescribed in St. 22 and 23 Vic. C. 41—7 B. L. R. 27 *See for other facts Col. 239 P. I.*

5 Power of the Government to dismiss its servants—Secretary of State—Liability of, 33 C. 669 Col: 359 P. II.

6 Prerogation ot levy—Assessment on land—Tax levied on trespasser—Prohibitory assessment. MADATHAPU RAMAYA v. THE SACRETARR OF STATE FOR INDIA.—27 M. 386—*See Revenue Recovery Act (Madras Act II of 1864).*

7 Prerogation of -Pauper suit—Court fee—Right of government—Crown debts have preference over other debts. 10 C. W. N. 857—33 C. 1040 Col. 1633 P. I.

8 Prerogation of—Government timber imported into Madras—Right of crown.—MAJOR C. BELL v. THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS. M. L. J., 1902 P. 208=25 M. 457. *See Madras City of Municipal Act (1 of 1884) S. 341.*

Crown *(Contd.)*

Crown Grants Act (XV of 1895).

See Col. 865 to 867 P. I.

Cruelty.

1 Cruelty—Restriction of Hindu Law—Husband and wife—Suit for—What amounts to—Power of Court to refuse restitution—9 C. W. N. 510 Col. 508 P. II.

2 *Cruelty legal—Mahomedan Law.*

If cruelty in a decree rendering it unsafe for the wife to return to her husband's dominion were established the court might refuse to grant a decree to the husband for restitution. 11 M. I. A. 551 ref. to. To render it '*unsafe* for the wife to live with the husband,' or, in other words, to constitute legal crulty, there must be actual cruelty of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it; and in this respect Mahomedan law does not differ from the English law. With anything less than legal cruelty as defined above, courts are not competent to deal; and in those cases of harshness or unkindness not amounting to legal cruelty, matters should be left to the husband's own conscience. MEHERALLY v. SAKERKHANOBAI (BATCHELOR J., O. C. J.) 7 B. L. R. 602 at 608. 609.

3 *Cruelty—Adultery.*

Cruelty must be such a course to raise a reasonable apprehension of severe physical injury. It is not necessarily one act. It may be and often is course of conduct from which a reasonable person would infer that the victim from it could not with due regard to her health and safety continue co-habitation with her husband. ARMOUR v. ARMOUR, 1 A. L. J. 318.

Cultivating Tenant.

1 Tenure-holder—Cultivating raiyat. 5 C. W. N. 535 Col. 77 P. II.

Cultivators.

1 Easement—Pasturage Rights—Landlord and tenant—Legal origin-Presumption from enjoyment from time immemorial—English law. 31 C. 503 Col: 927 P. I.

2 *Grove—Cultivator's rights* —Wajib-ul-arz —*Custom—Judicial notice.*—

A. R. alleging that he had ejected the defendants from their cultivatory holdings and obtained possession thereof on 18th May, 1894, and that according to law and custom the defendants on the same date lost all title to three groves in their possession, sued for possession of the groves together with mesne profits. The defendants denied the custom: no evidence of the alleged custom was given.

Cultivators (*Contd.*)

Held, (per Blenerhassett, J. C.) that the custom of the country which was perfectly plain was that the tenant retained his right to the trees until he died without heirs or absconded from the village with the intention of totally abandoning the trees. In the latter case in returning to the village he would frequenly recover his grove. Ejectment from cultivatory holding or residing in neighbouring village does not amount to an abandonment of the trees. *(Sel. Case, 130, dissented from).*

Held, (per Chamier, A. J. C.) that the custom alleged by A. R. was not so notorious or general as to justify the Court in taking judicial notice of it and treating it as part of the common law of the Province. It is open to a landlord to prove, if he can, the existence of such a custom as was alleged by A. R. UMRAO SINGH *v.* ALI RAZA KHAN. 1 O. C., 231.

Curators Act XIX of 1841.

See Act XIX of 1841 Cols. 52 to 54 P. I.

Currency Note.

Currency note—Legal tender—Bonafide transfer—Paper Currency Act S. 16—115 P L. R. 1904 Col. 352 P. I.

Custom.

1 Absence in Wajib-ul-arz—Pre-emption—Construction of document—Rules of Board of Revenue of settlement of Gorakhpur District (1888) A. W. N. 1905 P. 16 Col. 549 P. II.

2 *Adoption of son of brother's daughter's son—Custom—Hindu Law.*

Held, that the adoption of a brother's daughter's son is valid in southern India by reason of the general custom prevalent there notwithstanding the texts of the Hindu Law to the contrary. *Vayidinatha* v. *Appu* (I. L. R. 9 Mad. 44) followed. APAYYA BHATTAR *v.* VARGA BHATTA, 15 M.L.J. 211.

3 *Adoption—Custom—Purbia Kurmis.*

Held, that *Purbia Kurmis*, calling themselves *Purbia Chattris*, do not really belong to the regenerate classes, and therefore the adoption by a member of this caste of the grandson of his father's sister is not invalid as being within the prohibited degrees of relationship. JIWAN LAL *v.* KALLU MAL. A. W. N. (1905) 235.

4 *Application as further appeal when admissible*

In this case an application was admitted as a further appeal as there was a question of custom involved and the case was one of sufficient importance. KHAN MUHAMMED *v.* SHER MUHAMMED. 136 P. R. 1908 (Note case, p. 622).

5 *Co-sharers—Wajib-ul arz—Construction of document—Custom or contract.*

The chapter of a *wajib-ul-arz* dealing against other matters, with pre-emption com-

Custom (*Contd.*)

menced with a general heading applicable alike to relations based upon custom or upon contract, but the special heading of the clause relating to pre-emption was—"*Dastur darbab haq shafa*."

Held that this imported a custom [illegible] not a contract A W N 1907 [illegible] distinguished.

Held, also, that a custom securing to co-sharers a right of pre-emption at a fixed price per bigha, without reference to the actual price paid by a stranger, was a custom the enforcement of which, when proved, could not be refused. 10 A 621 and A W N (1887) P 76 referred to. HUSSAIN ALI *v.* MUHAMMAD UMAR, A W N (1908) 98.

6 *Contrary to Law—Hindu Law*—Nisprahi *and* Garbhari Gosavis-*Succession—Marriage—Widow*—Chela—*Custom, general and special.*

Marriages among *Nisprahi Gosavi* class are generally recognized.

Custom has tolerated marriages when the bride was a *Mahratta*.

The fact that the preliminary marriage ceremoney was attended by many members of the class to which the parties belonged and that no objection was then raised as to any impropriety arising from the connection between the parties, indicates that the ceremoney was not regarded as one which could create any obstacle to the marriage in the eyes of the community. In the absence of instances in which such marriages have entailed condemnation by the community, a marriage so contracted cannot be held as invalid.

A custom opposed to the ordinary Hindu Law must be proved by those who assert it.

But when a custom has been proved or admitted as binding on a particular section of the community, the plaintiff must prove that individual members are liable, on personal grounds, to be excluded from the operation of the custom which regulates the section to which they still belong.

The original custom of the *Nisprahi Gosavis* was that the property of a member of that section should descend in the line of spiritual, to the exclusion of secular, relationship and that custom is still in force.

Garbhari Gosavis in Poona do not constitute an independent collective body, and in accordance with custom the widow of a *Garbhari Gosavi* is not entitled to succeed to the property left by him to the exclusion of his *chela*. She can claim only maintenance. GITABAI *v.* SHEOBAKAS GIR. 5 B. L. R. 318.

7 Debutter—By-will—Shebaitship of—Hindu Law—Usage—Family custom—Shebaitship. Validity of, disposal by will. 12 C. W. N. 223=35 C 226 Col. 2132 P. I.

8 Dihar-Dhura *custom—Possession—Suit by Taluqdar for—Oudh Act I. of 1869 S. 3.*

A Taluqdar, sued under Act I of 1869 the defendant for possession of some land,

Custom (*Contd.*)

alleging that a sudden change in the course of the river that flowed between his village and that of the defendant in 1899 had transferred the land in suit, which was in the defendant's possession, to his (plaintiff's) side of the bank and that, by reason of an immemorial custom, known as the custom of *dhar-dhura* (literally stream boundary) he was entitled to it. The defendant denied the existence of the custom and further pleaded that, if such a custom ever prevailed, it was superseded by the Taluqdari *sanad* granted to the plaintiff's predecessor and by S. 3 of Act 1 of 1869.

Held, that the plea of custom was admissible in the case and that there was no reason for treating a title conferred by a Taluqdari *sanad* differently from a title acquired in any other manner. 1 N W P H C R 224 S C No 27 Jwala Prasad's Oudh Rulings App p iv Civil Appeal No 185 of 1873 11 B L R 265 13 Moo I A 1 Rafique and Jackson's Privy Council Rulings No. 66, S. C No. 290, F. C. A. No. 40 of 1897, Refd. to. SYED ABU JAFAR *v.* MAHARAJA SIR PARTAB NARAIN SINGH. **9 O. C. 129 (B).**

9 *Divorce — Hindu Law — Conversion to Muhammadanism—Marriage with a Muhammadan while Hindu husband alive—Act XXI of 1850—Unchastity - Divorce—Exclusion from inheritance.*

When a Hindu married daughter during the life time of her Hindu husband, abjures her religion, becomes a Muhammadan and contracts a *nika* marriage with a Muhammadan and has children by him, she is in the position of an unchaste daughter and is not entitled to inherit according to Hindu Law, the property of her Hindu father. 22 Cal., 347, 27 Cal., 801, referred to.

The provisions of Act XXI of 1850 do not apply to such a case and cannot save her right of inheritance. 11 All. 100, distinguished.

According to Hindu Law, there can be no divorce except by custom. SUMDARI LETANI *v.* PETAMBARI LETANI. **2 C. L. J. 87=9 C. W. N. 1003=32 C. 87.**

10 Exclusion of—Estoppel—Matter of law—Landlord and Tenant—Mokurari Istemrari—Construction of 3 O C. 883 See Col. 153 P. I.

11 Exclusive worship in temple—Trustee surrendering decree on appeal. 12 C. W. N. 946—8 C. L. J. 230 (P. C) Col: 497 P. II.

12 Evidence — Hearsay evidence, as regards relationship—Presumption as to statement of a witness regarding facts occuring in his life-time and before he was born. *Wajib-ul-arz*, value of, as record of custom 8 O. C. 94 Col. 165 P. I.

13 *Evidence necessary to prove* — Wajib-ul-arz.

The appellant and another were the widows of the deceased, and took possession of his property in equal shares after his death. The other widow dying, the respondent took possession of her half share. The suit was by the appellant to recover the said share. The defence was, that females were disentitled to inherit and that the appellant and the deceased widow took possession of their husband's property in lieu of maintenance.

Held, concurring with the lower Court that a custom excluding females from inheritance need not necessarily be proved by evidence of instances, wherein it was acted on, that the *Wajib-ul arz* of the village at the regular settlement signed by a large number of co-sharers, the settlement *khewat* and a decree passed on an award recognising the existence of the custom, and oral evidence of the existence of such a custom, all form good proof of the custom. Thus the existence of a custom may be proved otherwise than by means of instances, in which it was acted upon. MUSSAMMAT RAM KALI KUAR *v.* GIRJA DAT. **8 O. C. 142.**

14 *Evidence—Life tenant's right to work mines—Custom—Maintenance grant in Dhalbhum estate—Mines, new and open, distinction between—Reversioner's right to restrain life-tenant from working mines—Subsistence of tenancy—Lessee's Right—Onus of proof of reservation of rights in the grantor—Damages, assessment of.*

Per Harington, J. A *khorposh* or maintenance grant, in the absence of strict proof of custom of singular nature set up which is inconsistent with the character of such a grant, especially when the thing granted cannot be sold or made a gift of, by the grantee, confers on the grantee, a life-estate in the property and the reversion expectant on the determination of that estate remains in the grantor.

By English law, a life-tenant is clearly not entitled to open any new mines and the principle on which that rule of English law is founded is equally applicable to the case of life estates in India; a life tenant has the property only for life and is entitled to remove from it only such things as, in the ordinary course of nature, replace themselves, such as fruits and other agricultural produces; his right is limited to these and the estate, when it falls into the hands of the person ultimately entitled to it, is not to be diminished by the tenant for life.

Mines remain part of the soil and they belong to the person, who is to have the ultimate interest in the soil, and they cannot be worked by the life-tenant so as to take away that to which the remainderman is ultimately entitled.

A *Khorposhdar*, as life-tenant, has no right to remove, by himself or by his lessees, the minerals lying in the property which has been assigned to him as *khorposh* or maintenance, and the grantor of such *khorposh* or maintenance, as the reversioner, has the right to restrain the grantee, *khorposhdar*, from so doing, and that right can lawfully be asserted by his tenant, whom he has demised his interest in the mines on the property.

Custom (*Contd.*)

The *onus* is on the grantor of a *khorposh* or maintenance grant, to show that he has the right to take minerals from the grantee's *khorposh* property, during the subsistence of the grant, and, in the absence of any express reservation of the minerals and of the power in the grantor to enter upon the land for the purpose of removing minerals reserved, the grant of an estate for life, would be a grant as much of the minerals underground as of the surface of the soil itself and the grantor cannot work the mines himself and thereby take that which has been granted for life to the grantee.

Per Mookerjee J.—It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and should be established to be so by clear and unambiguous evidence; for it is by means of such evidence, that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

Land granted for maintenance is, *prima facie*, resumable on the death of the grantee.

But, in certain cases, the grant may be shown to have been absolute and irrevocable made in full satisfaction of all claims of future maintenance and conferring on the grantee not only an heritable, but an alienable, estate.

In the absence of such evidence, under the maintenance grant in the present case, grantee has nothing more than a life-interest in the property demised

By English law, a tenant for life is not in general entitled *prima facie*, as between himself and the reversioner or remainderman, to open or work a new mine, but it is within his right to work an open mine.

The above rule is not a doctrine peculiar to English jurisprudence, but is founded on reason and principles of general application and is accordingly applicable to this country.

If a reversioner or remainderman complaints that a tenant for life is improperly working a mine and the latter alleges that it was open when he entered into possession and no lapse of time occurred, the *onus* is in general on the latter to prove his allegation.

Mere preparations made for opening a mine are not sufficient to entitle a succeeding tenant for life to complete the opening and work the mine.

Opening mines in part of the land is not equivalent to opening similar mines throughout.

In the absence of proof to the contrary in this case, it was *held* that the leases granted by the life-tenant were granted without authority and that neither the life-tenant nor the lessees were entitled to open and work new mines and appropriate the minerals in the property demised and that the lessees should be restrained from carrying on mining operations.

The mere fact that the mines have remained unworked by the grantor and those

Custom (*Contd.*)

claiming under him for a number of years, does not constitute discontinuance of his possession, so long as the mines are not worked by any one else, for there is no discontinuance of possession unless there is abandonment of possession by one person followed by the actual possession of another person.

If a tenant for life, who is not unimpeachable of waste, improperly commits waste by cutting trees or digging minerals, such trees or minerals when served, become at once the property of the owner of the first estate of inheritance *in esse*, and the same rule applies if the timber be severed by the Act of God, as by tempest or by a trespasser, while if the severance be in the life-time of a tenant for life who is unimpeachable of waste, the severed portion of the inheritance belongs to such tenant for life. But, during the continuance of the life-estate, the reversioner or remainderman is not himself entitled to cut timber or work minerals.

When lands are granted for life without any reservation of mines, the reversioner or remainderman has the general property and right of inheritance, in the subsoil and in the mines or quarries which it may contain, as part of his right in respect of the entire *solum* from the surface down to the entire of the earth; but the tenant for life has the right of possession or temporary enjoyment, as part of his right in respect of the entire *solum* like manner.

Although the life-tenant of the maintenance *villages* is not entitled to work and appropriate the minerals, the grantor or his lessee is not entitled to work and appropriate them during the continuance of the life-estate, in the absence of proof that there was any reservation of the right to the minerals in favour of the grantor when the life-estate was created.

A trespasser, who works minerals beyond the limits of his property, is liable in damages to their value, when first converted into chattel, without allowing for the expenses of getting them out of the seam; but, under special circumstances of working under *bona fide* claim, a trespasser will be allowed the expenses of converting them into chattel, as well as the expenses of carrying them to the pit's mouth.

Where, as in this case, damage was done after service of notice protesting against the removal and appropriation of the minerals by the defendant, who instead of paying any heed to the protest, carried on the work with the full knowledge of the risk he was running and where there has not been any delay on the part of the plaintiff in commencing the action the milder rule of law ought not to be applied; and no allowance ought to be made in taking the accounts for the cost of severance of the minerals, but allowance should be made for bringing the minerals to the pit's mouth, which is always allowed whether the milder or the severer rule be

Custom (*Contd.*)

applied. PRINCE MAHOMED BUKTYAR SHAH *v* RANI DHOJAMANI. **2 C. L. J. 20.**

15 *Evidence of custom—Proof — Pre-emption—Document. Construction of*—Wajib ul-arz. *Entries in.*

Per Banerji J.—It is not possible in these Provinces to apply the principle of English common law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle would be to destroy many customary rights of modern growth 17. *All.*, 87 *followed.* GOKUL DICHHIT *v.* MAHESHRI DICHHIT. **A. W. N. 1905 P 266.**

16 Evidence as to custom — Power of court on second appeal to examine evidence of usage. 29 M. 24 Col, 1254 P. I.

17 Evidence as to—Appellate Court's Power to supplement evidence—Tenants Customary right in the locality to cut wood. SITAB RAI *v*, DUBAL NAGESIA. **6 C. L. J. 218**

See Landlord and Tenant.

18 Evidence to prove custom at variance with it inadmissible—See MAHOMMEDAN LAW (Succession). ISMAIL KHAN *v.* IMTIAZ-UN-NISA. **4 A. L. J. 792.**

19 *Evidence of custom wajib-ul-arz—Landlord and Tenant-Tenant's right in trees planted during continuance of tenancy — Ejectment of tenant—Tenant who has lost his holding and resides in another village in which his landlord has no interest*—Mafrur *or run-away tenant.*—

When a tenant is ejected from his holding his tenancy determines and his right to the trees planted in it during the continuance of the tenancy is extinguished. A *Wajib-ul-arz* contained the following provision:—"When the owner of the grove *gaon se farar ho jata hai*", the grove in the absence of an heir becomes *nazul* and is possessed by the *Taluqdar.*

Held, that a tenant who leaves a village because he has lost his cultivatory holding in it or has been ejected from it and goes to reside in another village in which his former landlord has no interest cannot be said to be a *Mafrur* within the meaning of the *Wajib-ul arz*; *held also*, that the *Wajib ul-arz* was no evidence of the local custom that a tenant lost his right to trees or plots which did not form part of his cultivatory holding, by reason of his having lost his cultivatory holding and having ceased to reside in the village and taken up his residence in another village.—CHANDI SINGH *v.* SYED ARJUMAND ALI, **2 O. C. 281.**

20 *Evidence of custom—Misl-rawaj-i-am—Admissibility of.*—

The plaintiffs brought a suit for certain property which rested mainly upon an allegation that by a custom obtaining in their family, daughters and daughters' sons were excluded from inheritance. In support of the custom, they relied on *rawaj-i-am* and the oral evidence. One of the questions raised in the case was as to the admissibility of *rawaj-i-am* in evidence.

Held, that, as an official record of a custom *Misl-rawaj-i-am* is admissible in evidence.—BAJRANG SINGH *v.* DAULAT SINGH, **7 O. C. 134.**

21 *Family or teritorial, how to prove—Incidents of Khorposh grant—Maintenance grant, duration of.*—

A family or teritorial custom, at variance with this general characteristic of a maintenance grant, must be established to be ancient and invariable by clear and unambiguous evidence—14 Moo. I. A. 570—W. R. 653—12 B. L. R. 356 (P. C.) applied. TITURAM MUKERJEE *v.* ELIAS E. COHEN. **1 C. L. J. 517=33 C. 203.** *See for other facts Col: 449 P. I.*

22 Family, of inheritance—Entries in *Wajib-ul-arz* as evidence of—Adoption of sister's son—Hindu Law—28 A. 488 Col: 174 P. I.

23 *Family custom—Proof—Hindu Law—Primogeniture—Evidence.*

A sepecial family custom involving a departure from the ordinary Hindu Law should be properly proved by the person who sets it up.

The custom of primogeniture held established in the family of the parties. It was admitted that the custom prevailed in two other families which with the family of the parties had descended from a common ancestor. The Privy Council attached importance to this admitted fact as lending strong antecedent probability to the existence of the custom. It was also found that for a period of nearly 80 years from the time of the British occupation the enjoyment of the estate had been consistent with the alleged custom and for the earlier and greater part of that term had been inconsistent with any other legal basis.

The custom of *gaddinashini* has clearly an important bearing on that of primogeniture though the connection between them may not be a necessary one.

It is admissible evidence for a living witness to state his poinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay.—Much reliance can not be placed on such evidence standing alone. GARURADWAJA PRASAD *v.* SUPERUNDHWAJA PRASAD. **5 C. W. N. 33=10 M. L. J. 256=27 I. A. 238=23 A. 37 (P. C).**

24 *Family custom—Hindu Law-Mayukha-succession—Collaterals-Propinquity-Aban Thakurs of Oudh—Succession of brothers and nephews irrespective of nearness of blood. Proof of.*

In Gujarat the *Mayukha* is recognized

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as an authority of paramount importance when it differs from the *Mitakshara*.

According to the *Mayukha*, sons of a brother, who is dead, share along with surviving brothers. The rule does not go beyond brothers' children.

Held, that the parties, *Ahban Thakurs* of Oudh, who came originally from Gujarat many centuries ago, were governed by *Mayukha*, and no custom, contrary to the rule of succession of collaterals, laid down in the *Mayukha*, could be found established by four instances of modern times. Although the migration took place before the *Mayukha* was written, it may well be that the rule was in force in earlier time, and that on this point the *Mayukha* only embodied and defined a pre-existing custom. CHANDIKA BAKSH *v.* MUNA KUAR. **6 C. W. N. 435=4 B. L. R. 676=29 I. A. 70=24 A. 273 (P. C).**

25 *Family custom--Succession in the* Dhalbhoom *family of* Ghatsila—*Primogeniture—Evidence—Hindu law—Mitakshara school.*

Found, by custom, that lineal primogeniture is the rule of succession in the *Dhalbhoom* family of *ghatsila*. MOESH CHUNDER DHAL *v.* SATRUGHAN DHAL. **4 B. L. R. 372=6 W. N., C. 459=29 C. 343 (P. C).**

26 Family custom—Primogeniture, rule of onus—Hindu Law—Inheritance 32 C. 6 Col. 157 P. I.

27 Family usage, essence of—Discontinuance—Onus of proof—Hindu Law—Joint family—Impartial Raj A. W. N. 1904 P. 244 =27 A. 203 Col. 489 P. I.

Notice 27 A. 203 read for 23 A. 203.

28 Haqs—Jethansi—Oral evidence—Haqs Compromise. 10 C. 301 Col. 219 P. I.

29 Haqi-chaharam—Acquisition of site and buildings occupied by tenants—Compensation to Zamindars and tenants—Right of. A. W. N. 1903 P. 5 Col. 864 P. I.

30 Haq-i-chaharam Alaulad--Construction of document--Khairat Bishanprit—Gift —Resumption on failure of male descendants of done. 31 C. 561 Col. 2091 P. I.

31 *Hindu widow*—Will—*Hindu widow —Revocation of joint will by surviving testator --Power of alienation*—Wajib-ul-arz—*Custom --Custom held proved owing to admission of its existence though oral evidence in support thereof deficient*—Res judicata. KISHAN DAYAL *v.* CHAMPA KUAR. **B. R. 80=4 O. C. 145.**

32 *Impartible Raj, alienation of—Legal necessity, debt for—Custom—Successor, liability of—Pachis Sawal, authority of—Hindu Law.*

Alienation by the proprietor of an impartible Raj, which is inalienable by custom is valid if made for legal necessity; and his successor who takes the Raj by right of survivorship is, under the Mitakshara law, liable for the debts proved to have been contracted for legal necessity. The *Pachis Swal* is a work of authority in respect of customs prevailing among the Rajas of the Tributary Mehals of Cuttack. *Nittanund Murdiraj* v. *Sreekuran Juggernath* (3 W. R. 116) referred to. GOPAL PROSAD BHARAT *v* RAGHUNATH DEB. **9 C. W. N. 330=32 C. 158.**

33 Inheritance — Custom amongst the Bhale Sultan Chattris in Oudh excluding daughters and their issue from inheritance—Proof—General Custom. BAJRANGI SINGH *v.* MANOKARNIKA BAKSH SINGH. **12 C. W. N. 74=6 C. L. J. 766=9 B. L. R. 1348.**

See Hindu Law—Widow.

34 Inheritance—Migrating families—Family custom-Presumption-Evidence, custom —Savings from ancestral property, 29 C. 433 Col. 2167 P. I.

35 *Insufficient evidence as to custom—Finding in favour of existence of custom based upon—Second appeal—Parties.—*

Held, that where a question arises as to the existence or non-existence of a particular custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. Hashim Ali, *v.* Abdul Rahman. I. L. R., 28 All., 698 approved. Raj Narain Mitter *v.* Budh Sen, I. L. R, 27 All., 388, referred to. RAM BILAS *v.* LAL BAHADUR, **A. W. N. 1908 P. 112=5 A. L. J. 456=4 M. L. T. 169=30 A. 311 (P. C).**

36 Judicial notice—Cultivators right.—1 O. C. 231. *See Cultivator No. 2.*

37 Local—Tanjore District—Landlord and tenant. 27 M. 517 Col. 277 P. II.

38 *Mahomedan Law—Custom—Land formerly used as graveyard—Right of performing rites at the graves—Regulation IV of 1827 S. 26.*

Certain land at Dharwar, which had formerly been used as a graveyard by the Mahomedan community there, but which had been disused as such for twenty or thirty years, was sold by the owner to defendant 4, who thereupon commenced to prepare the foundations of a house which he proposed to build upon it. The plaintiffs, who were Mahomedan residents at Dharwars, brought this suit, alleging that the Mahomedans of Dharwar were accustomed to perform religious rites and ceremonies at the graves in the said land, and praying for a declaration that they were entitled so to do and for an injunction restraining the defendants from obstructing them.

Held that they were entitled to the declaration and injunction prayed for.

Per Fulton, J.—By the custom of the country, founded on a sentiment which may almost be described as universal, the ground in which human relics are interred is regarded as for ever sacred. The members of the family of the dead are in the habit

Custom *(Contd.)*

of performing certain religious services at their tombs. The ownership of the soil may be vested in others, but the permission to bury in the land, granted, as it must be, carries with it the right to perform all customary rites.—RAMRAO NARAYAN *v.* RUSTUMKHAN, **3 B. L. R. 717=26 B. 198.**

39 Motap — Custom of—Competency of Court of first instance and not of appeal—30 B 220 Col 1055 P I.

40 Motap—Thalla Garasias of Limri in Kattiawar—Competent Court. 6 B L R 98 Col 1001 P I.

41 Motap. The custom of motap exists among the chundasama garasias of the village of kharad in the Dhanduka taluka. 7 B L R 821—30 B 220 Col 999 P I.

42 Marriage in their own community—Against validity of custom—Among Numberdari brahmins—14 M L J 214 Col. 271 P II.

43 *Mukhi—Appointment of—Salary of—Bombay Act VII of 1867.*

The Plaintiff, Desai of Patri, sued defendants, the Jiwakdars of the village Kamijala, to recover certain moneys which he had been forced by Government to pay as the salary of the Mukhi of Kamijala:

Held, that the plaintiff was entitled to recover the salary of the Mukhi from the defendants, as it was found that the right of nominating the mukhi, vested by custom in the Desai of patri both before and since the enactment of Bombay Act VII of 1897 and the remuneration of the Mukhi, is to be provided by the Bhagats, who hold the village. DESAI BAWABHAI *v.* SURAJMAL JI. **4 B. L. R. 266.**

44 Mutts—Governing mutts in the matter of their succession—Proof of custom—Election of—MOHUNTH PRAYAD DAS *v.* MOHUNTH KIRPARAM. **8 C. L. J. 499.** *See Religions Endowments.*

45 *N W. P. Rent Act XII of 1881 Section 93 (a)—Custom allowing remission or abatement of rent—Plea in a suit for rent.*

Held, that in a suit for rent where a tenant has not obtained an order for abatement under section 19 N. W. P. Rent Act, he cannot, in answer to a suit for rent, plead a local custom, whereby his rent is proportionately abated if the extent of his holding has diminished by reason of diluvion. But where what the tenant asks for is not an abatement of the rent of the holding permanently or for an indefinite period, but a remission from the payment of the rent for a particular year only, for such part of the holding as in that year is proved to have been unculturable by diluvion or otherwise, the plea is not of abatement in the sense of Chapter II of the Act but a release or remission by the landlord of part of his claim for rent in any particular year under section 63 of the Contract Act—such a plea based on a local custom is not inadmissible. W. N. All. 1893, p. 29 distinguished.

Custom *(Contd.)*

BENI PRASADKUARI *v.* DUKKHI RAI. **W. N. A. 1901, p. 69=23 A. 270.**

46 *Occupancy right—Local usage to transfer—Proof of Local usage.*

When the question was whether an occupancy holding was transferable, and the Lower appellate Court found as follows.

"There is abundant evidence on the record to show that such lands are actually sold in the locality, and the kobalas filed in this case support this fact."

Held, that this did not amount to a finding of a local usage. DINO NATH GHOSH *v.* NOBIN CHUNDER GHOSH. **6 C. W. N. 181.**

47 Occupancy holding—Transferability—Local usage—Proof of—6 C. W. N. 861 Col. 2137 P. I.

48 Opinion of witness who gives evidence—Opinion of Judge who does not take evidence. 1 L. B. R. 1900—1902 P. 80 Col: 183 P. I.

49 *Privacy—Custom of—Easements—Prescription.*

The mere fact that it is not the custom in the village for a window to be opened overlooking another's zenana cannot vest in the plaintiff the right of preventing the defendant from opening a window in his wall where the evidence does not show that the villagers have been in the habit of preventing their co-villagers from opening windows in such a manner. Defendants' not opening a window for 50 years in his wall does not give the plaintiff right by prescription to prevent him from opening a window in that wall unless it be shown that the plaintiff has been exercising the right of preventing the defendant from opening such a window for a period sufficient to establish a right by presciption. SRI NARAIN CHOWDHRY *v.* JADOO NATH CHOWDHRY, **5 W. N. C. 147.**

50 *Pre-emption—Custom—Hindus of Behar—Right of non-residents—Invalid sale.*

The plaintiff was a Hindu resident of a village in the N.-W. P. and was not a native of Chapra in Behar, where the property was situate. He claimed the property in suit by right of pre-emption.

Held, that although there was a custom of pre-emption prevailing among the Hindus of Behar, the plaintiff was not entitled to make the claim.

There is no right of pre-emption in respect of an invalid sale. PARASTH NATH TEWARI *v.* DHANAI OYH. **9 C. W. N. 874.**

51 Pre-emption—Contract—Effect of—Fresh settlement—Custom—3 A. L. J. 561—A. W. N. 1906 P. 174 Col: 307 P. II.

Note A. W. N. 1906 P. 174 read for A. W. N. 1905 P. 174.

52 *Pre-emption—Wajib ul-arz—Inference from entry in previous Wajib-ul-arz.*

A village *Wajib-ul-arz* prepared in the year 1833 contained only the following entry with reference to pre-emption: "Custom

Custom (*Contd.*)

of pre-emption: No pre-emption suit has been instituted, but the custom of pre-emption is accepted. But the *Wajib-ul-arz* of the same village, prepared in 1864 was more explicit. It ran as follows: "Mention of the right of pre-emption: When it is desired to transfer a share, the heirs and near brethren have the right first. On their refusal to take, the transferor is competent to sell, mortgage or assign to any one he likes.

Held, that in the *Wajib-ul-az* of 1883 the villagers intended to reproduce—and understood they were in fact reproducing—the custom of pre-emption that prevailed in 1864 that therefore the provisions of the Mahomedan law were not applicable.—POHKAR SINGH *v.* MUHAMMAD HUSAIN KHAN. **3 A. L. J. 451=28 A. 679.**

53 *Pre-emption* — Wajib-ul-arz.—*Entries in—Absence of custom with regard to pre-emption—Muhammadan Law—"Transfer," meaning of.*

The *Wajib-ul-arz* of a village provided that "the custom of pre-emption prevails" and that "every co-sharer has the right to transfer his property, subject to the right of pre-emption." It did not set forth what the custom was, and the plaintiffs also in their plaint did not allege any particular custom as prevailing in the village in question.

Held that the only rule of pre-emption that could apply was the rule of Muhammadan Law. 9 *All.*, 513, *followed.*

The term *intiqal* as used in the pre-emption clause of a *Wajib-ul-arz* includes transfers of all kinds, mortgages as well as sales. JAGDAM SAHAI *v.* MAHABIR PRASAD. **A. W. N. 1905 P. 190.**

54 *Pre-emption—Wajib-ul-arz — Custom—Effect of perfect partition, no new Wajib-ul-arzes for the new mahals being framed.*

Where a village, in which, according to the wajib-ul-arz, a custom of pre-emption existed amongst the co sharers, was divided by perfect partition into three mahals, but no fresh wajib-ul-arzes were framed for the new mahals, it was *held* that the custom was either abrogated in its entirety, or remained applicable in its entirety, to the co-sharers in the various new mahals *inter se.* *Badri Prasad* v. *Hashmat Ali* infra p. 299, discussed. *Dalganjan Singh* v. *Kalka Singh*, I. L. R. 23 All., referred to. GOBIND RAM *v.* MASIH-ULLAH KHAN. **4 A. L. J. 137=A. W. N. 1907 P. 89=29 A. 295.**

55 Primo geniture, rule of—Orissa, land tenure in—Hindu Law—Inheritance. 32 C. 6 Col. 158 P. I.

56 Proof of—2 C. L. J. 790=A. W. N. 1905 P. 266. *See No. 15 supra.*

57 Proof of—Mahomedan Law—Inheritance—Evidence of custom at variance with Mahomedan Law, 23 A. 20. *See Col. 792 P. I.*

58 Proof of—Relation between upper and lower riparion owners regarding right to use river water. 35 C 851 Col. 1807 P I.

59 Proof of—Wajib-ul-arz—Construction

Custom (*Contd.*)

Ekjaddi, meaning of—Presumption in favour of entry in Wajib-ul-arz. 4 O C 71 Col. 558 P II.

59 Proved custom supersedes general law — Validity of transfer by one who is not guardian — Voidable and void transfers—Redemption. 11 O C 1 Col 1838 P I.

60 Proved custom supersedes general law —-Pre-emption —-Customary right—-Hindus of Behar—Pleadings—Right of pre-emption, assertion of. 35 C 575 Col. 71 P II.

61 Question of existence or non-existence —Second appeal—Court acting on illegal evidence—Question of law. 3 A L J 467—28 A 698 Col 1250 P I.

62 Right to use of water—Riparion owners—Right to construct damson a stream—Prescription—Injunction. 29 C 100 Col. 1385 P I.

63 Special or local if to be proved to establish permanent tenancy—32 C 51 Col. 292 P II.

64 Saraogis—Alleged custom of exclusion of daughters from inheritance to fathers not proved.

Semble: 24 A. 242 Col. 180 P. I.

65 Succession of—Illegal Marriage—Brahman marrying a Chattri (Rajput) girl—Illegitimacy of the issue. 3 A L J 209—28 A 458 Col 272 P II.

66 Succession — Tank estate—Custom — Mahomedan Law—112 P L R 1903—66 P R 1903—30 C 843—66 P R 1903—30 I A 90 —5 B L R 486 (P C). Col 410 P II.

67 Succession—-Pagwand Chundawand 11 P R 1905 (*See Custom, Punjab*).

68 Tank estate 30 C 843 Col 410 P II.

69 Trade of—In Bombay—Agreement on printed form—Inconsistency between printed and written provisions—6 B L R 948—30 B 1 Col. 606 P. II.

70 *Trade of—Damages—Inferiority of quality—Burden of proof—Evidence—Method of ascertaining damages.*

In a suit for damages by a purchaser of goods on the ground of the goods being below the guaranteed standard of quality it is not necessary for the plaintiff to prove the alleged inferiority in quality by an examination of the entire bulk, an examination of a fair number of samples taken from different portions of the bulk is sufficient for the purpose.

In the case of sale of jute the method of ascertaining damages is established and recognised in the trade. It is not necessary for plaintiff to show how he dealt with the jute which was delivered, and whether he suffered any and what loss by reason of the jute not being up to the warranted standard. The buyer was held entitled in respect of the inferiority alleged in this case to an allowance of six annas per maund, the rule being to allow two annas per maund for a deficiency of 5 per cent. of Hessian Warp. BOISOGOMOFF *v.* NAHAPIEL JUTE COMPANY. **6 C W N 496=29 C 323.**

Custom (*Contd.*)

71 *Trade of—Brokerage usage of trade—In what circumstances Court may assume.*

In order that an alleged trade usage may be imported into a contract, or applied to the relationship between parties, it must be shown that it is invariable, certain, reasonable, and general, and it must appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract or relationship. Volkart Brothers *v.* Vettivelu Nadan, (1887) I. L. R. 11 Mad. 459, referred to. MILLER *v.* MOHAMED CASSIM SHEERAZEE. **3 L. B. R. 1905 P. 41.**

72 Trade of Contract of sale of goods—Vendor and purchaser—Speculations on the rise and fall of market - Damages —Rates fixed by *panchayat* nominated by parties—8 C. W. N. 57 (P. C.)—*See Col. 604 P. II.*

73 *Trade of*—Kacchi Adat *system*—Kabalas *between agent and debtor—Broker's* gala.

Under the *Kacchi Adat* system, when an agent receives an order he sends for a broker and settles the rate with him. The rate so settled becomes, from that moment, binding upon both the agent and the broker: and the broker remains personally bound till he brings a party willing to take up the contract. The broker, in such a case, adopts one of two ways. He either brings a party willing to take up and introduce him to the agent, and the party and the agent then exchange *Kabalas* with each other: or, where a broker has a contract of his own ready, he agrees to transfer it to the agent and then brings together the agent and the other party to his (broker's) contract, and these two then exchange *Kabalas* with each other. If when the party is brought to the agent, the market rate is the same as the rate settled by the agent with the broker, the broker gets nothing beyond his commission. If the rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person, with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. This payment of difference, which is either against, or in favour of, the broker, according as the rate in the market is less or higher than the original rate, is called the broker's *gala*. It is not usual for a *Kaccha adatia* to disclose the name of his principal to the person with whom he enters into contract. 7 H L 530 and 4 ch Ap 3 referred to. FAKIRCHAND LALCHAND *v.* DOOLUB GOVINDJI, **7 B. L. R. 213.**

74 *Trade of—Pakki adat—Custom of trade in Bombay.*

According to the custom of trade in Bombay, the following are the incidents of the *Pakki adat* system:—

(1) A *Pakka adatia* can allocate any up-country constituent's order to himself, without the knowledge, consent, or permission of the constituent. This may be called the right of allocation in the first instance.

(2) A *pakka adatia* receives an order to buy or sell. Accordingly he enters into a contract with a Bombay merchant. Subsequently, but before the due date the *pakka adatia* enters into a cross contract with the same merchant on his own account (the *pakka adatia's*) and either squares the original contract or keeps the two contracts open till due date. He is entitled to do that and yet keep the order of the first constituent open till the due date so as to hold the said constituent bound on that date to deliver or take delivery, as the case may be.

(3) In the case put in above (No. 2), instead of entering into the cross contract on his own account, the *pakka adatia* can enter into it on behalf of another constituent. The same result follows.

When a *pakka adatia* receives a second order from his constituent to enter into a cross-contract and cover his first order against due date, the *pakka adatia* is not bound to carry out the second order in case owing to loss of credit he is unable to do so and all that he is bound to do is to inform the constituent accordingly, so as to enable the latter to put through his order through some other *pakka adatia*. KANJI DEVJI *et al v.* BHAGVANDAS NAROTAMDAS. **7 B L R 57.**

75 *Trade of—Pakki adat system—Custom of trade in Bombay—Incidents attaching it.*

The evidence in the case established the following propositions in connection with *pakki-adat* dealings:—

(1) That the *pakka-adatia* has no authority to pledge the credit of the up country constituent to the Bombay merchant, and that no contractual privity is established between the up-country constituent and the Bombay merchant.

(2) That the up-country constituent has no indefeasible right to the contract (if any) made by the *pakka-adatia* on receipt of the order, but the *pakka-adatia* may enter into cross contracts with the Bombay merchant either on his own account or on account of another constituent, and thereby cancel the same.

(3) The *pakka-adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

Held, that the contract of a *pakka-adatia* in circumstances like those in the present case, is one whereby he undertakes, or *guarantees* that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid: in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference 7 Bom., L. R., 57 *confirmed.* BHAGWAN DAS NAROTAMDAS *v.* KANJI DEOJI. **7 B. L. R. 116=30 B. 205.**

Custom (*Contd.*)

76 *Trade of—Principal and agent—Sale and purchase according to the instructions of constituent—First contract—Cancelling the contract—Liability on the first contract—Balance—Adjustment.*

Where a plaintiff on a constituent's instructions buys a certain number of bales of cotton at a given price and later on his instructions sells a similar number of bales at the same price, then as between the constituent and the plaintiff his liability on the first contract is treated as balanced and adjusted.

To speak of these contracts of sale or purchase as being "cancelled" is perhaps not accurate; but what is meant, is, that a contract of the one class is followed by a contract of the other, having the effect of cancelling or reducing the liability on the first. 7 B. L. R., 57 distd. CHANDULAL SUKLAL *v.* SIDHRUTHRAI SOOJANRAI. **7 B L R 165=29 B 291.**

77 Transferability of tenure—Tenure of homestead land created before the Act T P A Landlord and Tenant. 32 C 1023 Col. 1275 P. I.

78 Unreasonable or invalid — Enhancement of rent even when improvements are effected by tenant. 28 M. 444 Col. 1674 P. I.

Custom of the Punjab.

I. Abadi.
II. Adoption.
III. Alienation.
IV. Alluvion and diluvion.
V. Application of custom to whom.
VI. Common land.
VII. Declaratory suits.
VIII. Escheat.
IX. Gift.
X. Inheritance and succession.
XI. Maintenance.
XII. Marriage.
XIII. Occupancy rights.
XIV. Partition.
XV. Pre-emption.
XVI. Religious Endowments.
XVII. Reversioner's suit.
XVIII. Son's right to contest alienation.
XIX. Tribal custom.
XX. Wajib-ul-arz.
XXI. Waiver.
XXII. Widow.
XXIII. Will.

I. Abadi.

Menials right to build mosque. 19 P. R, 1904 Col. 4 P. I.

II. Adoption.

(a) How made.
(b) By whom made.
(c) Who may be adopted.
(d) Power to set aside adoption.
(e) Relinquishment of status by adopted son.
(f). Succession of adopted son.
(g). Suit to set aside adoption.

Custom of the Punjab (*Contd.*)

(a) How made

1 *Adoption—Mere deed and admission of adoption in-sufficient contrary to Rivaj-i-am.*

Held, that mere execution of a registered deed of adoption, coupled with an admission in the suit to contest it, is not sufficient to constitute and prove a customary adoption, and to hold that such an act *per se* is sufficient, would reduce adoption, a well-recognized institution with its peculiar features and special legal incidents, to the mere level of an ordinary bequest.

Held, also, that where a *Rivaj-i-am* requires that either a special feast should be given to the brotherhood or that the deed of adoption be executed in their presence but neither of the facts is shown to have taken place, the mere execution of a registered deed of adoption *per se* is not sufficient to constitute a valid customary adoption 154 P R 1904 followed, 40 P R 1905 distinguished. LACHHMAN SINGH *v.* MIT SINGH. **29 P W R 1907.**

2 *Adoption—Mere deed and admission of insufficient—Limitation Act 1877 Schedule II, Article 118—Suit to declare an adoption invalid—Custom—Adoption—Gift—Daughter's son—Kathana Gujars of Gujrat.*

The mere registration of a deed would ordinarily be insufficient to constitute a valid adoption and would have to be perfected by other acts.

Article 118 of the Limitation Act 1877 is inapplicable where the person adopting has no inherent power to adopt—144 *P R* 1892 *followed*, 13 *Cal* 308 *P C referred to.*

Held, that a gift of ancestral property to, and adoption of, a daughter's son by a Kathana Gujar of Gujrat without the consent of collaterals are invalid by custom. —*P R* 140 *of* 1893, 35 *of* 1896, 45 *of* 1881 18 *of* 1880, 53 *of* 1889, 8 *of* 1891 *referred to.* MUHAMMAD DIN *v.* SADAR DIN. **67 P R 1901.**

3 Adoption—Sadhu Jat of Mauza Raja Jang—Lahore District—67 P. R. 1902 Col. 2046 P. I.

(b) By whom made.

4 *Adoption by childless proprietor—Suit for possession against adopted son—Right of each collateral.*

One Mangta, a childless Jat of *Tahsil* Samrala, District Ludhiana, died in 1886 after having registered, in 1885, a deed of adoption in favour of Basanta, his brother's daughter's son. In 1899 Seva, Indar and Bishen, collaterals of Mangta, sued for possession of Mangta's estate, of which Basanta got possession on Mangta's death. The remaining collaterals were impleaded as defendants, Father of Indar, plaintiff, died in 1884 before the deed of adoption was

Custom of the Punjab (*Contd.*)

registered when Indar was minor.

Held, that the claim of all the reversioners except Indar's was barred by limitation. His claim for his share was sustainable by the fact of his minority at the time when the cause of action arose in his favour.

Held, also, that any collaterals not claiming his share did not entitle Indar to any extra share.

The right of succession of collateral heirs to the estate of a Punjab agriculturist is not a single indivisible right so as to give each collateral a cause of action for the whole. The share of each heir is capable of exact determination, and the right of each plaintiff depends upon his own title and upon that title alone.—*P R* 2 *of* 1882, 176 *of* 1889 *followed*; 68 *of* 1889 *referred to.* BASANTA *v.* INDAR. **51 P L R 1903.**

5 *By childless proprietor—Gift by widow —Kathana Gujars of Jhelum.*

Held, that by custom, adoption is not recognized among Kathana Gujars.

Held, also, that among Kathana Gujars of Jhelum a childless proprietor or his widow has no power by custom to make a gift of ancestral property in favour of one of the collaterals of the proprietor without the consent of others —*P R* 140 *of* 1893, 35 *of* 1896, 16 *of* 1889, 8 *of* 1891 *referred to* JUMMA *v.* MUBARIK. **70 P R 1901.**

6 By daughter to her adopted son—Reversioner of last male owner suing for possession of the land acquiescence. 1 P R 1907—31 P W R 1907 Col 1901 P I.

7 *By sonless proprietor—Custom—Adoption -Appointment of heir-Evidence-Punjab Courts Act (XVIII of 1884), Section 70 (1) (b)—Suit to set aside adoption not a land suit.*

The plaintiffs, brother and nephew of a childless male proprietor, sued for a declaration that the defendant, another nephew, in whose favor the proprietor had executed and registered a deed of adoption, was not his duly adopted son and that the plaintiffs were his reversioners entitled to succeed to his property including his land after his death. The alleged adopted boy was 19 years old when the deed was executed. By custom of the tribe to which the parties belonged the proprietor was entitled to appoint him as his heir.

It was found that the proprietor treated the boy as his son, both previous to and after the, execution of the deed, and stated in Court that he had adopted the boy during his infancy in the presence of the brotherhood.

The original Court dismissed the suit, but the Divisional Judge on appeal decreed the claim, holding that adoption during infancy was not proved and the execution and registration of the deed was not sufficient to establish adoption.

On appeal to the Chief Court.—

Held, that the adoption during infancy was sufficiently proved, but even if it was not proved, the execution of deed coupled with the adopter's statement in Court and continuous subsequent treatment was sufficient to establish adoption.

That the adoption of a grown up youth is not invalid by custom when appointment of an heir is allowed

Held, also, that a claim for declaration of heirship apart from setting aside of the deed of adoption would not lie

That the suit was not " land suit " within the meaning of the Punjab Courts Act and further appeal did not lie. The Chief Court treated the application as a further appeal under section 70 (1) (*b*) of the Courts Act.

That under proviso IV to clause (1), (*b*) of section 70 of the Punjab Courts Act the Chief Court is competent not only to decide the question of custom raised but also to discuss the evidence bearing on the points to which the question of custom relates. BUDH SINGH *v.* MULA SINGH. **18 P L R 1905.**

8 By widow—Adoption, daughter's son —Jats of Hushiarpur District—Declaratory suit to set aside an adoption—178 P L R 1901 Col 1899 P I.

9 *Kashmiri Pundi's—Adoption by widow without husband's authority valid.*

An adoption, even though effected by the widow without her late husband's permission, is valid by the custom prevailing among Kashmiri Pundits of the Delhi District, which, in this respect, makes no distinction between boys who are, and boys who are not, members of the deceased husband's family, provided always that the adopted boy must be a Kashmiri Pundit. They are not governed by mitakshara Law in such matters.

The evidence in support of the alleged custom must be such as shows that, generally, in the district, the custom was followed to the exclusion of persons, who, if it had not been for the custom, would presumably have " enforced their rights under the general law " 16 A 221 approved. MAHARAJ NARAIN *v* BANOJI, **34 P R 1907.**

(C) Who may be adopted.

10 Brothers daughter, son—Burden of proof—Non-agricutural Brahmini of Chiragh Delhi village Near Delhi. 86 P R 1904 Col 2047 P I.

11 *Daughter's son—Custom*—Jats *of Dasuha* Tahsil, *Hoshiarpur District.*

The adoption of a daughter's son by a *Jat* proprietor in the Dasuha *Tahsil* of the Hoshiarpur District is not opposed to custom. BISHNA *v.* BANTA. **183 P L R 1905 =69 P R 1905.**

12 *Daughter's son—Hindu Nandan Jats of Dasuha tahsil, Hoshiarpur district—Custom of district—Setting up different custom in particular* got*—Onus of proof.*

Where the *Riwaj-i-am* applicable to the Jats of Hoshiarpur District, declaring the validity of the adoption of a daughter's son

Custom of the Punjab *(Contd.)*

in the presence of male collaterals, is also supported by the circumstance that in many *gots*, such adoption had actually taken place, the burden of proving the invalidity of such adoption as regards a particular *got* rests on the person, who seeks to set aside such adoption, 50 P R 1893 (F B), and 34 P R 1899 R 92 P R 1894 distinguished. ACHHAR SINGH *v.* MEHTAB SINGH, **81 P R 1907.**

13 *Daughter's son—Dhillon Jats of Tahsil Tarn Taran, Amritsar Dt.—Custom.*

Held, that the custom of adoption, as embodied in the *Riwaj-i-am* of 1865, prevails among Dhillon Jats of Tahsil Tarn Taran of the Amritsar District, and that the adoption of a daughter's son is valid under the said custom. 50 P. R. 1893 (F. B.), 140 P. R. 1894, 33 P. R. 1900, 86 P. R. 1907 referred to. SOHNA *v.* SUNDAR SINGH. **85 P. R. 1907.**

References:—50 P. R. 1893 (F. B.), 140 P R. 1894, 33 P. R. 1800 and 86 P. R. 1907 R.

14 *Daughter's son—Dhillon Jats of Tahsil Tarn Taran, Amritsar District—Custom.*

By custom, a sonless Dhillon Jat of Tahsil Tarn Taran has power to adopt his daughter's son. 50 P. R. 1893 (F. B.) refd. BUTA SINGH *v.* RAM SINGH. **86 P. R. 1907.**

15 *Adoption of daughter's son among Dhillon Jats of Tahsil Tarn Taran, District Amritsar.*

Held, that adoption of daughter's son among Dhillon Jats of tahsil Tarn Taran, District Amritsar, is valid according to custom. Civil appeal No 960 of 1895 followed. BELA SINGH *v.* AMAR SINGH. **2 P. W. R. 1907=25 P. L. R. 1907.**

16 Daughter's son—Burden of proof—Sokhu Jats of Tehsil Diska, Sialkot District 69 P. R. 1907 Col. 2046 P. I.

17 *Distant agnat—"Jats" of Amritsar District*

Held, that according to custom prevailing among *Jats* of Amritsar District, adoption by a childless proprietor of a distant agnate in the presence of nearer ones is not invalid. NIDHANA *v.* SHAMAN. **7 P L. R. 1907=43 P W R 1907=10 P. R. 1908.**

18 *Fathers sister's son's son—Jats of Kadipur—Tahsil Gurgaon—Plea of limitation to defence—Indian Limitation Act (XV of 1877), Ss. 4 and 28.*

In 1893, R. adopted G. his father's sister's son's son. One of the reversioners, respondent, N. (Lambardar), actually affixed his seal to the mutation proceedings. But none of the reversioners brought any suit to get the adoption set aside.

Shortly after R's death G. sued R's reversioners to get his land in Kadipur, Tahsil Gurgaon. The first Court decreed the claim finding the adoption proved and valid. The Divisional Court confirmed the decree inferring validity of the adoption from the circumstance that adoption of sister's son is allowed

Custom of the Punjab *(Contd.)*

among the Jats of the tribe to which the parties belonged.

Held, by the Chief Court, that as the general feeling is against the adoption of daughter's or sister's son, except among certain tribes, adoption of father's sister son's son cannot be assumed valid by analogy of these special customs without proof of appropriate instances to the point.

Held, also, that S. 4 of the Indian Limitation Act (XV of 1877) has no bearing on defences and pleas, but only on suits or appeals and so forth.

Held, further, that S, 28 of the said Act cannot apply to persons in possession, against whom a suit has been brought in respect of that property so as to prevent them from offering any defence they please. BALDEO *v.* GAJWA. **3 P. W. R. 1907=26 P. L. R. 1907.**

19 *Sister's son-Kalals of Butari, Ludhiana Tahsil.*

Among Kalals, otherwise called Ahluwalias or Nebs, of Mauza Butari, Ludhiana Tahsil, the adoption of a sister's son by a sonless proprietor is valid by custom. C. A., 371 of 1902, 67 P. R. 1904 D; 50 P. R. 1879, 122 P. R. 1893, 50 P. R. 1893, 21 P. R. 1896, 12 P. R. 1906 *referred to.* ATTARSINGH *v.* SANT SINGH **87 P. R. 1907.**

20 Sister's son—Onus probandi—Acharyya Brahmans of Kangra Tahsil. 79 P. R 1901 Col. 2045 P. I.

21 *Sister's son—Ghumman Jats of Sialkote District.*

Held, that the defendant on whom the *onus* lay, had failed to prove that by custom, prevailing among Ghumman Jats of Sialkote District, a sonless Jat could validly adopt his sister's son in the presence of a cousin *german*. 50 P. R. 1893 (F. B), 25 P. R. 1898, *referred to.* NANAK *v.* NANDI. **143 P. L. R: 1904=29 P. R. 1904.**

22 *Stranger rewaj-i-am providing for adoption of a collateral—Act XXI of 1850—Mohammadan convert's right to contest alienation by his Hindu collateral—Bengal Code, Reg. VII of 1832—Agriculturist* Khatri *of Bahadarpur, Tehsil Batala, District Gurdaspur, bound by custom — Adoption contrary to the terms of Rivaj-i am invalid—Acquiescence.*

Mohammadan converts are entitled to challenge the alienation of ancestral holding made by their Hindu collateral even if remotely related to them; and they are not estopped from doing so by reason of their standing by, when the alienee was appointed Lambardar or the common land was partitioned in the alienor's life-time, as long as their claim is within limitation.

Held, also, that where the Rivaj i-am provides that only a collateral can be adopted, the adoption of a stranger is invalid.

Held, further, that when a *Khatri* and his ancestors had been purely agriculturists for generations he is as much bound by the custom rules as if he had belonged to any ordinay agricultrist tribe. 82 P. R. 1890, 126

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P. R, 1890, 11 A. 100 referred to. JIWAN *v.* HARNAM DAS. **77 P. W. R. 1907.**

23 *Wife's brother's son—Brahmins of Dialpur, Tahsil Kasur — Right of collateral of eighth degree to question the validity of adoption—Burden of proof.*

Brahmins of Dialpur, Tahsil Kasur, Lahore District, who are full proprietors with share of Shamilat, and had settled with the founder, and agreed to the same conditions as the Jats, as to the alienation of land and as to the non-succession of daughter, are, in matters of adoption, governed by custom and not by Hindu Law, 103 P. R. 1902 distinguished.

Held that the defendant, on whom lay the burden of proving, that the collaterals of the eighth were not entitled to challenge the validity of adoption, had not discharged that burden. 35 P. R. 1906 F; 93 P. R. 1906 distinguished.

Held also that the onus of proving that an adoption of wife's brother's son was valid by custom in the above community lay on the defendant, and that he had failed to discharge the burden. 94 P. R. 1893, 3 P. R. 1901 D, 75 P. R. 1882 referred to. RAM CHAND *v.* THAKAR DAS. **94 P. R. 1907 =29 P. L. R. 1908=123 P. W. R. 1907.**

24 *Wife's sister's son—Dhawan Khatris of Ferozepur City—Hindu Law ceremonies.*

This was a suit to declare that the adoption by the defendant of his wife's sister's son by registered deed was imperative as against the rights of the plaintiff who was defendants' brother. The parties were Dhawan Khatris, Ferozepur City.

Held that the adoptions are generally prevalent among the Khatris caste and the adoption by the defendant of his wife's sister's son was not invalid.

The custom of the superior non-agricultural Hindu castes resident in towns in regard to adoption does not generally differ in essential particulars from Hindu Law but in the instance resort must be had to custom and not to the text books on Hindu Law. In the absence of evidence as to the necessity or otherwise of ceremonies constituting a valid adoption an unequivocal declaration of intention coupled with previous and subsequent treatment is sufficient proof of a valid adoption. GIRDHARI LAL *v.* DALLA MAL. **3 P. R. 1901=P. L. R. 1900 P. 297.**

(d) Power to set aside adoption.

25 *Custom—Adoption—Power to set aside—Kayasths of Rohtak.*

Held, that no valid custom was proved under which a Kayasth of Rohtak could set aside adoption once made. P. R., 15 of 1877, 17 of 1878 and 9 of 1893, referred to. KANHAYA LAL *v.* NAND KISHORE. **7 P. L. R. 1901.**

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(e) Relinquishment of status by adopted son.

26 *Custom—Adoption. Evidence of—Relinquishment of status by adopted son not allowed.*

An adopted son cannot relinquish his status.

The mere fact that the person whose adoption is contested is described as the son of his real father in deeds executed subsequently to the document appointing him as heir executed and registered by the adoptive father is not sufficient to regard with suspicion the oral evidence adduced in support of the registered document. NARAIN DAS *v.* MUNSHI. **1 P. L. R. 1906.**

(f) Succession of adopted son.

27 *Adopted son—Right to succeed—Appointment of heir—Succession—Death of appointed heir during his adoptive father's lifetime—Rights of appointed heir's sons*—Mehtons *of Jallandhar District.*

Held, that according to general principles of Customary Law in the absence of proof of custom to the contrary the sons of an appointed heir who has died during his adoptive father's lifetime are entitled to succeed to his property on the latter's death. 50 *P R* 1893 (*F B*) 178 *P R* 1894 *referred to.* CHAJJU *v.* DALIPA. **51 P R 1906.**

28 Adopted son's right of collateral succession—Inheritance—Rohtak, *Riwaj-i-am*—Unchaste widow entitled to succeed. 3 P W R 1908 Col 2048 P 1.

29 Adopted son's right of collateral—Succession.—

Adoption by Jats with ceremonies—Adopted son's right to succeed to the property of his adoptive father's father when the adoptive father dies in the lifetime of his father. 80 P L R 1906, 4 P W R 1908 Col 2048 P I.

30 Adopted son's right of collateral—Succession—Rights of members of natural family of the adopted person in the property of the adoptive father. 79 P W R 1902. *See Col. 2047 P I.*

(g) Suit to set aside adoption.

31 18 P L R 1905—40 P R 1905. *See No 7 supra.*

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(*a*) Acquiesence in.
(*b*) By adopted son and adoptive father.
(*c*) By brother.
(*d*) By childless proprietor.
(*e*) By daughter.
(*f*) By father.
(*g*) By Mahant.
(*h*) By Mother.
(*i*) By Mutation of names.

Custom of Punjab Alienation (*Contd*)

(*j*) Necessity for.
(*k*) By non-proprietor in Abadi.
(*l*) By occupancy tenants.
(*m*) By sonless proprietor.
(*n*) Suits to contest alienations.
(*o*) By widow.
(*See Gifts and wills given separately*).

(a) Acquiescence.

1 Acquiesence in—Burden of proof—102 P R 1902 Col 2092 P I.

(b) By adopted son and adoptive father.

2 By adopted son—Power to transfer property inherited from adoptive father 25 P R 1901 Col 2093 P I.

3 By adopted son—Right of sons born before the adoption of their father to contest the alienation. 66 P R 1908 Col 2093 P. I.

4 By adoptive father—Suit by reversioner during the minority of the adopted son—56 P R 1908 Col 1669 P I.

5 By adoptive father-Adopted son's right to object to alienation. 42 P L R 1901 Col. 2093 P I.

(c) By brother.

5 By brother—Sale of ancestral property by brother in-lieu of necessary and antecedent debts of father—Right of minor brothers. 48 P. R. 1903.

(d) By Childless proprietor.

6 By childless male proprietor—Power to transfer ancestral property. 6 P. R. 1902, Col. 159 P. I.

7 *By childless male proprietor—Custom—Alienation — Burden of proof — Bawarias of Tahsil Muktsar, Ferozepur District.*

Held that the Bawarias of Tahsil Muktsar in the District of Ferozepur are not an agricultural tribe, and they have not adopted the customs of the agricultural tribes in their neighbourhood restricting the power of alienation of ancestral agricultural land. WAZIRA *v.* RAM SINGH. **36 P. R 1906**, *Civil*; **14 P. R. 1906**.

8 *By childless male proprietor—Acquiescence by father of plaintiff.*

A childless male proprietor sold his ancestral property by two sales in 1897 and 1900. The plaintiff, his nephew, sued to set aside the sale in 1903. It appeared that the plaintiff's father took no steps to challenge the validity of the sale and he did not die till about a year after the second sale.

Held that the suit must be dismissed, for the plaintiff must be held bound by the acquiescence of his father. MUHAMMADI BEGAM *v.* FAIZ MUHAMMAD KHAN. **12 P. L. R. 1908 = 35 P. R. 1907** (*note*).

9 *By childless male proprietor—Alienation of ancestral property—Nearest reversioner estopped by acquiescence from questioning alienation—Such reversioner's son's right to impeach alienation for want of necessity.*

Where a childless male proprietor sold ancestral immoveable property, the fact that the next reversioner challenged the sale, not for want of necessity, but on the ground that he was ready to pre-empt, which he never did, and his omission at mutations to attack the sale as unnecessary, are circumstances proving that the sale was acquiesced in as a valid sale, and such reversioner's son is, therefore, estopped from suing for possession of the property sold, on the ground that the sale was not effected for necessity. LAKHA SINGH *v.* JOTA SINGH. **25 P. R. 1907 = 14 P. L. R. 1908.**

10 By childless proprietor, to daughter's son. 51 P R 1903 Col 2097 P I.

11 By childless proprietor to daughters or relations in the female line—Phapra Mughals of Jehlum District. 96 P R 1904 1098 P I.

11 (a)—By childless male proprietor—Declaratory decree—24 P R 1906. *See No. 81 infra.*

12 By childless male proprietor—Burden of proof—Non-agricultural Khatris of Hasil village chakwal Tehsil. 12 P R 1906 Col 273 P II.

13 By childless male proprietor—Non-agricultural Khatris of Batala—Adverse possession—106 P R 1906 Col 1972 P I.

14 By childless male proprietor—Right of reversioner to contest the alienation—58 P R 1908—117 P W R 1908 Col 2117 P I.

15 *By childless male proprietor to agnate relation in tenth degree—Competency of collateral of equal degree to contest the alienation —Burden of proof.*

There is no definite rule that up to a certain degree of propinquity it is to be presumed that kinsmen have a right by agricultural custom to impeach alienations of ancestral land made by a childless male proprietor without consideration or necessity and beyond which they are to be presumed not to have it. The facts of each case and the constitution of the village has a material bearing on the decision of the point.

In the absence of special facts it cannot be laid down as a general principle of Customary Law or as a deduction from the decided cases that an alienation by a childless proprietor in favour of an agnate cannot be challenged by another agnate of equal degree. The only exception is where a gift is made to a collateral relation who has rendered service to the donor. KHAZAN SINGH *v.* RELU. **35 P R 1906.**

16 By childless proprietor—Right of agnates after his death in the presence of his widow—65 P L R 62—50 P R 1902 Col 2097 P I.

17 By brahmans childless proprietor of Mohal village, Tehsil Lahore. Agricultural

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tribe. 10 P. R. 1902 Col. 2094 P. I.

18 *By childless proprietor---Difference between the status of a childless proprietor and a widow as regards power of alienation--Gift--* Locus standi *of stranger to question—Transfer of inheritance by collaterals on the death of the proprietor--Parties--Transferrers not necessary parties.*

The collaterals of a childless male proprietor transferred after his death to the plaintiff land gifted by the proprietor to a third party and joined the plaintiff in bringing a suit for possession of the land. They alleged that the gift was invalid and succeeded in obtaining a decree in the plaintiff's favour. On appeal to the Chief Court, the case was remanded to the Divisional Court, after the collaterals were removed from the record on their own application. The divisional Judge dismissed the claim on the ground that the plaintiff being a stranger to the family was not competent to sue alone to set aside the gift, and that his suit for possession did not lie.

Held, that the order of dismissal was wrong, for the collaterals were competent to make a transfer of their right to challenge the gift and to transfer their right to sue possession in favour of the plaintiff, and that the plaintiff's suit was maintainable without joining the collaterals as parties to the suit. P. R., 66 of 1897, 12 of 1894; I. L. R., XXVII All., 271 (P. C.), referred to. P. R., 22 of 1900; s. c., P. L. R. 1900, p. 186, doubted. SHER SINGH *v.* SIDHU. **9 P. W. R 1907 =30 P. L. R. 1907=11 P. R. 1907.**

18 By childless proprietor—-Khatris, Bhabras of Rawalpindi—Joint Hindu family —Non-joinder of all the members of the family as plaintiff, 15 P. L. R. 1902 Col. 1374 P. I.

19 By childless proprietor—-Khatris, Bhandari of Vairoval village—Tarn taran Tehsil—Issues of preliminary nature. 117 P. L R. 1901 Col. 2094 P. I.

20 By childless male proprietor—Khatris —In favour of Khana damad—Suit by collaterals of Khanadamad to set aside—Gift by his wife—Gift by daughter to son in Law. 39 P. R. 1905 Col. 2112 P. I.

21 By childless male proprietor—Gift— Mair Manas of Jhelum District—Right to agnates after his death in the presence of his widow. 50 P R 1902--65 P L R 1902 Col 2097 P I.

22 By childless male proprietor—Sale by childless proprietor—Suit by collaterals when the proprietor left widow and daughter-in-law. 29 P R 1903 Col 2095 P I.

23 By childless male proprietor—Sale to remote collaterals—Burden of proof. 75 P R 1902 Col 2101 P I.

(e) By daughter.

24 *By daughter--Gift by daughter of property inherited from father---Khattars of Attock.*

The childless daughter of the last male owner who was a *khattar* of Attock District having inherited ancestral property from her father (there being no male collaterals), made a gift of the same to her husband's collaterals. The brother's daughters of the father (the last male owner) brought this suit for a declaration that such alienation would not affect their riversionary rights.

Held that the plaintiffs have no *locus standi* to bring this suit inasmuch as the donor inherited the property from her father in the absence of male collaterals, and a female is not entitled to control such an owner unless she can establish a custom to that effect.—NURUL NISSA *v.* GAUHAR-UL-NISSA, **61 P R 1906**, *Civil.*

25 By daughter—Sayads of Shahabad village Karnal District 18 P R 1906 Col 271 P II.

(f) By father.

26 By daughter entitled to possession until her death or marriage—Necessity. 90 P. R. 1903 Col. 2107 P. I.

27 *By father—Lorai Lohars of Kunjah, Gujrat District.*

Found, that the parties to the suit, Lorai Lohars of Kunjah, Gujrat District, were governed by agricultural custom, restraining alienation of ancestral property by a proprietor in the absence of valid necessity. KASIM *v.* HASHAM. **39 P. R. 1906=98 P. L R. 1906.**

28 By father—Necessity for sale established though sale for higher sum. 8 P. R. 1908 Col. 2104 P. I.

29 *By father—Sale mainly for just antecedent debts.*

Where the plaintiff sued for possession of the property in suit, and contended that the sale of the same by his deceased father to the defendant, in consideration of Rs. 1,250, was invalid, and it was found that there were just antecedent debts amounting to Rs. 1,112 due by the deceased father of the plaintiff.

Held, that the suit must be dismissed, the mere fact that the plaintiff's father secured Rs. 138 more from the vendee was no reason for holding that the sale was not for necessity. GHULAM MUHAMMAD *v.* ALLAH DAD. **5 P. L. R. 1906.**

30 By father—Father's powers of—Ancestral property—Antecedent debt—Necessity—62 P. L. R. 1901 Col. 2102 P. I.

31 By father—Antecedent debts—Necessity. 97 P. R. 1901 Col. 2103 P. I.

32 By father—Sale—Act of good management 67 P. L. R. 1903 Col. 2103 P. I.

33 By father—Hindu Law—Alienation by childless male proprietor—Right of unborn son. 55 P. R. 1903 Col. 2102 P. I.

33 a. By father—Sale—Suit by son to contest alienation after decree in the pre-emption suit. 72 P L R 1904 Col 2116 P I.

34 *By father—Hindu Law—Son contesting alienation of ancestral property by his*

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father—Ancestral property—Onus on son—Ancestral property mixed up with self-acquired.

Held, that the onus of proving that certain property is ancestral lies on the son who contests its alienation by his father on the ground of its being ancestral.

Held, also, that, unless the son proves that the property has come to his father by descent from a lenial male ancestor in the male line through whom the son also in the like manner claims, it is not to be deemed ancestral in Hindu Law.

Held, further, that when the ancestral property is so mixed up with the self-acquired that it is impossible to differentiate between the two, the whole of it is to be regarded as self-acquired. ATTAR SINGH *v.* THAKAR SINGH, **128 P W R 1908 (P C.)**

35 By father—Awans of Tahsil Khushab —Ancestral property—Income derived from ancestral property 161 P L R 1901, Col 2101 P I.

36 By father—Brahmin family at Gopalpur Amritsar District to question an alienation by father 59 P R 1908 – 121 P W R 1908 Col 2105 P I.

37 By father—Kalals of Alawalpur town in Jallandar District—Alienation by childless male proprietor. 127 P L R 1906. See Col 515 P II.

38 *By father—Koreshis of Mouza Kareli in Jhelum District—Right of son to contest alienation by father—Punjab Land Alienation Act, s. 4—Burden of proof.*

Held, that in matters of alienation of ancestral property, the Koreshis of *mouza* Kareli do not observe the rules of customary law as is ordinarily prevalent among the agricultural tribes of the Punjab, but they are governed by the principles of their personal law, *viz.*, Mahomedan Law. Consequently a son has no right to challenge alienations of ancestral property made by his father on the ground that there was no consideration or necessity for such alienation.

Held, also that where under section 4 of the Punjab Alienation of Land Act, a particular tribe has been included in the list of agricultural tribes of a district, that fact is not conclusive proof that the tribe has adopted the custom of the agricultural tribes of the district. JAWAHIR SINGH *v.* YAQUB SHAH. **59 P. L. R. 1906 = 5 P. R. 1906.**

39 By father — Lohars of Jullundur Tehsil—Sale—Power of father. 48 P. L. R. 1901 Col. 2101 P. I.

40 By father—Unequal distribution of property among heirs by a childless proprietor—Mahommadan Rajputs of Amritsar District—42 P. R. 1902 Col. 2102, P. I.

41 *By father—Sayads of khanpur, Hoshiarpur District—Creation of accupancy rights in ancestral property—Act of management.*

The plaintiffs' father, a *Sayad* of Khanpur, Hoshiarpur district, created occupancy rights in certain land in favour of defendants Nos. 2 and 3 who agreed to pay revenue and cesses but no rent, they were also given power to alienate as they deemed proper, it was also stipulated that rent would not be enhanced. He mortgaged his proprietary rights also with the defendants for 10 years and agreed to pay interest at two per cent per mensem. The conditions were such as rendered redemption out of question. The plaintiffs sued for a declaration that after the death of their father the above mentioned transactions would not effect their rights. The suit was evidently brought with the connivance of their father. The defendants pleaded that the suit did not lie, for the parties were governed by Muhamma lau Law and not by general agricultural custom, and that even if they were governed by custom, the creation of accupancy rights was an act of management and did not amount to alienation of land.

Held, upon evidence, that in matters of alienation the alienor and his family were bound by the restrictive rules ordinarily observed by the agricultural tribes of the province and the plaintiffs' suit was competent.

Held, further, that though it is open to a land-owner to create accupancy rights in his land as an act of management, and as a general rule it is not open to his heirs to challenge his action yet as in this case, the creation of occupancy rights was not merely an act of management but was an alienation of land prejudicial to the interests of the plaintiffs, the suit must be decreed. FAQIR MUHAMMED *v.* FAZAL MUHAMMAD. **66 P. L. R. 1906 = 16 P. R., 1906.**

42 By father—Unequal distribution of property by father among his sons sheikhs of Rawalpindi District. 62 P. R. 1903 Col. 2104 P. I.

43 By father—Jats of Amritsar District whose ancestor had emigrated from Rajputana—Suit by son contesting alienation. 58 P. R. 1905 Col. 2104 P. I.

44 By father—Suit bv after-born son. 76 P. R. 1906 Col. 1916 P. I.

(g) By Mahant.

45 By Mahant—Necessity—60 P. L. R. 1902, 3 P. R. 1902 and 110 P. L. R. 1903 = 45 P. R. 1903 Col. 2114 P. I.

(h) By Mother.

46 By Mother of ward's property—Mahammadan Law—52 P. R. 1904 Col. 2114 P. I.

(i) By Mutation of names.

47 *Construction of mutation proceedings —Rebutting circumstances that a person is not a tenant—Reversioner's claim.*

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K was entered as sole owner and founder of a village in the Settlement Record of 1872-73, and his nephew was described therein as a tenant-at will of a certain area of that village. It also contained an entry to the effect that since 5 years M had separated his cultivation from K.

In Jamabandi of 1888-89, M was shown in possession of 250 *kanals* as his *khud kasht* and in joint possession with his cousins. This area was very nearly equal to one-sixth of the village. In 1889, H. M. and C., three sons of K, admitted in a mutation proceeding that M had ⅙th share of the estate. H had then two adult sons, but none of them objected. In 1905 two sons of H, one of whom had just attained majority and the other was born six years after 1889, treated the mutation proceeding as an alienation of ⅙th share and sued to get it declared invalid.

Held, upon the above facts, that M was in reality an owner of ⅙th share long before 1889, and the admission of that year was a mere recognition of an already existing right and gave no cause of action to the reversioners.

Held, also, that whether a mutation proceeding embodies merely a recognition of existing right or is intended by the parties to take effect as an alienation by gift is to be deduced from the circumstances of each case. NUR MUHAMMAD *v.* SAR DARA, **65 P W R 1907.**

(j) Necessity for.

48 Necessity for—3 P R 1902 and 45 P R 1903 Col 2114 P I.

49 Necessity—Female estate—Suit for possession—140 P L R 1902 Col 940 P I.

50 Necessity—Widow's power of—Acquiescence of reversioner—61 P L R 1201 Col 2121 P I.

(k) By non-proprietor in Abadi.

51 See Abadi No. 1 73 P R 1903 Col 1 P I.

(l) By occupancy Tenants.

52 By occupancy tenant—Reversioners suit against alienation of occupancy right —62 P W R 1907—98 P R 1907 Col 313 P II.

53 By occupancy tenant—Right of his collaterals to set aside alienation.—Onus Probandi. 115 P L R 1901 Col 2114 P I.

54 Occupancy right — Widow's powers —Collateral's right to object. 49 P. L. R. 1904 Col. 2115 P. I.

(m) By sonless proprietors

55 *By sonless proprietor, for religious purposes.*

An alienation by sonless proprietor among Datt Brahmans of the Gurdaspur District, for religious purposes is valid. The alienation was for the purpose of sinking a drinking well. TARA SINGH *v.* GOPAL SINGH. **26 P. R. 1905.**

56 *By sonless proprietor—Aroras of Tehsil Chakwal — Jehlum District. Hindu Law, whether applicable — Alienation of ancestral property.*

In matters of alienation, Aroras of Tahsil Chakwal, Jhelum District, who are members of a tribe or caste which *prima facie* does not belong to an agricultural community are governed by Hindu Law, and not by custom. Among them, therefore, a sonless male proprietor is not precluded from selling or even gifting a part of his ancestral property to his sister's son, and such alienation is binding upon the reversioners. 22 P. R. 1904, 71 P. R. 1904 122 P. R. 1893, 62 P. R. 1902, referred to.

Members of non-agricultural tribe are not to be held bound by customs prevailing among agricultural tribes, simply because they happen to own lands, and to be living with members of agricultural tribe. 122 P. R. 1893, 94 P. R. 1898, 107 P. R. 1901, 61 P. R. 1903, 12 P. R. 1906, referred to. GOHRA *v.* HARI RAM. **115 P. R. 1907.**

57 By sonless proprietor—Assent by reversioner after decree in his favour—Validity of, 78 P. R. 1908 Col. 2118 P. I.

58 *By sonless proprietor—Bhat Jats of Tahsil Raya, Sialkot District—Right of reversioners of 8th degree to contest alienation.*

Among the Hindu *Bhat Jats* of *Tahsil* Raya, an alienation of ancestral land made by a childless proprietor cannot be contested by his collaterals in the 8th degree. 93 P. R. 1906, 126 P. R. 1890 referred to. HIRA *v.* KARAM KAUR. **35 P. L. R. 1908=23 P. R. 1907.**

59 *By sonless proprietor—Bedi Khatris of Calewal, Tahsil Dasuha, District Hoshiarpur—Reversioner's right to impeach it—Onus.*

It cannot be said that, in the matter of alienation, any custom can as yet have been adopted or followed by the Bedi Khatris of Calewal, in regard to alienation of ancestral estate. The burden of proof of a special custom is on the reversioner, who asserts it. 22 P. R. 1891, 122 P. R. 1893, 21 P R. 1896 referred to. NISAL CHAND *v.* BHAGWAN SINGH. **33 P. R. 1907=9 P. L. R. 1908.**

60 *By sonless proprietor—Brahmans, Sikh of Chawala in Ambala—Alienation of ancestral land*

Held, that the rules of the Hindu Law regarding alienation do not apply to the Sikh Brahmans of *mouza* Chaowala, in *tahsil* Jagadhri in the district of Ambala, who have abandoned their sacred thread, and do not exercise the priestly functions of Brahmins but have, for generations, been agriculturists. They are governed by the agricultural custom which obtains around them. GOPAL SINGH *v.* SUKA SINGH. **58 P. R. 1906,** *Civil.*

61 By sonless proprietor of ancestral pro-

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perty to daughter's son --Brother's son living --Brahmins of Rawalpindi Tehsil. 125 P. R. 1908 Col 2116 P. I.

62 *By sonless proprietor—Ghuman Jats of Sialkot--Burden of proof.*

A childless proprietor, who was a Ghuman Jat of *tahsil* Sialkot alienated his ancestral property and the plaintiff, collaterals of the eighth degree, brought this suit challenging the alienation on the ground that it was without valid necessity or consideration, and was not sanctioned by custom.

Held, that the plaintiffs on whom the burden of proving the custom lay, having failed to discharge the *onus*, the suit must fail. NATHA SINGH *v.* MOHAN SINGH. **93 P. R. 1906**. *Civil.*

63 *By sonless proprietor—Gilani Sayads of Mauza Masania, Tahsil Batala, District Gurdaspur—Alienation by sonless proprietor, reversioner's right to question—Alienation for religious purposes.*

The Gilani Sayads of Mauza Masania being agriculturists, and having adopted agricultural customs in matters relating to succession and alienation, the initial presumption against an unrestricted power of alienation is applicable to them. It is not sufficient to rebut such presumption that a number of alienations were effected by members of the tribe to which the parties belonged, unless it is further proved that the alienation effected were such as are unauthorised by the customary law. But a member of the tribe is justified in incurring expenditure for a religious ceremony, such as the *aqiqa* ceremony of his son and the marriage of his first cousin, each item being a necessity, and he is, therefore, justified in alienating a small portion of his ancestral land for such purposes. 21 P R 1896 referred to. SHAH NAWAZ *v.* AZMAT ALI, **10 P L R 1908=40 P R 1907.**

64 *By sonless proprietor—Gujars of Gujar Khan in Rawalpindi—Will.*

Held that among the Gujars of *tahsil* Gujar Khan of Rawalpindi District, a bequest by a sonless proprietor of his ancestral property to his daughters and daughters' sons is valid by custom, even in the presence of male collaterals. MUSSAMMAT BHOLI *v.* FAKIR. **62 P R 1906=136 P L R 1906**

65 By sonless proprietor--Ancestral land acquired property, 132 P R 1908 Col 2116 P I.

66 By sonless proprietor—Acquiescence in—Sale—Necessity—Burden of proof. 102 P R 1902 Col 2092 P I.

67 By sonless proprietor—Rawals of Mauza Budala, Nurpur Tahsil, Kangra District—Power to transfer of ancestral property. 154 P L R 1901 Col 159 P I.

(n) Suit to contest alienation.

(*a*) By husband's sister and sister's daughter.
(*b*) By remote reversioners.
(*c*) By reversioners.
(*d*) By sister against alienation by daughter.
(*e*) By son.
(*f*) By step daughter,
(*g*) Suit by wife and son contesting alienation by her husband of property which the latter had got as a khanadamad.

(a) BY HUSBAND'S SISTER AND SISTER'S DAUGHTER.

68 Suit by widow's husband's sister and sister's daughter to set aside mortgage 29 P. L. R. 1902 Col. 2120 P. I.

(b) BY REMOTE REVERSIONERS.

68 (a) Right of remote reversioner to sue while widow's daughter exists. 149 P. R. 1908 Col. 2119 P. I.

69 Right of remote reversioner's to contest the alienation—Alienation by widow. 48 P. R. 1908 Col. 2120 P. I.

70 Collateral's right of suit--Alienation by widow. 6 P. L. R. 1902 Col. 2110 P. I.

(c) BY REVERSIONERS.

71 Suit by reversioner-- Alienation by childless male proprietor--Suit by father of reversioner to have the alienation declared null and void. 68 P. R. 1905 Col. 2118 P. I.

72 Suit by collateral reversioner--Domra Jats of Dera Ismail Khan Tehsil--Alienation by widow. 2 P. R. 1901 Col. 2120 P. I.

73 Right of distant collaterals to object--Alienation by childless proprietor--Locus standi--Bajmah Jats of Sialkot. 94 P. L. R 1903 Col. 2100 P. I. No. 28.

74 By reversioner—Gift to daugher's son—Remote collateral's right to sue in the presence of a near collateral's widow--44 P. R. 1905 Col; 2109 P. I.

75 Right of reversioners of 8th degree to contest alienation by childless proprietor—23 P. R. 1907. *See No 58 supra.*

76 Right of reversioner of 8th degree to contest alienation to daughter by a sonless proprietor—11 P. R. 1908—13 P. W. R. 1908—92 P. L. R. 1908 Col: 2117 P. I.

77 Reversioner of 9th degree contesting alienation in favour of reversioner of 9th degree—111 P. L. R. 1908 Col: 989 P. I.

78 Effect of reversioners—Acquiesence in alienation on his son's suit—14 P. L. R. 1908—35 P. R 1907. *See No 9 supra.*

79 Effect of reversioners—Acquiescence—Alienation by sonless proprietor—Assent by reversioner after decree in his favour, validity of- 78 P. R. 1908 Col: 2118 P. I.

80 Reversioner's right to contest alienation for religious purposes by a sonless proprietor—40 P. R. 1907. *See No 63 supra.*

81 *Reversioner obtaining declaratory decree—After born son of alienor--His right*

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from such decree--Alienation by childless male proprietor--Decree obtained by collaterals of the proprietor enures for the benefit of the proprietor's heirs who are descendants of the common ancestor of the proprietor and themselves.

When collaterals of a childless male proprietor obtain a decree declaring an alienation made by the proprietor wholly or partially invalid, the decree enures for the benefit of the subsequently born sons or other heirs of the proprietor who are descendants of the common ancestor of the proprietor and themselves. MUHAMMAD DIN *v.* FATTEH MUHAMMAD. **96 P. L. R 1906=24 P. R., 1906.**

82 Suit by collaterals reversioner—Alienation by childless proprietor—Gift of ancestral property in favour of one of his grandson to the prejudice of the others. 3 P. L. R. 1901 Col. 2095 P. I.

83 Suit by reversioner that alienation was invalid as against his interest—Alienation by childless proprietor. 56 P. R. 1903 Col. 1868 P. I.

(d) BY SISTER AGAINST ALIENATION BY DAUGHTERS.

84 *Sayads of Gurgaon District--Suit for declaration by sister of last male proprietor and his son to contest alienation of ancestral property by daughter of such proprietor--Right of female prospective heir to contest alienation.*

When a female with a right to succeed to the estate held by another female seeks to control an alienation by the latter, she must first prove two things:—that she is in fact entitled to succeed on the death of the alienor; 61 P. R. 1906; 90 P. R. 1894; 74 P. R. 1899; 16 P. R. 1903; 90 P. R. 1903; 19 P. R. 1906; 72 P. R. 1906 referred to. That the alienor is holding as a female with only a limited estate resembling that of a widow. When a female is holding an estate on the same tenure as a male proprietor male sonless proprietor, another female is not competent to contest her alienation.

The parties to this suit were *Sayads* of the Gurgaon District. The defendant succeeded to the property of her father in default of male heirs and alienated portions of it. The plaintiffs, who were a sister of the father of the defendant and her son, sought for a declaration that the alienations shall not affect their rights after the death of the defendant.

Held that, as the alienor had succeeded by custom to the ancestral landed property of her deceased father as a full owner, the plaintiffs had no *locus standi* to maintain the suit. MAQSUD-UL-NISSA *v.* KANIZ ZOHRA. **135 P. R. 1908.**

(e) BY SON.

85 Suit by son of assenting reversioner—Sheikh of Rupar Tehsil—Alienation by widow 59 P. R. 1905 Col. 2118 P. I.

85 a. By son born after alienation. 55 P. R. 1903 117 P. L. R. 1903 Col. 2102 P. I.

(f) BY STEP DAUGHTER.

86 Right of step daughter to contest—Ghelna arains of Lahore—Alienation by widow—70 P L R 1906 Col. 578 P. I.

(g) SUIT BY WIFE AND SON CONTESTING ALIENATION BY HER HUSBAND OF PROPERTY WHICH THE LATTER HAD GOT AS A KHANADAMAD.

87 Suit by wife and son contesting the alienation of property got from his father-in-law by gift as a khanadamad 20 P R 1904 Col 2112 P I.

(o) BY WIDOW.

88 By widow—Assent of reversioners—Suit by son of assenting reversioner—Sheikhs of Rupar Tehsil—59 P R 1905 Col. 2118 P I.

89 By widow—Hindu Law—Remote reversioners right to sue while widows daughter exists. 149 P R 1908 Col. 2119 P I.

90 By widow—Consent of nearer reversioners--Right of remote reversioners to contest the alienation—48 P R 1908 Col 2120 P. I.

91 *By widow--Compromise by nearest reversioner--Suit by son of reversiner.*

H, widow of G, alienated her husband's land by way of mortgage to one K. N. the nearest reversioner, objected to the alienation and as a result of the objection, by private arrangement the remainder of G's estate still unencumbered, was made over entirely to N. the mortgage being allowed to remain.

Held, that the son of N and other remote reversioners were not entitled to contest the alienation afresh in future in their own right, provided that the action of N was *bona fide* and the compromise was entered into by him in good faith in the belief that it was a reasonable and proper one.—BUTA *v.* KHUDA BUKSH. **P. L. R. 1906=97 P. R. 1906**

92 By widow—Domra jats of Dera Ismail Khan—2 P R 1901 Col 2120 P I.

93 By widow—Widow denying adoption alleged to have been made by her husband—Suit to contest alienation.—43 P L R 1904 Col 1903 P I.

94 By widow—Right of step daughter to contest- Ghelna arain of Lahore—70 P L R 1906 Col 578 P I.

95 Widow's power of—Necessity--Acquiesence of reversioner—61 P L R of 1901 Col 2121 P I.

96 By widow—Onus probandi—Majawars of Mailsi Tehsil—66 P R 1905 Col 2118 P I.

97 By widow—Suit by her husband's—Sister and sisters daughters to set aside mortgage. 29 P L R 1902 Col 2120 P I.

98 By widow—In favour of a near rever-

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sioner—Assent of other reversioners. 47 P R 1903 Col 2121 P I.

IV. ALLUVION AND DILUVION.

1 Alienation — Entry in wajib-ul-arz — Rights of adna malik in lands submerged in river. 79 P. R, 1902 Col. 176 P. I.

2 Deep stream rule—Ownership in bed of river — Jago Kalan village in the Gujrat District. 16 P. L R 1904 Col. 2143 P. I.

3 Custom—Mauza Khanpur Gujrat District. 15 P. R. 1904 Col. 2143 P. I.

4 Occupancy rights—Submersion of land of occupancy tenant—Pakhiwan village Gurdaspur District. 80 P. R. 1905 Col. 2144 P. I.

V. APPLICATION OF CUSTOM TO WHOM.

1 Right of son to contest alienation by father—Punjab Land Alienation Act S. 4. 5 P. R, 1906. *See Custom of the Punjab Alienation No 38.*

2 *Muhammadan Law—Burden of proof—Lohars of Kotli Loharan village in the Sialkote District.*

Held, that the plaintiff, on whom the *onus* lay, had failed to prove that *Lohars* of Kotli Loharan village in the Sialkote District were agriculturists and bound by custom restraining alienatio of property.—UMAR-UD-DIN *v.* JANTO. **101 P. R 1906.**

3 *Privacy—Burden of proof.*

When right of privacy is claimed the plaintiff should establish that the custom of domestic privacy is observed among that section of society of which he is a member, and that the domestic privacy of individuals is generally regarded among the community of the locality where the plaintiff resides, as being of so much importance that by common consent it is considered incumbent upon owners of land and houses either to abstain from elevating their houses or to elevate them with precaution against the violation of such privacy. NIHAL CHAND *v.* FAZAL DIN. **174 P L R 1901.**

4 Julahas of Pajawas Tahsil Fazilka, whether governed by agricultural custom 69 P R 1908—125 P W R 1908 Col 2113 P I.

5 Alienation of immoveable property by sonless proprietor. 125 P R 1908 Col 2116 P I.

6 *Alienation by male proprietor—Will—Jhiwars of Jugatpur Bazar, Amritsar District—Evidence—Wajib ul-arz—Attestation of, by non agriculturist leading men in village—Ancestral property.*

Held, that the family of the parties belonging to Jhiwar caste and holding land which they did not cultivate themselves were not shown to be governed by agricultural custom and were therefore subject to their personal law.

That from the mere fact of a non agriculturist person, who is a leading man in the village, attesting a Wajib ul-arz of the village, it does not follow that he meant to acknowledge that his own particular family followed the same custom as other families in the village.

Quære. Whether land purchased by a father for the benefit and in the name of his sons is ancestral land in the hands of his son? Chatterji and Chevis, JJ., held different views on the point. SARDAR NARAIN SINGH *v.* SARDAR HIDA SINGH, **158 P L R 1908=141 P W R 1908.**

7 Custom or Hindu Law—Remote reversioners—Right to sue while widow's daughter exists 149 P R 1903 Col 2119 P I.

8 *Koreshis of Guliana Rawalpindi District Gujar Khan Tahsil belonging to family of Pirs—Whether governed by Mahomedan Law or by custom.*

Found, the Koreshis of Guliana in the Rawalpindi District, Gujar Khan Tahsil, who belong to a family of Pirs who practise Pir Muridi and live, to some extent at any rate, on offerings, are governed in matters of inheritance by Mahomedan Law, and not by custom 110 P R 1908 followed and referred to. MUSSAMMAT BAKHT BANO *v.* CHIRAGH SHAH, **93 P W R 1908 =45 P R 1908.**

9 Gift-Mohammadan Law—Gulfrosh city Arains of Lahore and Amritsar—Inheritance —72 P W R 1908 Col 533 P II.

10 *Rajputs of Ludhiana District—Succession—Dower.*

The Mahomedan Rajputs of the Ludhiana District, who are governed by the general rules of agricultural custom of the province in matters of succession generally are governed by Mahomedan Law as regards succession to unpaid dower of a deceased female. FAQIR MUHAMMAD *v.* MIRAN BAKSH. **43 P R 1908.**

11 *Awans Ludhiana—Non-agricultural family—Succession, whether under Mahomedan or customary law.*

The Awans of Ludhiana Town, belonging to a non-agricultural family, the members of which had for generations depended upon service or been seeking independent means of livelihood, are, in matters of inheritance, governed, not by the rules of the customary law applicable to agricultural tribes, but by the provisions of the Mahomedan Law.

Where a non-agriculturist, who had purchased agricultural land in a village out of the savings of his income as a contractor, attested a *Riwaj-i-am*, *held* that his attestation of the *Riwaj-i-am* was by no means presumptive evidence of his own family following the ordinary customary rules of dominant agricultural tribes in matters of succession. 110 P. R. 1906 (F. B) referred to. JAMIAT-UL-NISA *v.* HASHMAT-UL-NISA. **124 P. R. 1908.**

12 *Khatris of Satgara Montgomery district—Burden of proof—Wajib-ul-arz—Riwaj-i-am—Entries in.*

Held, that the parties to the suit, high caste non-agriculturist Khatris of Satgara

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town in Montgomery district, were in matters of succession, bound by Hindu Law and not by custom, and that the fact of record of custom in the *Wajib-ul arz* of the village and the *Riwaj-i-am* was not sufficient to apply custom to the present case.

Held, also, that the case was not affected by the admission of applicability of custom made by one of the female parties to the case on a previous occasion. GANPAT RAI *v.* KESHO RAM. **181 P. L. R. 1908**.

13 *Custom—Muhammad Law—Adoption—will—Kilchi Mughals of Mudki, Ferozpur District, following agriculture for a century—Inherently invalid adoption need not be impugned—Limitation—Act, Art. 118.*

Held, that Kilchi Moghals of *Mudki*, a town in Firozepur District, are governed in matters of inheritance by Mahomedan Law which does not recognise adoption, and that, on account of their not living in a village, the fact of their following agriculture, rise no presumption of their having also adopted customs of agricultural tribes. 16 P. R. 1906 C. A. No. 213 of 1906 referred to.

Held, also, that an adoption inherently invalid need not be impugned independently of the claim brought for possession of the adopter's estate after his death; and that such a claim does not become barred by limitation simply on the ground that no suit for declaration of its invalidity has been brought within six years under Art. 118 of 2nd Schedule to Indian Limitation Act XV of 1877, 66 P. R. 1905 (F. B,) followed, 31 P. W. R. 1907 - 1 P. R. 1907 dissented from.

Held, further, that according to Mahomedan Law, a will in favour of an heir is valid up to the extent only of ⅓ of the *testator's property*. NIZAM *v.* BHANA. **56 P. W. R. 1908 = 91 P. R. 1908**.

14 Hindu Law—Succession of daughters and collaterals—Duty of mortgagee. 95 P. L. R. 1908 Col. 962 P. I.

VI. COMMON LAND.

1 *Civil or Revenue Courts—Suit for declaration that plaintiff had muqarraridarie rights in land—Registration Act (III of 1877), S. 17 (d)—Lease—Documents constituting perpetual lease.*

The plaintiff sued for a declaration that he had *muqurraridarie* rights in the shamilat of a village created by deeds executed by or on behalf of the proprietary body who owned the shamilat,

Held, (1) that the suit was cognisable by Civil Court,

(2) that the deeds constituted perpetual lease and not being registered were not admissible in evidence,

(3) that the deeds could not bind those owners, who did not join in their execution, and that the suits must be dismissed. JHANDAD KHAN *v.* ABBAS KHAN. **189 P. L. R. 1908**

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VII. DECLARATORY SUIT.

1 Suit by father of reversioner to have the alienation declared null and void. 68 P. R. 1905 Col 2118 P. I.

2 Suit for declaration by sister of last male proprietor and his son to contest alienation of ancestral property. 135 P. R. 1908 *See Custom of the Punjab Alienation No. 84.*

VIII. ESCHEAT.

1 *Custom—Escheat—Gift—Death of donee without heirs—Right of heirs of donor.*

Where the village is a *Bhyachara* one and the proprietorship belongs to persons of different *gots* there is no presumption that the land escheats to the proprietary body on the death of an owner without heirs.

In the case of death of a donee without heirs the gifted property reverts to the heirs of the donor. RAJA RAM *v.* DAYA RAM. **26 P. L. R. 1904**.

2 *Custom—Succession—Sister's son—Ghirths of Tika Bonehr of village Baldhar, Kangra District—Escheat.*

The land in suit was situated in *Tika* Bonehr of village Baldhar, Kangra District, and was owned by the deceased maternal uncles of the plaintiff, and was mutated after their death in favour of owners of *Tika* Bonehr, a heterogeneous body consisting of men of various castes. The plaintiff claimed to succeed to the land as sister's son of the deceased proprietors whom he had rendered services.

Held, that the claim was valid both under Hindu Law and custom. There could not be the faintest presumption of escheat in favour of the owners of the *Tika* BALLU *v.* GUR DYAL. **47 P. L. R. 1906 = 95 P. R. 1905**.

IX. GIFT.

- (*a*) By childless proprietor.
- (*b*) By daughter.
- (*c*) By father.
- (*d*) By occupancy tenant.
- (*e*) By sonless proprietor.
- (*f*) By widow.

(a) BY CHILDLESS PROPRIETOR.

1 *Gift by a childless proprietor in favour of one of his next heir, agnates, who is not his in lieu of services—Dhat Jats of Hoshiarpur Tehsil.*

A gift by a childless proprietor in favour of one of his agnates who is not his next heir for services rendered to the donor, is not invalid by custom among Dhat Jats of the Hoshiarpur Tahsil. P. R. 62 of 1884, 116 of 1886, 85 of 1889, 18, 19, 190 and 116 of 1894 14 of 1901 and 83 of 1892, referred to. ATMA SINGH *v.* NAUDH SINGH. **102 P. L. R. 1901 = P. R. 61 of 1901**.

2 Gift in favour of one of collaterals—

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King Jats of Hoshiarpur District. 14 P. R. 1901 Col. 2096 P. I.

3 Gift to one of the same tribe in the presence of near collaterals—Gangal Rajputs of Mauza Mohra Thakra—Rawalpindi District. 52 P. R. 1905 Col. 2109 P. I.

4 Gift to daughter and her son—Awans of Dhanal village, Jallandur Tehsil. 14 P. R. 1803 Col. 2098 P. I.

5 *Gift to daughter—Awans of Jhelum.*

Held, that an Awan of Talang tahsil in the Jhelum District is by custom, competent to make a valid gift of his ancestral property to his daughter's son who has rendered him service, even in the presence of his nephews—KHUDYAR *v.* FATTEH, 8 P R 1906 *Civil.* **64 P L R 1906**.

6 *Gift to daughters and Khanadamad—Succession—*Waraichs *of Gujrat.*

According to the custom of the leading agricultural tribes of the Gujrat District, a *khanadamad* associated with the father-in-law in his lifetime, succeeds to his property to the exclusion of other heirs, even if there is no express gift.

Where a *Waraich* of Shadiwal, in the District of Gujrat, executed a deed gift, in favour of his three daughters, of all his land, in equal shares, and the husband of one of them had been made a *khanadamad* at the time of her marriage, and the plaintiffs, brother's son of the donor, sued to have it declared that the gift was inoperative against their rights of reversion—

Held, that as the plaintiffs would have no rigiht to challenge the gift, if it was in favour of the *khanadamad* alone, by whom they were excluded, their suit was not maintainable. HAYAT *v.* GAUHAR. **80 P R 1902**.

8 Gift to daughter's son—Acquiescence in—Suit for possession—Appeal—133 P L R 1902 Col 2092 P I.

9 *Gift to daughter's son and son's daughter—Arains of Nakobar in Jullunder.*

Held, that by custom amongst the Arains of Nakobar *tahsil* in Jullunder District, a sonless proprietor is competent to make a valid gift of his ancestral property to his daughter's son or to his son's daughter especially where she is married to his daughter's son.—BALA *v.* NUR MUHAMMAD, 133 P R 1906 *Civil.* **115 P L R 1908**.

10 *Gift to grand nephews mairs of Chakwal tahsil, Jhelum District—By a childless proprietor in presence of other nephews and grand-nephews—Validity.*

Among the Mair Rajaputs of the Chakwal tahsil, Jhelum District, a childless proprietor is competent by custom to transfer by gift the whole of his estate in favour of two of his grand-nephews in the persence of other nephews and grand-nephews. 1109 P R 1892 F 22 P R 1904 48 P R 1903 (F B) referred to. FAIZ BAKHSH *v.* JAHAN SHAH, **96 P R 1907=23 P L R 1908**.

11 Gift to heir in presence of other heirs—Gift in lieu of services to one of several heirs—Burden of proof. 33 P. R. 1905 Col. 2100 P. I

12 Gift to heir in presence of other heirs—Gift of ancestral property by childless male proprietor—Suit to enforce gift—Gift held invalid Col. 2098 P. I.

13 Gift to heir in presence of other heirs—Sahota Jats of Hushiarpur Tahsil. 36 P. R. 1904 Col. 2099 P. I.

14 Gift to heir in presence of other heirs—Naru Rajputs of Jallandhar District. 92 P. R. 1904 Col. 2100 P. I.

15 Gift to Khanadamad—Gift to benefit daughter and her children—Gift by daughter to her son-in-law. 39 P. R. 1905 Col. 2112 P. I.

16 Gift to Khanadamad—Grand-daughter—Waraich Jats of Gujrat District. 28 P. R. 1905 Col. 2113 P, I.

17 Gift to nephew and a cousin to the exclusion of other relations equally related to him. 33 P. R. 1905—88 P. L. R. 1905 Col. 2100 P. I.

18 Gift to nephew in presence of brothers—Naru Rajputs of Jullundur District. 92 P. R. 1904 Col. 2100 P. I.

19 Gift to nephew in presence of brothers—Burden of proof—Brahmins of Kharain Tehsil - Gujrat District 12 P R 1904 Col 2115 P I.

20 Suit to grand nephews in presence of other nephews and grand nephews—Valid by custom. 97 P R 1907. *See No.* 10 *supra.*

21 *Gift to nephew of ancestral property—Awans Jullundur District.*

A childless Awan, in the Jullundur District, has not the absolute and uncontrolled right to give away ancestral land to strangers and non-relations, to the prejudice of his collateral relations, though his powers of disposition are undoubtedly large. BARKAT ALI *v.* JHANDU, **81 P W R 1907=127 P R 1907=59 P L R 1908**.

22 Limitation Act Art 91, 113, 120, 144—Claim by reversioner that alienation was invalid as against his interest. 56 P R 1903 Col 1867 P I.

23 Gift for pious purposes by childless male proprietor—Dat Brahmins of Gurdaspur 98 P. L. R. 1905, 26 P. R, 1905 Col. 2113 P. I.

24 Gift of self-acquired property—Suit for possession of property. 2 P. L. R. 1905—74 P. R 1904 Col. 1861 P. I.

25 Gift in lieu of services Jhiwars of Hoshiarpur District. 96 P. R. 1905 Col. 2100 P. I.

26 Sale by childless proprietor- Suit by collaterals, when the proprietor left widow and daughter-in-law. 29 P. R. 1903 Col. 2095 P. I.

27 Gift to sister's husband in lieu of services—Dogras of Firozepur District. 55 P. L. R. 1905 Col. 2109 No. 59.

28 Gift to sister's son adopted more than six years before suit was invalid—Suit by reversioner. 68 P. R. 1903 Col. 1902 P. I.

29 Gift to sister's son in presence of

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nephew. 122 P. L. R. 1905-55 P. R. 1905 Col. 2110 P. I.

30 Gift to sister's son—Arians of Jullundar District. 24 P. R. 1905 Col. 2110 P. I.

31 Gift to sisters' son—Sheikh Tiwanas of Okhali Mohalla, Khushab Tehsil 94 P. R. 1905 Col. 2110 P. I.

32 Gift to son-in-law Koreshis of Shahpur District. 101 P. R. 1902 Col. 2113 P. I.

33 Gift to daughter and son-in-law Janjuhas of Jehlum District. 85 P. R. 1904 Col. 2109 P. I.

(b) BY DAUGHTER—Gift.

35 Gift by daughter—Mithu Jats of Musaffargarh District. 62 P. R. 1905 Col. 2107 P. I.

36 Gift of inherited estate by daughter to her adopted son—Ansari Sheikhs of Basti Danishmandan not agriculturists. 1 P. R. 1907 Col. 1901 P. I.

37 Gift to her son-in-law—Suit by collaterals of khanadamad to set aside gift by his wife, daughter of original proprietor—39 P R 1905 Col 2112 P I.

(c) BY FATHER.

38 Gift to cousin when his own son was alive 126 P R 1908 Col 2105 P I.

39 Gift to daughter—Refusal of sanction by Deputy Commissioner—REVISION. MUSSAMMAT SAIRAN *v.* GHANA. **8 P W R 1908 (Rev.)**

See Act XIII of 1908 (Punjab Alienation of Land) S. 3 (3), 5.

40 Gift to daughter and wife in presence of son—Sials of Jhang 82 P R 1902 Col 149 P I.

41 Gift of ancestral land to grandson in the presence of son. Jats of nakadar Tehsil—31 P L R 1902 Col 2109 P I.

42 *Gift to son-in-law—Khanadamad—Hatars of Goga village, Bhera Tahsil, Shahpur District.*

Held, that no special custom was established under which a Hatar of Goga village in the Bhera Tahsil of the Shahpur District could make a valid gift of ancestral property to his son-in-law to the prejudice of his sons.

The institution of *khanadamad* is not recognised in the Shahpur District.

The rule restricting the right of the male proprietor to alienate ancestral land in the presence of sons is even more universal in Customary Law than that limiting the power of alienation of childless male owners to the prejudice of agnates. SHARAF *v.* JOWALA. **114 P L R 1902=77 P R 1902.**

43 *Gift to wife for life in lieu of maintenance—Rights of her step sons.*

When a person governed by Customary Law makes a gift of his property in favor of his wife for her life in lieu of maintenance in case she has no sons of her own, her step-sons have a vested interest in the property which may be alienated during her life-time. JOWALA SINGH *v.* DAWARKA DAS. **143 P. L. R. 1905.**

(d). **By occupancy tenant.**

44 Gift to nephews in presence of brother—Burden of proof—Brahmins of kharian Tahsil, Gujrat District—12 P R 1904 Col 2115 P I.

(e). **By sonless proprietor.**

45 Gift to a collateral—Gift by childless proprietor to one collateral to the exclusion of other collaterals—Sahota Jats of Hushiarpur Tahsil. 36 P R 1904 Col 2099 P I.

46 Gift in favour of one of collaterals King Jats of Hoshiarpur District—14 P R 1901 Col 2096 P I.

47 Gift of ancestral immoveable property with the consent of childless son to daughter—Right of reversioners to contest alienation—58 P R 1908 Col 2117 P I.

48 *Gift to daughter—Rajputs of Kharal Kalan and Kharal Khurd in Julluadar and Hoshiarpur District—Burden of proof.*

Held that the donees, the daughters, on whom lay the onus of proving that among the Rajputs of the above Mauzas, a sonless proprietor by custom to make a gift of ancestral land to his daughter in the presence of the collaterals of 5th and 3rd degree had failed to prove it and, therefore, such gift to them was invalid. 14 P R 1890, 90 P R 1881, 46 P R 1894, 101 P R 1895, 110 P R 1894 and 145 P R 1895 referred to. NIGAHIA *v.* SANDAL KHAN **88 R P 1908.**

49 Gift to daughter—Bukhari Sayads of Gujrat District—Khanadamad 70 P R 1908—127 P W R 1908 Col 2117 P I.

50 *Gift to a daughter by donee's sonless Waris—Brahmins of Sampla—Reversion of land to the line of the donor— Waris—Rivaj-i-am supported and unsupported by instances—Suit by collaterals of donor.*

By the custom of Brahmins of Sampla Tehsil, as laid down in the Rivaj-i-am of the said Tehsil, the land gifted to a daughter reverts, on the failure of the male lineal descendants of the donee, to the line of the donor.

Held, also, that where any of the male lineal descendants of the donee, who succeeds to the gifted land, is sonless, and alienates it to a person not entitled to inherit it, according to the above rule, the reversioners of the donor can maintain a declaratory suit to protect their rights and that, by the term "Waris," is meant a person entitled to succeed to the donated property.

Held, further, that the provisions of a Rivaj-i-am, which are in accord with the principles of general Customary Law, must be regarded as *prima facie* correct, but where they are not so, they are *per se* insufficient

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to prove any custom, in the absence of instances in their support. SHADI *v.* RICHA RAM, **24 P W R 1907**.

51 Gift to daughter—Accretions from ancestral property are not rendered ancestral property unlike the Hindu Law—12 P R 1901 Col 2105 P I.

52 Gift to daughter—Ghumaun Jats of Daska Tahsil, Sialkot District—17 P R 1904 Col 2106 P I.

53 Gift to daughter—Grand daughter—Khanadamad—Waraich Jats of Gujrat—28 P R 1905 Col 2106 P I.

54 Gift to daughter—Sale by daughter entitled to estate until marriage. 90 P L R 1903 Col 2106 P I.

55 *Gift to daughter by childless male proprietor*—Pathans *of Shakargarh* Tahsil, *Gurdaspur District.*

Held, that by custom prevailing among *Pathans* of the Shakargarh *tahsil* in the Gurdaspur district a childless male proprietor is competent to make a gift of his ancestral property in favour of his daughter to the exclusion of his collaterals. AMIR KHAN *v. Mussammat* RURI. **31 P L R 1906=14 P R 1906**.

56 Gift to daughter without possession 44 P R 1902 Col 2105 P I:

57 Gift to daughter—Right of plaintiff to object—How far minor son is bound by acquiescence of his father—7 P R 1905 Col 2107 P I.

58 Gift to daughter—Awans of Pindadan Khan Tehsil of Jehlum District 121 P R 1903 Col. 2107 P I.

59 *Gift to daughter—Jats of Kulchpur, Gujrat District—Gift by sonless proprietor inheriting from mother to whom property was given by her father—Resident daughters.*

A sonless proprietor *Jat* Kulchpur inheriting property from his mother who had received it from her father, can make a gift of it to a resident daughter and her husband, a *khanadamad*, in the presence of near collaterals. 109 P R 1891, 106, P R 1901 referred to. INAM DIN *v.* MULLA **104 P R 1907**.

60 Gift to daughter by will—Ancestral immoveable property—Right of collaterals of 8th degree to contest alienation—92 P L R 1903—11 P R 1908 Col 2117 P I.

61 To daughter and her husband—Ghakkars of Domeli District Jehlum 53 P R 1902 Col 2111 P I.

62 Gift to daughters and son-in-law—Janjuhas of Jehlum District—85 P R 1905 Col 2109, P I.

63 To daughter's son—Awans of Shahpur —26 P R 1901 Col 2108 P I.

64 Gift to daughter's son—Suit for possession—Appeal—Consolidation of—133 P L R 1902 Col 2092 P I.

65 Gift to daughter's son—Mairs of Murid Chakwal Tehsil—Jehlum District—22 P R 1904.

66 Gift to daughter's son—Remote collateral's right to sue in the presence of a near collateral's widow—44 P R 1905 Col 2109 P I.

67 *Gift to daughter's son—Gujars of Bholiwal Qadim village, Ludhiana District.*

The parties to the suit were Gujars of Bholiwal Qadim village, in the Ludhiana district. The plaintiffs, collaterals of a sonless proprietor, sued to set aside a gift made by the proprietor in favor of his daughter's sons. It was found that the father of the donees was *Khana damad* of the donor, having married the mother of the donees.

Held, that the gift was valid by custom. NAZAM *v.* GAUHARA. **17 P R 1906**.

68 Gift to daughter's son—Hindu Goldsmith of Umballa city—Ancestral property —51 P R 1903—Col 2097 P I.

69 Gift to daghter's son, by a Chimba occupancy tenant of Bhaman Kalan Lahore District—60 P W R 1907 Col 400 P II.

70 Gift to daughters or relations in the female line—Phapra Mughals of Jehlum District. 71 P R 1904 Col 2098 P I.

71 Gift to a grandson—Ancestral property —Chatha Jats of Wazirabad, 3 P L R 1901 Col 2095 P I.

72 Gift to Khanadamad—Ghakkars of Domeli, Jhelum District. 53 P R 1902 Col 2111 P I.

73 Gift to khanadamad—Succession—Wariach of Gujrat—80 P. R. 1902 Col. 2111 P. I.

74 Gift to sister's son by will—Ancestral property—Power to make will—34 P. R. 1905 Col. 2121 P. I.

75 Gift to sister's son—Arians of Jallandar Tahsil—24 P R. 1905 Col. 2110 P. I.

76 Gift to sister's on—Sheikh Tewanas of Okhali Mohala, Khushab Tehsil. 94 P. R. 1905 Col. 2110 P. I.

77 *Gift to sisters son and Khanadamad —Khinger Jats, Chakwal, Jhelum District—Ancestral property.*

Amongst Khinger Jats of Chakwal Tahsil, a sonless proprietor can make a valid gift of his ancestral land to his sister's son and Khanadamad and to his daughter's son in the presence of male collaterals 22 P. R. 1904, 85 P. R. 1904, 71 P. R. 1904, 33 P. R. 1905, 62 P. R. 1906, *referred to.* FAZAL *v.* HAYAT ALI. **29 P. R. 1907=22 P. L. R. 1908**.

78 Gift to son-in-law and stranger Rajputs in the presence of near collaterals—52 P. R. 1905 Col. 2109 P. I

79 Gift to wife and daughter in the presence of son—Sials of Jhang—32 P. R. 1902 Col. 149 P. I.

(f) By widow.

80 *Gift by widow to her daughter married in the same village—Power of daughter to make a further gift in favour of her daughter —Onus probindi — Chachars of Chachar village, Shahpur District.*

A widow of the Chachar tribe of Chachar village, in the Shahpur District, made a gift

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of land inherited by her from her husband, in fovour of his daughter, who was married in the village to a person of the same tribe, *i. e.* Chachar. The donee, when a widow. again made a gift of the same land in favour of her daughter, who herself had also married a Chachar of the village. The plaintiffs, reversioners claimed that the original gift conveyed a limited interest, and the donee had no right to make the subsequent gift. It was found that a widow belonging to Chachar tribe of the Chachar village was entitled, by custom to make gift of land inherited by her from her husband in favour of her daughter if that daughter married within the village.

Held, that plaintiffs, on whom the *onus* lay, had failed to prove that the subsequent gift by the donee, daughter, made in favour of her daughter, was invalid by custom— *98 P. R. 1894 ; 129 P. R. 1893 ; 12 P. R. 1892 (F. B.) ; 32 P. R, 1895 (F. B.) ; 19 P. R., 1887 ; 19 P. R., 1897 ; 112 P. R., 1900 ; S. C. P. L. R. 1900, p. 471 ; 53 P. R.; 1901 : S. C. 72 P. L. R.* 1901, 19 *P. R. 1903, S. C. 25 P. L. R. 1908: 20 P. R. 1904 ; S. C. 39 P. L. R. 1904 referred to.* NAWAB *v.* WALLAN. **91 P. R. 1906=108 P. L. R. 1907.**

81 Gift by widow to daughter and daughter's son—Gil Jats of the Amritsar District —Right of collaterals of 6th degree—112 P. W. R. 1901—67 P. R. 1908 Col. 2119 P. I.

82 *Gift by widow to daughter and khanadamad—Right of collaterals af first degree—Validity of gift—Power of widow of alienating Non-ancestral property—Arians of Naraingarh.*

The widow of a deceased male proprietor, in possession of his estate for life, is subject to the same restriction in alienating non-ancestral estate of her husband as in alienating ancestral estate. 98 P. R. 1891, 18 P. R. 189, 63 P. R. 1895, 28 P. R. 1893, 58 P. R. 1899, referred to.

In the presence of reversioners, cousins of first donee, she can alienate only to one having a better right to inherit, or to some one else, only if there is in existence some one whose existence bars these reversioners. The existence of a daughter does not preclude cousins of first contesting an alienation made by a widow in possession of property.

Among the Naraingarh Arains, the widow of a deceased male proprietor in possession of her husband's property cannot make her son-in-law *khanadamad* in the sense that he thereby becomes as it were a son. Nor can she in the presence of collaterals of third degree make a gift of that property to her daughter and son-in-law. MUHAMMAD UMAR *v,* ABDUL KARIM. **108 P. R. 1907.**

83 Gift by widow to khanadamad. Ancestral property—Suit by daughter and daughter's son to contest the alienation—20 P R 1904 Col. 2112 P I.

84 Gift by widow to near reversioner—Assent of other reversioners—Claim by reversioner not assenting. 47 P R 1903 Col 2121 P I.

85 Gift by widow to Sanatan Dharam Sabba and daughter and daughter's son living—Khatries. 119 P R 1901 Col 2110 P I.

86 Gift to khanadamad by childless male proprietor to benefit daughter and her children—Gift by daughter to son-in-law—Suit by collaterals of khanadamad to set aside gift by his wife. 39 P R 1905 Col 2112 P I.

87 Gift by widow to a stranger—Onus probandi—Mujawars of Mailsi Tehsil Multan District 66 P R 1905 Col 2118 P I.

88 Gift by widow to a stranger—Necessity—Suit for possession—Resjudicata—140 P L R 1902 Col 940 P I,

Custom of the Punjab Inharitence and succession.

X. Inheritance and Succession.

(*a*) Adopted son.
(*b*) Agnates.
(*c*) Ala malik and collaterals.
(*d*) Application of customary or personal Law.
(*e*) Aunt's son.
(*f*) Brother's sister's son.
(*g*) Collaterals.
(*h*) Daughters.
(*i*) Daughters and daughter's son.
(*j*) Daughters' son and nephew.
(*k*) Donee dying without direct heirs.
(*l*) Khanadamad.
(*m*) Pattidars.
(*n*) Premogeniture.
(*o*) Sister.
(*p*) Sisters' son.
(*q*) Sons.
(*r*) Son-in-law.
(*s*) Widow.
(*t*) Wife's property inherited by her from her father.

(a) ADOPTED SON.

1 *Adoption—Appointment of heir—Self-acquired property.*

In the absence of his lineal descendants the self-acquired property of an adopted son passes to the heirs of his natural family.

The rule that a customary appointment as heir does not take the adopted son out of his natural family has been established and the rule that the property of the adoptive father goes in the adoptive family and not in the natural family of the adopted son does not affect self-acquired property of the adopted son. 72 P. R., 1893; 12 P. R, 1892 (F. B.); 4 P. R., 1900; s. c., P. L. R., 1900, p. 152, referred to. PUNJAB SINGH *v.* KHAZAN SINGH. **149 P. L. R. 1906.**

2 *Adoption—Right of adopted son in his natural father's estate—Jats of Panipat Karnal District.*

Held, that among *Jats* of the Panipat

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Tahsil, an adopted son is not entitled to take a share in the estate of his natural father in the presence of a brother—*68 P R 1898, referred to.* MUKH RAM *v.* NOT RAM **101 P L R 1907=100 P R. 1906**.

3 *Adopted son—Occupancy tenancy—Succession—Adopted son of occupancy tenant associating strangers with him—Right of collaterals of the adopter to succeed to the adopted son who died childless—Punjab Tenancy Act XVI of 1887 S. 53 and 59.*

In contest between a landlord and others regarding succession to, or alienation of, a tenancy, S. 53 and 59 of the Act must be regarded in cases of contest between occupancy tenants and their natural heirs under custom, or, between persons claiming succession to an occupancy tenancy, the holder of which has died, and alienees of the occupancy rights, the same rule of custom should presumably be followed as regulates alienation of, and succession to, land held in ownership. 68 P R 1894, 89 P R 1898, (F. B) 69 P R 1900, 12 P R 1904, and 109 P R 1894, referred to.

The adopted son, and the donee of an occupancy tenant, died sonless leaving a widow, after having formally associated the defendants with him in the tenancy. After the death of the widow a dispute arose between the collateral heirs of his adoptive father and the defendants.

Held that if he was treated as an adopted son, his heirs, under custom and S. 59 (2) of the Act, are his adoptive father's nearest male agnates, and that, if he was treated as a donee, the gift, under custom, reverts, upon failure of his male line, to the heirs of the donor.

Held, also that there was no time bar against the plaintiffs, inasmuch as they could not sue for possession until the death of the widow of the adopted son. SAIDA *v.* ISMAIL, **76 P R 1907=32 P L R 1908**.

4 *Adoption--Right of adopted son to succeed to the property of his adoptive father's collaterals*—Chima Jats *of Sialkot district—Precedents—Uncontested cases.*

Held, that according to custom prevailing among Chima Jats of Sialkot district, an adopted son succeeds to the property of his adoptive father's collaterals in the same manner and to the same extent as a natural son of such adoptive father would succeed.

Where in a number of cases persons have claimed property basing their right to succeed on custom and the claim has been allowed without objection, such cases are best proof of custom sanctioning the right allowed. MAKHAN SINGH *v.* DULO. **55 P L R 1906=4 P R 1906**.

5 Adopted son—Adoption by Jats with ceremonies - Right to succeed to the property of his adoptive father's father when the adoptive father in the life time of his father

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80 P L R 190[illegible]

6 *Adopted* [illegible] *son being* [illegible] *—Right of* [illegible] *to natural son's* [illegible]

Held, that, by [illegible] succeeds to the sh[illegible] to the adopte[illegible] without issue, [illegible] father's collatera[illegible] 34 P R 1883 (F B) [illegible] 1887, 181 P R 1889, [illegible] 1892 (F B) 56 and 111 P R 1893. [illegible] 1894, 29 43 (F B) 53 P R [illegible] 1900 D 4 P R 1891 (F B) [illegible] JOWALA SINGH *v.* LAL SINGH, [illegible] P W R 1908.

7 *Adopted son's right to collateral succession in adoptive father's family—Onus—Chima Jats of Daska Sialkot District.*

Held, that the defendants, on whom the *onus* lay. 12 P R 1892 (F B) 61 P R 1894, 138 P R 1894, 29 P R 1895, 18 P R 1900-- P L R 1900 P 49 followed, had failed to prove the alleged custom that, among Chima Jats of Daska Tahsil of Sialkot District, an adopted son can succeed collaterally in his adoptive father's family 4 P R 1906--55 P L R 1900 referred to. RAM DITTA *v.* TAKHT MAL, **67 P L R 1908=50 P R 1908, 104 P W R 1908**.

8 *Adopted son dying without male lineal descendants.*

The estate of an adopted son dying without any male lineal descendants is inherited according to custom by the heirs of his adoptive father and not by the heirs of his natural family.—58 *P L R* 1901 *overruled.* GURDITTA *v.* ATAR SINGH, **117 P R 1906 =77 P L R 1907**.

9 Adopted son—Appointment of heir—Death of appointed heir during his adoptive father's lifetime. 51 P R 1906. *See Custom Punjab—Adoption.*

10 *Adopted son—Collateral succession—Right of sons of adopted son to succeed collaterally in their natural family*—Moghals *of Pind Dadan Khan* Tahsil, *Jhelum District.*

Held, that according to custom prevailing among *Moghals* of Pind Dadan Khan *Tahsil* of the Jhelum District, to which tribe the parties belonged, sons of an adopted son succeed collaterally in their natural family. GHELA *v.* HAIDER, **59 P R 1906=68 P L R 1907**.

(b) AGNATES

11 *Agnates—Punjab Laws Act (IV of 1872) S. 5—Succession—Personal Law—Burden of proof—Community of descent—Residence in other villages.*

Held, by the Full Bench, that it has not been laid down by the Chief Court as a rule, that mere community of descent does not give agnates of a deceased land owner a right of succession to acquired land

Custom of the Punjab Inheritance and Succession (*Contd.*).

left by him in a village in which they do not own land.

Held, that among parties generally following Customary Law it is permissible to fall back, as a last resort, on their personal law for the decision of the point in issue, where no definite rule of the former law applicable to the case, before a Court can be found. DAYA RAM *v.* SOHEL SINGH. **110 P. R. 1906 = 59 P. W. R. 1907 = 31 P. L. R. 1907 (F B).**

(c) Ala malik and collaterals.

12 Ala maliks' right to succeed on the death of an adna malik as against collaterals 119 P W. R. 1908 Col. 1592 P. I.

13 Ala maliks' *right to succeed to the adna malik dying sonless, collaterals of the deceased extent—Rajputs of moza Narainpore District Gurdaspur—Estoppel—Waiver*

Held (1) That residence in an adjoining village and not in the village where the property is situate does not ordinarily deprive the collaterals of their right to succession.

(2) That plaintiffs entirely failed to prove that by custom they were entitled to recover possession of the land sold by the deceased *adna malik* to the defendant in the presence of collaterals of the deceased *adna maliks.*

(3) That one of the plaintiffs having sued for pre-emption of the land sold by the *adna malik* to the defendant, must be taken to have admitted the validity of the sale.

(4) That three of the *adna malik* vendors, having died nine years before the institution of the present case, and no effort having been made during this period to recover possession on the ground of lapse, the plaintiffs are not entitled to any indulgence. HIRU *v.* THAKAR DAS. **118 P. W. R. 1908.**

(d) Application of customary or personal.

14 *Muhammadan Law—Succession*-Kashmiris *of Lahore City.*

Found that the parties to the suit, Muhammadan *Kashmiris* of Lahore City, who were engaged in trade and manufacture, were governed in matters of succession by Muhammadan Law and not by custom—25 *P. R. 1882; 35 P. R., 1891; 4 P. R. 1888; 149 P. R. 1888; 24 P. R., 1893; 23 P. R., 1897; 47 P. R., 1900; s. c., P. L. R., 1900, p. 381; 41 P. R. 1901; s. c., 49 P. L. R. 1901; 92 P. R., 1901; s. c., 143 P. L. R., 1901; 103 P. R. 1902; 30 P. R., 1903, s. c., 85 P L R. 1903; 51 P. R., 1903; s. c., 174 P. L. R. 1903; 54 P. R., 1903; 51 P. L. R., 1904; 114 P. R. 1896; 30 P. R. 1896, referred to.* MAULA BAKHSH *v.* MUHAMMAD BAKHSH. **54 P. R. 1906 = 74 P. L. R. 1907.**

15 *Custom — Inheritance — Muhammadan Law—Koreshis of Gujranwalla city.*

Held, that the parties to the suit, Koreshis of Gujranwalla city, who are non-agriculturists are governed by Muhammadan Law in the matter of inheritance. *175 P R 1883, referred to. Mussammat* KARAM BIBI *v.* HUSSAIN BAKHSH. **92 P. R. 1901.**

16 *Custom—Succession—Hindu Law-Non-agricultural* Aroras *of Kasur, Lahore District —Proof of Custom—Instances—Rebutting evidence.*

Found, that by custom among non-agricultural Aroras of Kasur, Lahore District, the daughter is excluded by the brothers.

Where witnesses to the existence of a custom have fairly ascertained instances it is for the other side to show by cross examination or evidence in rebuttal that those instances do not in reality support the alleged custom. ANANT RAM *v.* HUKMAN MAL. **102 P L R 1902 = 62 P R 1902.**

17 Custom—Mohammadan Law—Succession—Tank estate. 30 C 843—112 P L R 1903—67 P R 1903 (P C) Col 410 P II.

18 *Custom—Muhammadan Law—Succession—Pathans of Lahore City.*

Held, that the parties to the suit, Lodhi Pathans of Lahore city, were governed in matters of succession by Muhammadan Law and not by custom. MT. HUSAINI BEGAM *v* MT. SAHANI BEGAM. **51 P L R 1904.**

(e) Aunts son.

19 *Proprietary body—Right to succeed in preference to aunt's son of the deceased proprietor—Mauza Balana. tahsil Panipat.*

The plaintiffs, who form the proprietary body of *pana* Dasondha of the village Balana claimed possession, alleging that, a co-sharer of another tribe having died leaving no male lineal descendants, the land reverted to them as proprietors to the *pana*, both by law and custom. The defendant contended that he was related to the deceased proprietor as his aunt's son and that he was his heir, and that the plaintiffs, as owners of the *pana* had no right to succeed by law or custom.

Held, that the plaintiffs had failed to prove the custom set up by them, *viz.*, that they as mere co sharers in the *pana* were entitled to succeed in preference to the aunt's son of the deceased proprietor. 28 P. R. 1904, 12 P. R. 1892 (F. B. referred to. NIHALA *v.* RAHMATULLAH. **137 P. R. 1908.**

(f) Brother's daughter's son.

20 *Custom—Succession—Collaterals and son of brother's daughter.*

Out of three brothers Ram Singh,

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Chuhar Singh and Mohan Singh, only Chuhar Singh had a child, a daughter, *Mussummat* Chandi. She had two sons Rur Singh and Sewa Singh. Ram Singh adopted Rur Singh. On Rur Singh dying childless Wasawa Singh, a collateral of Ram Singh, sued for his property left by Rur Singh.

Held, that the claim was not maintainable and Sewa Singh was entitled to succeed his brother Rur Singh. *P. R.*, 12 of 1892, *distinguished.* SEWA SINGH *v.* WASAWA SINGH. **58 P. L. R. 1901.**

(g) CALLATERALS.

21 *Ancestor's descendants inherit in preference to heterogeneous body of a different got.*

By the customary law, in succession, representation is recognised. The direct descendants of the daughter and the daughter's son of a deceased proprietor's ascendant are, in the absence of all male collaterals entitled to exclude an hetrogeneous proprietary body belonging to a different *got.* 77 P. R. 1896, 102 P. R. 1906, 102 P. R. 1900, 28 P. R. 1904, 95 P. R. 1905, R. ; 141 P R 1893, distinguished. WARYAMA *v.* HIRA NAND, **128 P. W. R. 1908=63 P. R. 1908.**

22 *Collaterals, associated and disassociated —Rajputs of Dasoya Tahsil, Hoshiarpur District.*

According to general agricultural custom all collateral heirs succeed together and not to the exclusion of each other, whether they were associated with, or separated from, the deceased. DEVI SINGH *v.* PUNJAB SINGH. **75 P. L. R 1904.**

23 *Collaterals versus daughter — Custom, ordinary law—Aroras of Amritsar—Onus.*

The burden of proof, that a high caste Hindu community, as Aroras of Amritsar, are governed by a custom, directly in contravention of their personal law, lies heavily on the party making such an allegation 16 A. 221 ; 34 P R. 1907 : 110 P. R. 1906 ; 24 A. 273 ; 24 P. R. 1893 ; 45 P. R 1903 referred to.

It cannot be accepted as an axiom, that the Aroras of Amritsar are bound by custom, found to obtain in other parts of the country ; but rulings of Courts on question of custom obtaining among Aroras in other parts may be usefully examined.

Held, that, in this case, the defendants had not established the custom they set up, of collaterals succeeding among the Amritsar Aroras, to the exclusion of daughters. 144 P. R. 1882 ; 85 P. R. 1884 ; 148 P. R. 1890 (note) ; 62 P. R 1902 referred to. RAITHO *v.* HARNAMAN. **99 P. R 1907=167 P. L R. 1908:**

24 *Collaterals versus daughters—Bunjahi Khatris of Rawalpindi—Hindu Law—Custom —Possession by widow of predeceased son of her father-in-law's estate — Adverse possession—Limitation.*

The Bunjahi Khatris of Rawalpindi followed Hindu Law of the Mitakshara School. They have not become agriculturists and do not follow Jats custom. In that tribe, near collaterals do not exclude daughters, daughter's son and grandsons of a deceased sonless proprietor. 54 P. R. 1906, 15 P. R. 1903, 94 P. R. 1898 referred to.

The burden of proving the existence of a special custom excluding them from inheritance lies on the collaterals.

Where the widow of a deceased son held her and father-in-law's estate after his death, not as of right, but in lieu of maintenance, the property yielding only just enough for her maintenance, held, that her possession was not adverse to the real heir, whoever he may be, inasmuch as she did not assert any rival right or arrogate to herself the position of a trespasser 3 P. R. 1904 distinguished.

A subsequent assertion by the widow, in a suit by the collaterals in which the Court declared that the collaterals were entitled to succeed after her death, that she held for life, could not show that her possession was adverse 24 P. R. 1906 referred to.

Nor could the decree in the suit make the question of heirship of collaterals *res judicata* against daughter's son 28 M. 457 referred to.

Bunjahi Khatris, though they may follow their personal law, do not always follow it in every particular. This tribe may have adopted a variation under which the widow of a predeceased son takes the same widow's estate which she would have taken had her husband survived his father. 178 P. L. R. 1905 referred to. BURA MAL *v.* NARAIN DAS. **102 P. R. 1907.**

25 *Daughters—Chamar Jats of Tehsil Lodhran of the Multan District—Muhammadan Law—Collaterals.*

In a suit for inheritance, the parties to which were Chamar Jats of *Tehsil* Lodhran of the Multan District, *held* that no positive custom was proved regulating the rights of the parties and that the Muhammadan Law must govern the case under section 5 of the Punjab Laws Act. SHERAN *alias* SHER MUHAMMAD *v. Mussammat* SHARMAN. **182 P L R 1901.**

(h). Daughters—

26 Daughers-Awans of Pind Dadan Khan Tehsil—Daughter of sonless proprietor inheriting father's non ancestral property—Father's collaterals suit. 121 P R 1908 Col 2108 P I.

27 *Daughters—Collaterals Brahmins of Gurdaspur—Hindu Law—Custom.*

Sarsuit Brahmins of the town of Gurdaspur are, in matters of succession, governed by the general rules of agricultural custom and not by Hindu Law ; and daughters and their issue are therefore excluded by near agnates of the last male proprietor. 73 P, R 1896 107 P R 1901, 119 P R, 1901, 30 P R 1903, 12 P R 1906, 16 A 221 D 21 P R 1906 16 P R 1906, 58 P R 1906, 102 P R 1901 followed. NANAK CHAND *v.* BASHESHAR NATH, **16 P. W. R. 1908=94 P. L. R. 1908=3 P. R. 1908.**

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28 *Daughters—Nathari Bilochis of Sangarh* tahsil, *Dera Ghazi Khan District—Mahomedan law not custom.*

The parties being Natkari Bilochis of Sangarh *tahsil*, Dera Ghazi Khan District, the plaintiffs, collaterals in various degrees claimed property in the possession of the defendants, the daughters of the deceased on the ground that by custom the collaterals were entitled to exclude daughters, *held*, that, the plaintiffs who were bound to prove the existence of such special custom, among the said tribe, having failed to establish the same or that custom and not Mahomedan Law regulated the Law of Succession among them, the rights of daughters to succeed in accordance with the principles of the Mahmedan Law were recognised in the Sangarh *tahsil*. GHULAM HAIDAR *v.* PHAPHAL. **155 P. W. R., 1908=92 P. R. 1908.**

29 *Daughter—Daughter's son—Naru Rajputs of Mamun Mazra village, Thanesar Tahsil, Amballa District.*

Held, that according to custom prevailing among *Naru Rajputs* of Mamun Mazra village Thanesar *Tahsil*, Amballa District, to which class the parties belonged, collaterals of a childless male proprietor succeed to ancestral land left by him in preference to his daughters. SAMANDA *v.* Musammat NURBI, **37 P. L. R. 1905.**

30 *Daughter—Her right to succeed to her father and uncle's property and to contest alienation by her aunt—Necessity—Alienation by guardian—Minor's liability—Village community can not inherit in presence of daughter.*

Held, that, among Hindu agriculturists of Hoshiarpur District, the daughter of a male sonless proprietor is entitled to inherit the property of her father and uncle after the death of her mother and aunt, and is also competent to contest the validity of the alienation by her aunt where they have left no reversioner, and that there exists no custom allowing the village community to succeed to their property in preference to the daughter.

Held, also, that in such a case the daughter can maintain a suit for obtaining immediate possession of her father's share and also for getting a declaration that the alienation by her aunt will not be binding upon her after her aunt's death.

Held, further, that in case of an alienation of a minor's property by his *de facto* guardian, the minor's liability extends only to the benefit he derives therefrom. NAK BADHA *v.* GURDEVI, **136 P. W. R. 1908.**

31 Daughters—Sayads of Shahabad village Karnal District—Alienation by daughter—18 P. R. 1906—114 P. L. R. 1906. *See Col. 371, P. II.*

32 Daughters—Collaterals of sixth degree—Hindu Chuhan Rajputs of Tahsil Naraingarh in Umballa District. 86. P. R. 1908—146. P. W. R. 1908 Col. 272 P. II.

33 *Daughter—Daughter's daughter—Collaterals—Lodi Pathans of Jullundur District.*

Where the parties to a suit were *Lodi Pathans* of Jullundur District, and the daughter had succeeded to her father's estate by custom of the family.

Held, that upon the death of the daughter her daughters had a preferential claim by custom of the family and the tribe to succeed as against the collaterals of the father.—*P. R.*, 5 *of* 1895, *referred to*; *P. R. 19 of 1887. P. R.*, *3 of 1888; P. R., 31 of 1889; P. R., 12 of 1892: P. R.*, 75 *of 1893; P. R., 19 of 1897, distinguished.* WAZIR ALI KHAN *v.* SHAH ZAMAN. **61 P. R. 1902=72 P. L. R. 1902.**

34 *Daughters—Collaterals of seventh degree—Mahomedan Chuhan Rajputs of Kharwan, Jagadri Tahsil, Umballa District.*

As custom as to the daughter's succession varies among the various tribes; it is unsafe to lay down as a general rule of customary law, regardless of tribe and creed, that daughters are excluded from succession by collaterals however remote.

Held, also, that the plaintiffs in the case have failed to prove a custom to the effect that among Chohan Rajputs of Mauza Kharwan, Jagadhri tahsil, Umbala District, collaterals of the seventh degree were entitled to succeed in preference to a married daughter of the deceased sonless proprietor. ABDUL KARIM *v.* SAHIB JAN. **5 P R 1908=29 P W R 1908=99 P L R 1908.** *See for other facts Col 443 P I.*

35 *Daughters—Distant collaterals—Riwaj-i-am—Effect of entries in.*

In this case the collaterals beyond 7 degrees to the deceased suit for possession of his estate on his widow remarrying. In addition to his widow the deceased had left a daughter.

Held, that the daughter was by custom entitled to ratain her father's estate until her death or marriage, and that the plaintiffs who were distant collaterals had failed to establish their right to possession.

Though it cannot be held that an entry in a *Rewaj-i-am* is of no value without instances quoted, yet its value is very much diminished by that omission. *Mussammat* MARI *v.* JAWAHRA. **12 P R 1902=51 P L R 1902.**

36 *Daughters--Collaterals--Laghari Bilochis, Sanghar tahsil, Dera Ghazi Khan—Mahomedan Law—Custom.*

In matters of female succession the custom of the *Laghari Bilochis* of the *Sanghar tahsil* of the *Dera Ghazi Khan* District, is largely tinctured by a preference to Mahommedan Law rules, where the contest is between daughters and collaterals; and a daughter is entitled to claim her share of the ancestral estate of her father in the presence of his male collaterals, descendants of a common grandfather 110 P R 1906 (F. B.), F.; 119 P R 1907, Civil Appeal No. 994 of 1889, decided on 24—7—1890 and Civil Appeal No. 199 of 1895, decided on 12—11—1897,

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referred to. SABHAI *v.* ALI. **136 P R 1908.**

37 *Daughters—Right of grand-daughters their father having pre-deceased his father—Mahomedan Law.*

The question was whether grand-daughters inherited when their father had predeceased his father. It was taken for granted that by Mahomedan Law they did not inherit under such circumstances. The plaintiffs alleged that by custom they were so entitled.

Held, the evidence of instances adduced on behalf of the plaintiffs was not strong enough to establish the alleged custom.

Held also that no custom excluding grand-daughters from succession in the absence of all other issue was proved by the defendant. MUSSAMMAT GAUHAR *v.* KHAN MUHAMMAD, **136 P R 1908** (*Note case p. 619.*)

38 *Daughters—Mahomedan Law—Custom—Bilochis Natkani Datani got of the Sanghar tahsil of the Dera Ghazi Khan District—*

Bilochis of the Natkani Datani got of the Sanghar tahsil of the Dera Ghazi Khan District do not strictly follow Mahomedan Law, but their custom of agnatic succession is greatly influenced by the spirit of the Mahomedan Law, and daughters are often allowed to succeed in the absence of sons, and, sometimes though more rarely, even in the presence of sons. The Natkani Datanis show the greatest favour to daughters and sisters, and allow them to take what would be regarded as their share by Mahomedan Law. No doubt they would not work out this share minutely. They would be guided by the general principle that the female's share should be half that of the males. KHAN MUHAMMAD *v.* SHER MUHAMMAD. **136 P R 1908** (*Note case p. 622*).

39 *Daughters—Nephews—Sayyads of Tahsil Shujabad.*

Among Sayyads of Shujabad customary law and not by Mahomedan Law prevails and the nephews of a deceased proprietor succeeds to his estate in preference to his daughter. A daughter cannot exclude a nephew, merely because he is married to one of them, unless some definite ground for holding so is established. AHMAD SHAH *v.* AHMAD SHAH. **111 P W R 1908=68 P R 1908.**

40 *Daughters—Muhammadan Law—*Sayyads *of Bannu* Tahsil.

Held that among *Sayads* of Bannu *Thasil*, unmarried daughters can claim their share of father's property in accordance with Muhammadan Law.

Quœre:—Whether the daughters have unrestricted powers? KHAMIM SHAH *v.* AMIRZADA SHAH. **62 P. R. 1904=36 P. L. R. 1904.**

41 *Daughters—Right of daughter—Mahomedan Jats of tahsil Leiah in Dera Ismail Khan.*

The *onus* lay on the defendant to prove that by custom among the Mahomedan Jats of *tahsil* Leiah in Dera Ismail Khan, a daughter has a right to inherit to her father's property in the presence of his near collaterals.

Held that the defendant having failed to discharge the *onus*, the custom was not established. MALIK NUR *v.* AISHAN.—**105 P. R. 1906=86 P. L. R. 1906.**

42 *Daughters—Collaterals.*

Found, on the evidence on the record that in the matter of succession the family to which the parties belonged daughters succeeded in preference to collaterals, according to family custom and Muhammadan Law. *Mussammat* FATIMA *v.* ARJMAND ALI. **P. L. R 49 of 1901.**

(i) Daughters and daughter's sons.

43 *Daughters—Collaterals Bilochis of Dera Ghazikhan.*

The Customary Law of the Dera Ghazikhan District makes it clear that, with the exception of certain sections of the Nutkani tribe in Sangarh, the Belochis of that District generally, and especially those of Dera Ghazikhan Tahsil, follow their own custom and not Mahomedan Law. Among them a widow is entitled merely to maintenance and daughters do not, in any case succeed to any portion of their father's ancestral property in the presence of male collaterals of the father. BAKHT SAWAI *v.* SARDAR KHAN. **119 P. R. 1907.**

(j) Daughter's son and nephew.

44 *Rajputs of the Rawalpindi District—Limitation Act Art. 91—Wills*

Among the Rajputs of the Rawalpindi (now Attack) District a daughter's son is not entitled by custom to succeed in preference to collaterals who are descendants of the grandfather of the last male owner.

Art. 91 of the Limitation Act has no application to wills 23 C. 1 (P. C) referred to. JAHAN KHAN *v.* SHAHMAD. **134 P. R. 1908.**

45 Daughters son—Nephew—Goldsmiths of Saharanpur—Counsels and client. 134 P. L. R. 1903 Col. 692 P. II.

46 *Hindu Law—Custom—Succession—Tewari Brahmins of Amritsar City—Burden of proof—Nephew—Daughter's son.*

Held, that the parties to the suit, Tewari Brahmins of Amritsar City, being a non-agricultural class and having migrated from Oudh, must be presumed to have retained after immigration the law of their sect in the country of their adoption.

Found, that the plaintiff had failed to prove that by custom among Tewari Brahmins of Amritsar City a nephew of a childless proprietor excluded his daughter's son in matter of succession to his estate.

A family custom in derogation of the ordinary law cannot be supported on slender

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evidence of a few instances of modern date. 24 A. 273 (P. C.); 116 P. R. of 1893, 43 of 1899 108 of 1888 referred to. MUSSAMMAT JAMNA DEVI *v.* GHUNI LAL. **85 P. L. R. 1903=30 P. R. 1903.**

(k) DONEE DYING WITHOUT DIRECT HEIRS.

47 Occupancy rights--Near relations resident in other villages. 128 P. R. 1906 Col. 589 P. II.

47 (a) *Gift of ancestral property to daughter's son—Succession on donee's death without male issue—*Waraich Jats *of village Kaka, District Gujart—Limitation—Effect of donee executing a will in favour of his relations.*

Held, that among the *Waraich Jats* of the village of Kaka, in the Gujrat District, when a gift has been made to a daughter's son in virtue of that relationship, and that daughter's son dies without issue, the land, if the ancestral land of the donee at the time of the gift, reverts on the death of the original donee to the heirs of donor, and not to those of the donee.

If the donee has bequeathed the property by will to any of his heirs, it is not necessary for the heirs of the donor to get the will cancelled before claiming possession of the property on the death of the donee; and the limitation for a suit by them for possession is not affected by the existence of the will. HAYAT MUHAMMAD *v.* ALA BAKSH. **19 P. R. 1903=25 P. L. R., 1903.**

48 Occupancy right—Punjab Tenancy Act XVI of 1887. Ss. 58, 59—Succession occupancy tenancy—Adopted son of occupancy tenant associating strangers with him—Right of collateral heirs of the adoptive father to succeed to adopted son dying childless. 76 P. R, 1907. *See Punjab Tenancy Act XVI of 1887.*

(l) KHANADAMAD.

49 *Khanadamad--Daughter--Bangial Jats of Gujrat District.*

Found, that by custom among Bangial Jats of the Gujrat District a married daughter is entitled to succeed her father, a sonless proprietor, where he has settled that daughter and her husband in his house and on his land, with a view to their succeeding him as his heirs to the exclusion of his collateral. It is not necessary that the resident son-in-law must be the first husband of the daughter. The second husband also succeeds even if he happens to have been resident son-in-law in his first wife's family, her first father-in-law having died before the second marriage. Delivery of possession before death by the father-in law is not a necessary condition for succession of the resident son-in-law. *P. R. 56 of 1878, 24 of 1879, 67 and 162 of 1882, 15 of 1884, 45 of 1885, 31 of 1895, referred to.* SAMMAN *v.* ALA BAKHSH, **106 P R., 1901.**

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(m) PATTIDARS.

50 *Escheat* Bhayachara *village--Right of* Pattidars *on the death of an owner without heirs--*Rors *of Murtazapur village, Karnal District.*

Held, that on the whole it has never been definitely decided by the Chief Court that the members of a village community are the ultimate heirs of any co-sharer among them who dies without heirs in every instance, without regard to the constitution of the village or the facts of the particular case which comes up for decision.

Held, that the plaintiffs, *pattidars* of Murtazapur village in the Karnal District, belonging to the *Ror* caste were not entitled by custom to succeed as mere *pattidars* to the land of a Jat who had died without heirs, the village being a *Bhayachara* one owned by miscellaneous castes and tribes. HARNAM SINGH *v.* PARTAB SINGH, **102 P. R. 1906 =129 P. L. R. 1906.**

(n) PRIMOGENITURE.

51 *Kunjpura Nawabs family--State property--Primogeniture -- Succession to private property by Mahomedan Law.*

Held, that, in the Kunjpura family of the Mahomedan Nawabs, the special custom of primogeniture does pevail as regards succession to all property which formed part of the Kunjpura State before 1849; and that as regards the rest, the personal law of the parties, *i. e.*, Mahomedan Law applies.

Found, that all lands which were owned by that State as State before 1894, including all the lands then in the Mawab's possession and so entered in the Settlement Records of 1852, form part of the State property. NAWAB AHSAN ULLAH KHAN *v.* NAWAB MUHAMMAD IBRAHIM ALI KHAN, **77 P W R 1908=47 P R 1908 177 P L R 1908.**

(o) SISTER.

52 *Sister's right of inheritance--Nature of her right.*

When a proprietor, following the customary law of the Punjab, dies leaving no sons but a sister, the sister should, for the purposes of inheritance, be regarded as only the sister of that proprietor, and not as a daughter of his father. 103 P R 1900, 110 P R 1906, (F B), Diss; 117 P R 1888, 171 P R 1888, 46 P R 1891 (F B), D; 134 P R 1907 (Note), followed. HAMIRA *v.* RAM SINGH, **74 P L R 1908=85 P W R 1907=134 P. W. R. 1907.** = 134 P.R. 1907

53 *Sister and Collaterals--Onus.*

Where a man, having no brothers, dies sonless in a tribe in which the daughter excludes the collaterals, it cannot be held that his sister has the same rights as a daughter and also exclude, collaterals. The burden of proof lies upon her to prove a

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special custom in her favour, when she is contesting, with ascertained collaterals, however distant, the right to inherit the property of the deceased—71 P R 1892. 24 P R 1905, 41 P R 1895, 46 P R 1895, 4 P R 1891 (F B), 12 P R 1892 (F B), 171 P R 1888, 140 P R 1893, 172 P R 1889, referred to and distinguished. SAIDAN BIBI *v.* FAZAL SHAH, **134 P R 1907** (Note)=**85 P W R 1907** (App.)=**74 P L R 1908** (Note).

54 *Sisters—Jats of Rupar Tahsil, Umballa District.*

Held, that according to custom prevailing among Jats of Rupar Tahsil of the Umballa District sisters have a preferential right to succeed their deceased brother's property than his distant collaterals and the proprietary body. BISHEN SINGH *v.* BHAGWAM SINGH. **28 P R 1904=64 P L R 1904.**

55 *Punjab Laws Act (IV of 1872), Section 5—Custom—Muhammadan Law—Succession—Onus—Sayads of Amballa City.*

The person who alleges a custom contrary to some precept of his personal law is *prima facie* bound to prove the custom. But where a rule of custom is known to be generally widely prevalent, or where it has been found to govern a particular tribe, or to obtain in a particular locality in a series of judicial decisions of the Chief Court, or where the *onus* of proof in regard to a particular custom has been laid down by a Full Bench of the Chief Court, the Courts may start with an initial presumption in favour of its existence.

It clearly lies in all cases upon the party setting up a custom differing from his personal law to prove the existence of that custom by one or other of the modes of proof recognized by law and procedure. If no custom is affirmatively proved, the rule applied to govern the case must be the personal law of the parties. If one custom is alleged by one side and a different one is alleged by the other and neither side succeeds in proving the existence of the custom set up by him the Courts must, under section 5 of the Punjab Laws Act, fall back upon the personal law of the parties as the rule to govern the case.

The plaint alleged that contrary to the general custom of agriculturists one *Mussammat* Nasiban had made a gift of certain house-property to her daughter, who in her turn had gifted it to her husband, the defendant. The plaintiffs, male collaterals of *Mussammat* Nasiban's husband, already in possession of their agricultural land, claimed the property, according to custom, on the death of the defendant's wife. The parties to the suit were Shiah Sayads, who lived in the City of Amballa, where they owned house property, and made their living in many cases by private service neither practising agriculture nor living by its proceeds.

Held, that it was for the plaintiffs to prove affirmatively that the parties were governed by agricultural custom, and that according to that custom they were entitled to succeed to the property claimed in preference to the defendants.

Held, also, that it was proved that though some of the members of the family or connections, when it suited them, had tried to take advantage of the agricultural custom, there was nothing to show that the main body had shown any tendency to surrender the principles of their personal law. No special custom having been proved personal law of the parties governed the case, under which the plaintiff's case must be dismissed.

Where a widow is found enjoying the whole of her husband's property to which she has succeeded on the death of her husband, particularly if that property or any substantial part of it is landed property, and it is shown that the widow under the personal law would have succeeded to something much less in extent the presumption is, that the widow has only succeeded for her life. But the presumption does not arise when the widow succeeds to an estate identical in extent with that which she would have succeeded to under her personal law. MUHAMMAD HUSSAIN *v.* SULTAN ALI. **54 P R 1903.**

56 *Sister*—Bhatias *of Bannu.*

Held, that among the parties to the suit, *Bhatias* of Bannu, who originally came from Gujrat in the Bombay Presidency, where according to custom prevailing in their community modifying the personal law sisters succeeded their deceased brother's property the sister was entitled to succeed for life or until marriage to the estate of her brother. WASNA RAM *v.* *Mussammat* UTTAM (DEVI) BAI. **165 P L R 1903=79 P R 1903.**

(p) SISTER'S SON.

57 Sister's son—Ghirths of Tika Bonehr of village Baldhar, Kangra District—Escheat 95 P R 1905—47 P L R 1906 *See Custom of the Punjab Escheat No. 2.*

58 *Sister's issue and* ala-malik—*Thakar Rajputs in Dada Siba Jagir, Congra District*

By the custom prevailing among the Thakar Rajputs, a sister's son cannot inherit his maternal uncle's property in preference to the *Jagirdar Ala Malik.* The burden of proving that a sister's issue comes within the category of heirs rests upon the persons so alleging. 175 P. R. 1888 referred to. GURDITTA *v.* JAI SINGH. **72 P. R. 1907=31 P. L. R. 1908.**

(q) SONS.

59 Chundawand and Pagwand—Pagwand—Rathis of Palampur. 22 P. R. 1902 Col.

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60 Chundawand and **Pagwand** — Sarai Jats of Dholpur village, **Batala Tahsil**, Gurdaspur District. 142 P. L. R. 1906 Col. 416 P. II.

61 *Chundawand--Bedis of Chawbinda village, Sialkot District.*

It was not established that the *Chundawand* rule of succession governs Bedis of Chawinda village of the Sialkot District. BAWA SANT SINGH *v* GANGA SINGH. **P. R. 47 of 1901.**

62 Chundawand. Pagwand---Whole and half blood--Rajputs of Hoshiarpur Tahsil. 31 P. R. 1903--14 P. L. R. 1904 Col. 416 P. II.

63 Chundawand — Pagwand — Tribal family—Yusafzai Pathans of Dujana, Rohtak District. 127 P. L. R. 1904—29 P. R. 1905 Col. 416 P. II.

64 Pagwand-- Chundawand--Sheikhs *of Mulana village, Amballa District.*

Held, that by custom the *Pagwand* rule of succession prevailed among the *Sheikhs* of Mulana village, Amballa District. QAMAR-UD-DIN *v.* NASIR-UD DIN. **126 P. L. R. 1905=11 P. R., 1905.**

65 *Chandawand. Samra Jats, Tahsil Hafizabad, Gujranwala District—Rule of succession, pagwand or chandavand.*

The *pagwand* and not the *chandawand* rule of succession governs the Samra Jats, *Tahsil* Hafizabad, Gujranwala District— 4 P R 1891; 29 C 433 (P.C) 12 P R 1899; 101 P R 1879, R; 84 P R 1893, explained. LABH SINGH *v.* SUNDAR SINGH, **148 P. R. 1908.**

66 *Custom—Inheritance—Special family custom—Onus probandi—Pathans of Desa, Rawalpindi District.*

In this case the defendant pleaded that the whole property left by his father descended to him by special family custom, the other sons being merely entitled to maintenance.

Held, that the parties being agriculturists of Western Punjab and the ordinary rule of inheritance among them being that of equal succession of all the sons the burden of proving a special family custom lay on the defendant. A special family custom must be proved to be ancient and invariable by clear and unambiguous evidence.—*14 M. I. A. 70, 11 Bom., H. C. R. 249, 1 Cal. 186, 10 M. I. A., 511 and 537, 8 Cal., 826, followed.*

Held, upon evidence that no such special family custom was proved to exist among the parties to the case who were Pathans of Desa in the Chachh Ilaqa of Rawalpindi District. ZERIF KHAN *v.* AMIR KHAN. **85 P. R. 1901.**

67 *Son as a collateral to the last male owner —Custom—Succession--Muhammadan Law.*

F. and *S.* were brothers, the former having no sons but a daughter, N., and the other brother having two sons, *H.* and *K.* *H* had one son, *A*, the defendant. *N's* first husband was her cousin, *H A* being their son. Her second husband was Kasam, and their sons were plaintiffs who claimed to inherit the property left by their mother, *N.*, which she had inherited from her father, *F. A.* defendant contended that he alone was entitled to inherit the property, being a collateral of *F.*, through his father, *H.*

Held, that the contention of the defendant, *A.*, was not sound. ALAM *v.* AKBAR ALI. **P. L. R. 72 of 1901=52 P. R. 1901.**

68 *Son of a predeceased collateral--Right of representation among Muhammedan Kashmiris of Banga, Tahsil Nawashahr, Jullundar District.*

In matters of inheritance, the Mahomedan Kashmiris of Banga are governed by custom, and not by Mahomedan Law, and among them, therefore, the son of a predeceased son is entitled by custom to succeed to his grandfather's property by right of representation. 54 R 1906, 114 P. R. 1893, 80 P. R. 1882 referred to. SIRAJ-UD-DIN *v.* MUHAMMAD FARUK, **8 P. R. 1907=47 P. W. R. 1907.**

69 *Custom--Muhammadan Law--Succession--Right of representation--Sufi Sayads of Ludhiana City--Adverse possession--Permissive possession--Absentee--Possession on behalf of wife.*

The parties being *Sufi Sayads* of Ludhiana City, plaintiff, uncle of the defendant, sued for declaration of his right to the property belonging to his father and grandfather of the defendant, alleging that the defendant's father having predeceased his father according to Muhammadan Law, the plaintiff excluded the defendant.

He also claimed declaration of right to land belonging to his maternal uncle which he alleged was in the possession and management of his father by reason of the latter having married plaintiff's mother.

Held, (1) that it was proved that the family of the parties had long since lost sight of the elaborate rules of inheritance prescribed by Muhammadan Law under which a son excludes from inheritance the sons of another son, who has predeceased their father and (2) that, in the absence of gift or acquisition of title by adverse posession, the possession by plaintiff's father of the land belonging to plaintiff's maternal uncle must be held to have been on behalf of plaintiff's mother, and the plaintiff was entitled to the declarations sought for. SAYAD ATA MUHAMMAD *v.* NUR-UL-HASSAN, **25 P L R 1906.**

70 *Shamsi Khojas of Lahore,—Custom and not Mahammadan Law—Succession-Presumption —Practice, Representation, right of.*

There is no initial presumption in favour of the personal law as to matters of inheritance under the provisions of the Punjab Laws Act, the parties being townsmen and not members of an agricultural tribe. The initial presumption, if at all, is in favour of their being governed by custom which must in each case be ascertained by in-

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vestigation and enquiry. The Court must ascertain at first the rule of decision by enquiry into the alleged custom, and, on failure of proof of such custom, apply the provisions of the personal law. But the question must be approached with a free mind without any bias in favour of the personal law being applicable. 81 P R 1874 *Appr*, 4 P R 1888, 47 P R 1900, 30 P R 1903, 54 P R 1903, 54 P R 1906, referred to.

In matters relating to succession, the Shamsi Khojas, Lahore, despite their conversion to Islam, follow and are governed by the rules of Customary Law as found to prevail generally, and not by the strict provisions of the Mahomedan Law. 27 P R 1868. 39 P R 1894, 52 P R 1888, referred to.

The rule of Mahomedan Law, which exculdes issue of predeceased persons from succession, is wholly inapplicable to Shamsi Khojas, Lahore. The usage relating to representation in case of collateral succession, though opposed even to the provisions of Hindu Law, is found to prevail generally in Punjab, without distinction of caste, creed and calling. So sons of a predeceased collateral have a right to succeed by right of representation in presence of their uncle. 91 P R 1879, 80 P R 1882, 71 P R 1882, 39 P R 1884, 3 P R 1890, 8 P R 1907 *cited*. MEHTAB UD-DIN *v.* ABDULLAH. **63 P. W. R. 1907=143 P. R. 1908.**

71 *Son of a predeceased collateral—Muhammadan Law—Kaka Khels of Parang Kandi Akhund Khel of Peshawar District—Right of representation—Grandsons whose father died during his father's lifetime.*

Found, that by custom prevailing among Kaka Khels of Parang Kandi Akhund Khel of Peshawar District, the son of a father who has predeceased him succeeds to the property of the grand father as representing his father and is not passed over. KHARUD MIAN *v.* BADSHAH. **50 P. R. 1904=83 P. L. R., 1904.**

72 *Son of a second wife—Right of sons of widow's second husband in her first husband's estate*—Sikh Jats *of Sirsa Tahsil.*

Held, that the plaintiff, on whom the burden of proof lay, had failed to prove that among *Sikh Jats* of Sirsa Tahsil, District Hissar, the son of a widow by her second husband takes the property of the first husband to the exclusion of the male collaterals of the latter. KANWAR SINGH *v.* SAMPURAN SINGH. **75 P. R. 1906.**

(r) Son-in-Law.

73 *Gujars of Gujrat—Right of son-in-law of* Khanadamad *to inherit.*

Among Gujars of Gujarat District, the son in-law of a *Khanadamad* cannot be appointed *Khanadamad* and heir to the ancestral estate left by the appointer of the first *Khanadamad*. 96 P. R. 1892, 129 P. R. 1894, 19 P. R. 1906, 91 P. R. 1906, referred to. SHARFS *v.* RAMZAN. **126 P. W. R. 1907=14 P. R. 1907=20 P. L. R. 1908.**

(s) Widow.

74 Widow—Life-estate—Absolute estate—Onus probandi. 74 P. R. 1902 Col. 1574 P. I.

75 *Widow—Muhammadan Law.*

Held, that in matters of succession that the parties to the suit, *Jatoi Biloch* of Muzaffargarh District, were in the absence of proof of special custom, governed by Muhammadan Law. *Mussammat* BAKHT WADI *v.* SAYAD KHAN. **66 P. R. 1902=105 P. L. R. 1902.**

76 *Widow—Sahswal Rajput of the Fatehjang Tahsil, Attock District.*—

A childless widow of a Sahswal Rajput of the Fatehjang Tahsil, Attock District, herself belonging to the inferior tribe of Maliars, takes the usual life-estate in her deceased husband's property, and is not merely entitled to maintenance. Neither the *Wajib-ul-arz*, nor the *Riwaj-i-am*, is against such right of the widow. 44 P R 1907 referred to. PIR BAKHSH *v.* SARDAR BANO. **73 P. R, 1908=144 P. W. R. 1908.**

77 *Widow—Whether entitled to succession or maintenance—Jagirdar Khatri Sodhis of Ferozepore District.*

Held, that the plaintiff, who set up a special custom that among Jagirdar Khatri Sodhis of Ferozpore District, a widow of a deceased proprietor was entitled merely to maintenance, and not to a life estate, in the landed property of her deceased husband, had failed to prove the custom set up by him. HUKHAM SINGH *v.* BHAGWAN DEVI, **133 P R 1908.**

78 *Widows life estate—Collaterals succession—Nephews—Right of representation—Gardezi Sayads of Multan District—Limitation—Effect of entry in Wajib-ul-arz—Estoppel—Purchase of property claimed.*

In a case of succession among Gardezi Sayads of Multan District, *found*, that the plaintiffs were entitled by custom to succeed, by right of representation, to the share of their father, on the death of their uncle's widow, in the property of their uncle and to recover it from the defendant, another uncle, who had previously obtained it by suit from the widow.

The widow was held by custom to have succeeded to a life interest in her husband's immovable property; and the plaintiffs' suit filed within twelve years from the death of the widow was held not barred.—*P R 4 of 1888, commented upon; P R 18 of 1889 followed.*

Held, also, that the plaintiffs were not estopped from claiming the property in dispute by reason of their having purchased a portion of the property of their deceased uncle from the defendant who had bought it from the widow.

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The *Wajib-ul-arz* of a village is to be presumed to apply to landowners in that village as a body, and it could clearly be held applicable to all such owners unless they are specifically exempted. It is not specific mention that is looked for in a village administration paper, but specific exemption. The case of a *Wajib ul-arz* is totally different from, and its force is far greater than a mere entry in a *Rawaj-i-am.* SAYAD RAHIM SHAH *v.* SAYAD HUSSAIN SHAH. **119 P L R 1901.**

79 *Widow's right to inherit husband's share in joint ancestral property—Brahmins of Karnal City.*

Held, that by custom prevalent among the non-agricultural Brahmins of Karnal City, a widow was entitled to succeed to the share of her deceased husband in joint ancestral property. GOKAL CHAND *v.* RAJA DEVI. **197 P L R 1905—83 P R 1905.**

80 *Widow's right to inherit husband's share--Succession--Widow--Step-son---Arains of Ludhiana District.*

Held, that according to custom prevailing among Arains of Ludhiana District, a widow is not entitled to succeed to the property of her deceased husband when the latter has left surviving him sons by another wife. ELAHI BAKHSH *v.* KHEWNI. **116 P. R. 1906=93 P. L. R. 1907.**

81 *Widow of predeceased son, if succeeds to a life, interest in her father-in-law's estate. Isa Khel Pathans of Tehsil Isa Khel, Mianwali District.*

Where the parties are Isa Khel Pathans of *tahsil* Isa Khel, Mianwali District, *held*, having regard to the custom prevalent among them, and the conduct of the parties, that the widow of a son who has predeceased his father is, on the death of her father-in-law, entitled to succeed to a life-interest (either jointly with the widow of her father-in-law, if there be any such, or solely if her father-in-law, has left no widow) in the property of the deceased. 18 P. R. 1898, 157 P. R. 1889 (F. B.) referred to. MEHR KHAN *v.* AZIZ ULLAH. **158 P. W. R. 1908=84 P. R. 1908.**

82 *Widow of predeceased son is not entitled to inherit under Hindu Law—Khatris of Akalba village, District Ludhiana.*

In the absence of custom to the contrary the widow of a predeceased son is not entitled to inherit under Hindu Law, Mitacshara, as applicable to the Punjab, property left by her father-in-law in the presence of collaterals related to him in the 4th degree. Nor does she take by survivorship, not being a joint owner with her father-in-law.

Held, that no custom was proved to exist amongst the parties to the suit who were *Khatris* of Akalba village in the Ludhiana District, under which a widow of a predeceased son could succeed to the property of his father-in-law. RADHA MAL *v.* MUSSAMMAT KIRPI. **100 P. R., 1901.**

83 *Widow's right to succeed to husband's collateral—Johal Jats of Ludhiana District.*

Found, that in the Ludhiana district among Johal Jats the widow of a sonless proprietor succeeds on a widow's tenure to the property of her husband's brother to which her husband could have succeeded. 20 P. R., 1895, 56 P. R., 1891, 133 P. R., 1893, 146 P. R. 1889, 77 P. R. 1893, 112 P. R., 1900 s. c , P. L. R., 1900 P. 471, 69 P. R. 1896, referred to. SADDAN *v.* KHEMI. **117 P. L. R. 1906=15 P. R. 1906.**

84 Right of collaterals' widow to contest such alienation — Alienation by widow. Ghirths of Kangra District. 72 P. R. 1906 Col. 439 P. I.

85 *Widow's right—Collateral succession.*

Sona, Channan and Sawan were three brothers. Sona died first and his widow succeeded to his property. After Sona died Sawan and his property was inherited by Channan his brother and his deceased brother Sona's widow in equal shares. Afterward Channan died and his son Hamira inherited his property which devolved on his widow on his death, Channan's widow getting maintenance only. On the death of Sona's widow dispute arose as to the succession of property left by her between the widows of Channan and his son Hamira.

Held, that Channan's widow was the preferable heir, for had Channan been alive it was he and not his son Hamira who would have succeeded on the death of Sona's widow. ANAR DEVI *v.* KAULAN. **112 P. L. R. 1905=43 P. R. 1905.**

86 Widow's right—Remote collateral's right to sue in the presence of a near collateral's widow 44 P. R. 1905. Col. 2109. P. I.

87 *Widow's right to succeed to property of her husband's collaterals—Rajputs of Kangra.*

Held, that by custom prevailing among Rajputs of Kangra District, a Hindu widow is entitled to succeed for life to the property of her deceased husband's *near* collaterals. *P. R.*, 90 *of* 1888 ; 56 *and* 111 *of* 1891, *referred to.* *Mussammat* BADAMON *v.* LEHNU. **93 P. L. R. 1904.**

88 *Widow with sons—Custom—Succession—Widow claiming definite share in her husband's estate along with his sons—Chohan Rajputs of Rawalpindi District.*

Although the widow's succession to a share of her husband's property along with his sons is not absolutely unknown, it is extremely rare in the Customary Law. Evidence of such a peculiar custom ought to be strong and cogent.

Held, that in the present case the widow had failed to prove a custom among Chohan Rajputs of Rawalpindi District, to which class the parties belonged, under which she could claim any definite share of her husband's land in the presence of sons.

That the evidence showed that in cases like the present the general rule is to allot

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maintenance to the widow particularly if she happens to be a step mother of the sons in the shade of a quantity of her husband's land sufficient for the purpose instead of leaving her dependent upon a cash or grain payment by the latter. SHER KHAN *v.* *Mussammat* BIVI. **38 P. L. R. 1905—30 P. R. 1905.**

89 *Widow's unchastity—Custom—Succession —Widow—Exclusion from succession on the ground of unchastity—Alienation—Right of reversioner.*

In a suit by reversioners to set aside a sale of property inherited by a widow as made without necessity, the allegation by the plaintiffs that prior to the date of the sale the widow had become unchaste and had by custom forfeited her right to the property left by her deceased husband cannot be enquired into. BAINTA *v.* ACHHAR. **188. P. L. R. 1905.**

(t) WIFE'S PROPERTY INHERITED BY HER FROM HER FATHER—ANCESTRAL.

90 *Custom—Succession—Ancestral property —Property inherited by females—Husband's right to succeed on his wife's death to ancestral property belonging to his father-in-law held by his wife.*

In a village community, where a daughter succeeds, either in preference to, or in default of, heirs male to property which, if the descent had been through a son, would be "ancestral," she simply acts as a conduit to pass on the property as ancestral to her sons and their descendants, and does not alter the character of the property simply because she happens to be a female.

The property in suit, situate in the Moga Tahsil of the Ferozepur District, belonged to the plaintiff's father-in-law as his ancestral property. On his death mutation in the Revenue Records was effected in favour of his widow, and on the latter's death in favour of plaintiff's wife. On the death of his wife the plaintiff claimed the property against his father-in-law's collaterals. The plaintiff did not set up his claim as khana-damad.

Held, that the plaintiff was not entitled to succeed, as the possession of his wife must be regarded as permissive, and that she did not acquire by adverse possession an estate inheritable by her husband. KALA SINGH *v.* BUTA SINGH, **38 P. L. R. 1903=16 P. R. 1903.**

XI Maintenance.

1 Inheritance—Chohan Rajputs—Rawalpindi District—A childless widow's right to share in husband's property. 38 P. L. R. 1905. *See Custom of the Punjab Inheritance and Succession No. 88.*

2 *Mortgage—Custom—Alienation by childless male proprietor—Mortgage—Death of proprietor after mortgage—Subsequent mortgage by sister of proprietor who took possession "for life or until marriage"—Right of subsequent mortgagee to redeem the prior mortgage.*

Some land, a house, and a mill belonging to a minor childless, male proprietor were mortgaged by his guardian to the defendant. The proprietor died and his sister came into possession "for life or until marriage". She mortgaged the land to the plaintiff authorising him to redeem the defendant's mortgage. The defendant objected that the plaintiff's mortgage was invalid by custom and his suit for redemption did not lie.

Held, that the contention had no force. NADIR KHAN *v.* MOHIN KHAN. **61 P. L. R. 1905=98 P. R. 1905.**

XII Marriage.

1 Marriage—A khatri Kuka Sikh married a Tarkhani Jat woman—Hindu Law. 15 P. L. R. 1907 Col. 63 P. I.

2 *Marriage of a Bedi Khatri with a Brahmini—Will—Hindu Law.*

A Bedi Khatri married a Brahmini and before his death made a Will in respect of his property in favor of the son born of the union.

Held, that the parties not being shown to have been agriculturists the Will was not open to any objection on the part of the testator's brother and nephews who contended that the Will was in operative and the testator's son being illegitimate had no right to succeed to the property of the testator. PREMAN *v.* SANT RAM. **77 P. L. R. 1906.**

3 *Exchange-marriages. Validity of—Damages in case of breach—Hindu Law.*

Where the only consideration for the marriage of a girl is a sum of money to be paid for her, the contract would be one void as opposed to public policy.

A family arrangement amongst persons of the same class, by which the family A, gives a girl to be taken as a wife, on equal terms, into a family B, and a girl of a family B is at the same time given as a wife into family A, stands on a totally different footing from what is really the sale of a girl, the suitability of the marriage and the prospective happiness of the girl being entirely lost sight of in the latter case in view of the pecuniary gain.

A number of *Khatris*, all of the same caste and community, arranged a number of marriages amongst themselves, none of which was shown to be *prima facie* unsuitable or undesirable. There was nothing to show that the performance of any one of the betrothal contracts was to be made dependent on the previous performance of any of the others. The arrangements were made independently of each other, though at one and the same time.

Held, that the betrothal contracts were not opposed to public policy and damages could be recovered on breach of them.

Custom of the Punjab Marriage (*Contd.*)

AMIR CHAND *v.* RAM. **50 P R 1903= 95 P L R 1903**

4 Marriage between a Khatri and a Khatrani widow—Chadarandazi—Legitimacy of issue—Inheritance. 2. P L R 1905 Col. 63 P I.

5 *Marriage of a Rajput with a Khatrani—Evidence—Treatment as wife—Onus.*

Held, that under the Hindu law, the marriage of a *Rajput* with a Khatrani woman is not invalid 1 M H C 478, 13 M I A 141, 14 M I A 346, 22 B 277, 9 W R 552, 1 C 1 15 C 708, 18 C 264, 73 P R 1897, 51 P R 1900 48 P R 1890, R; 2 B 128, *D* 29, P R 1882, 57 P R 1893 *not* followed and that the defendants on whom the *onus* lay 13 M I A 121 and 8 A 143 followed had failed to establish any custom to the contrary among the *Bhadiar Rajputs* of the Kangara district.

Where it was alleged that the marriage in dispute took place more than fifty years ago and it was shown that the woman was recognsied as a married wife and her son as a legitimate issue by the alleged husband—

Held, that under the circumstances of the case the marriage must be held as proved. HARIA *v.* KANHAYAN, **64 P. L. R. 1908.**

6 Marriage of Rajputs with a Mahajan woman KHAIRU *v.* FAKIR CHAND. **150 P L R 1908=114 P W R 1908.** *See Hindu Law Marriage.*

XIII Occupancy Rights.

1 Occupancy tenant's adopted son—Succession to occupancy tenancy. 32 P L R 1908. *See Custom of the Punjab Inheritance and Succession No 3.*

2 Occupancy right, creation of—Sayads of Mauza Khanpur, Hoshiarpur District. 66 P. L. R. 1906. *See Custom of the Punjab Alienation No. 41.*

3 Occupancy right, gift by a Chimba to her daughter's son. 60 P. W. R. 1907 Col. 409 P. II

4 Occupancy right—Succession of adopted son—Adopted son of occupancy tenant associating strangers with him. 76 P. R. 1907. *See Custom of the Punjab Inheritance and Succession No. 48.*

5 Occupancy right—Alienation of—Reversioners right to contest. 98 P. R. 1907—62 P. W. R. 1907 Col. 313 P. II.

XIV. Partition.

1 *Partition—Widow's right to partition.*

It is settled law in the Punjab that a widow cannot claim a partition of the joint estate in which she possesses a life interest accruing on the death of her husband. SODHI WARYAM SINGH *v.* *Mussammat* HARNAM KAUR. **P. L. R. 131 of 1901.**

XV Pre-emption.

1 Agricultural land converted into building site.
2 Ala malik.

Custom of the Punjab Pre-emption (*Contd.*)

3 Bhaya chara Tenure.
4 Concealment of sale.
5 Co-sharer.
6 Decree for pre-emption against father, suit by son to contest alienation.
7 Effect of Act II of 1905 on custom.
8 Exchange of land.
9 House property.
10 Jagir villages.
11 Mortgage.
12 Occupancy rights.
13 Ownership of opposite house.
14 Owner of site.
15 Patni village in Dera Ghazi Khan.
16 Pattidari village.
17 Presumption as to.
18 Purchaser improvements.
19 Relationship.
20 Resale to vendor.
21 Rewaj-i-am.
22 Sale or gift.
23 Sale or mortgage.
24 Shops.
25 Shops and houses.
26 Speculation, pre-emption suit, Alienation—Necessity.
27 Sub-division.
28 Taraddadkars.
29 Vicinage.
30 Waiver.
31 Wajib-ul-arz.

1 Agricultural land converted into building site.

1 *Agricultural land in suburbs of Lahore, converted into building sites—Absorption of the land by Lahore City—Onus.*

Certain plot, originally belonging to a certain village in the suburbs of Lahore City, and which was agricultural land, was made the site of about 200 buildings and was absorbed, within recent years, within the limits of Lahore City.

Held, that the land was not "agricultural land" within the meaning of the Punjab Tenancy Act of 1887, as it had become a part of the City, and that there was no presumption as to custom of pre emption in respect of sale of such land. 87 P. R. 1890 and 21 P. R. 1900, R. 66 P. R 1903 (P. C), *cited*.

Held, also that the pre-emptor, on whom lay the burden of proving a custom of pre-emption in respect of that part of Lahore City, or in Lahore City generally, had failed to prove it. MUHAMMAD DIN *v.* SHAH DIN. **90 P. R. 1907.**

2 *Civil station of Amritsar—Sale of agricultural land—Pre-emption by reason of vicinage.*

There is no custom of pre-emption, on sale of agricultural land, on the ground of vicinage, in the civil station of Amritsar. 21. P. R 1906, 22. P. R. 1906 approved; 7. P. R, 1893. 153 P. R. 1888 distinguished. ISHWAR DAS *v.* DUNI CHAND. **27 P. R. 1907=70 P. L. R. 1908.**

Custom of the Punjab Pre-emption (*Contd.*)

Appr.; 7 P. R. 1896, 153 P. R. 1888, *D.*

(2) ALA MALIK.

3 *Pre-emption—Punjab Laws (Act IV of 1872), Section* 12 (a)—Ala Malik.

Where the vendor, the vendee and the pre emptor were all *adna maliks* in the *kandi* where the land sold was situated and the pre-emptor claimed superior right of pre-emption for being *ala malik*of the land sold—

Held, that the claim was not valid, for he could not be considered a co-sharer with the *adna maliks*, his interest being of an entirely different character. (*Kazi*) ABDUR RAB KHAN *v.* FAZAL MAHMUD. **64 P. R 1904 112 P. L. R. 1904.**

3 BHAYACHARA TENURE.

4 *Custom—Pre-emption—Sayads of village Bal Sayadan, Fattehjung Tahsil, Rawalpindi District—Relationship – Bhyachara tenure.*

Held, that by custom of pre-emption prevalent among Sayads in the village of Bal Sayadan, Fattehjang Tahsil, Rawalpindi District, the plaintiffs, Sayads, who were the first cousins of the vendor, had a superior right of pre-emption over the vendee who was a Khattar proprietor in the same village. KARAM SHAH *v.* TORA SHAH. **43 P. L. R 1906=87 P. R 1905.**

5 Bhayachara *village,-Relationship--Proof of special custom--Value of chakwar wajib-ul-arz--Document containing custom of whole Tahsil tribe by tribe--Earlier and later wajib ul-arz, conflicting--Ss. 31 (2) (b) and 44, Act XVII of 1887 (Punjab Land Revenue).*

In a pre-emption suit of land in a *bhayachara* village, the grounds were the agnatic relationship of the plaintiff to the vendor and his being a *jaddi malik*, whereas vendee was a *malik* by purchase. The plaintiff should prove a special custom to that effect.

The *chakwar wajib-ul-arz* is not, properly speaking, part of the settlement record, which is a village record and, therefore, no presumption of correctness attaches to it under S. 44 of the Act. 87 P. R. 1905 and Civil Appeal 127 of 1899 referred to.

Even if it be taken to form part of the settlement record, the circumstance that it states the custom of pre-emption as *tribal*, whereas pre-emption is peculiarly a *local* custom, deprives the entry of all its presumptive value 26 C. 81 (P. C) referred to.

Where a village *wajib-ul-arz* states no custom, but does not exclude it, the party alleging a special custom must prove it. A document, in which customs are stated for a whole Tahsil, tribe by tribe, inasmuch as it does not deal with rights and liabilities "in an estate," cannot be said to fall within S. 31 (2), cl. (*b*). Having, therefore, no presumptive value, it only helps to prove them, and serves as a guide to enquiry, but actual instances of enforcements of the customs stated are necessary.

Custom of the Punjab Pre-emption (*Contd.*)

The value of even a genuine *wajib-ul-arz*, favouring relatives in the matter of pre-emption and standing unsupported by actual proof of custom, followed by a later *Wajib-ul-arz*, in which the "law" of Act IV of 1872 is stated to contain the rule of pre-emption, is so small as to be virtually *nil*. Technically, the value is not *nil* 52 P. R. 1896 and 35 P. R. 1905 referred to. But even negative indications, the other way, are sufficient to reduce its value to nothing 27 P. R. 1893, 98 P. R. 1894 (F. B) 52 P. R. 1896, 78 P. R. 1904 35 P. R. 1905 and 70 P. R. 1905 referred to GULDAD KHAN *v.* GUL KHAN. **44 P. R. 1907=82 P. L. R. 1908**

(4) CONCEALMENT OF SALE.

6 Suit for pre-emption—Fraud 27 P. L. R, 1903 col. 1771 P. I.

(5) CO-SHARER.

7 *Kucha Billa Kabutarbaz in Mohalla Kabuli Mal—Inference of custom—Co-sharer's superior pre-emption.*

The custom of pre emption prevails in *Kucha* Billa Kabutarbaz in *Muhalla* Kabuli Mal.

Where, in a small blind alley, no case of pre-emption has occurred, but, in lane running into it, cases of pre-emption have occurred, it is a reasonable inference that the custom of pre-emption prevails in the blind alley 83 P. R. 1903, 6 P. R. 1905 referred to.

The right of pre-emption of a co sharer in the property sold is superior to that of the owner of a neighbouring house 71 P. R. 1905 referred to. ALLAH DITTA *v.* RAJ KUMAR. **138 P. R. 1907.**

8 *Custom—Pre-emption— Sale to a person not co-sharer in the joint holding—Sale by vendee to a co sharer before suit—Rights of other co-sharers.*

A co-sharer in a joint undivided holding sold his share in the holding to a person who had no share in it. The plaintiffs as co-sharers brought a suit for pre-emption. The vendee had sold the land to another co-sharer before the suit was brought. The suit was dismissed. On revision it was contended that the plaintiffs had a right to ignore the second sale, and that in any case they were entitled to claim proportionate shares along with the second vendees.

Held, that the contentions were not valid and the suit was rightly dismissed. *P. R. 73 of 1898 and 94 of 1904 (F. B) S C. 103 P L. R., 1904 (F. B.) followed, P. R., 111 of 1901 has been overruled by P. R. 94 of 1904 (F. B.) S. C. 103 P. L. R., 1904 (F. B.).* TOPAN MAL *v.* DITTA. **47 P. L. R. 1905.**

9 *Pre-emption—Loss of right—Vendee becoming co-sharer before institution of suit,*

Held, that the plaintiff, who was at the date of sale a co-sharer in the land in suit, could not claim pre-emption in respect of

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the sale of that land as against the vendee who at the date of sale was not a co-sharer therein but became a co-sharer before the plaintiff instituted his suit for pre-emption 138 *P. R.*, 1884; 73 *P. R.*, 1898; 47 *P. L. R.*, 1905; 49 *P. R.* 1901, s. c, 157 *P. L. R*, 1901; 95 *P. R.* 1901; s. c., 125 *P. L. R.* 1901; 32 *P. R.* 1902; s. c., 30 *P. L. R.* 1902; *I. L. R. XXVI* All. 389, *XXI* All. 374, 441; 75 *P. L. R.* 1903 *referred to. Sardar* DARCHAN KHAN *v.* SOHAURA MAL. **3 P. L. R. 1907 =48 P. W. R. 1907 =124 P. R. 1907.**

(6) DECREE FOR PRE-EMPTION AGAINST FATHER, SUIT BY SON TO CONTEST ALIENATION.

10 Sale—Decree in the Pre-emption suit—Collusion—Costs. 72 P. L. R. 1904 Col. 2116 P. I.

(7) EFFECT OF ACT II. OF 1905 ON CUSTOM.

11 Change of rule as to custom of pre-emption—Persons having the right to sue at the commencement of the Act. THAKARIA *v.* DAYA RAM. **143 P. R. 1907.** *See Act II of 1905 (Punjab Pre-emption).*

(8) EXCHANGE OF LAND.

12 *Punjab Laws Act (IV of 1872), Section 12—Exchange of land.*

Where two co-sharers in a joint undivided holding had exchanged certain specified quantity of land out of their share in the holding with the same quantity of land in the village, but not in the same holding, in the possession of the vendees—

Held that the vendees did not thereby become co-sharers in the holding and entitled to claim the land in the joint holding subsequently sold to them, as against other co-sharers' rights. P. R., 54 of 1882 *has been overruled* by P. R., 94 of 1904, (F. B.), s. c. 103 P. L. R., 1904, (F. B.) KAHNA *v.* SULTANI. **56 P L R 1905.**

(9) HOUSE PROPERTY.

13 Bhiwani—Fraud—Physical possession—Bhag Dhaggan, town of Bhiwani Hissar District. 16 P. R. 1902 Col. 1816 P. I.

14 *Delhi city, Mohalla Haveli Khan Duran Khan, Sale of house property.*

The custom of pre-emption obtains, when there is a sale of house property, in Mohulla Haveli Khan Duran Khan, Delhi City, 20 P. R. 1906; 122 P. R. 1906. *relied on*; 2 P. R. 1908 (F. B.) referred to. ABDUL GHAFUR KHAN *v.* MUHAMMAD ZIAUDDIN KHAN **147 P R 1908.**

15 *Dera Ismail Khan, Mohalla Kazianwalla.*

Held, that the plaintiff had failed to prove that a custom of pre-emption prevailed in respect of houses situate in Mohalla Kazianwalla in the town of D. I. Khan. TAGGA *v.* ALLAH BAKHSH. **P R 69 of 1901.**

16 *Ferozepur city—Towns—Sub-divisions—*Mohalla *Kassaban of Ferozepore City—Vicinage—Relative rights of owners of adjoining houses—Sale of his house by vendee to vendor on the same day the house in suit is sold—Evidence—Instances.*

The plaintiff claimed, by right of pre-emption, the house in dispute, situate in *Mohalla* Kassaban of Ferozepore City. Plaintiff's house and that in suit opened on the same street, side by side. Defendant's house also opened on the same s reet, though at a little distance further on, and on the southern extension of the street, and it also adjoined the disputed house on the west, though not for the whole length on that side. There was greater length of contiguity between the house in dispute and the plaintiff's house. On the date the house in dispute was sold to the vendee, the vendee's son sold the house belonging to the vendee to the vendor of the house in dispute. It appeared from the boundries given in the two sale-deeds that the sale of the vendee's house was subsequent to the sale of the house in dispute, though both were executed on the same date.

Held, that the City of Ferozepore contained sub-divisions for purposes of pre-emption, and that *Mohalla* Kassaban was one of them.

Found, that the custom of pre-emption exists generally in the City of Ferozepore, *i. e.*, in many, if not most, of its sub-division as regards dwelling-houses and that it also prevails in the sub-division known as *Moholla* Kassaban.

Held, also, that a superior right of pre-emption in favour of plaintiff was not established.

Held, further, that the sale of the vendee's house on the same day, after the sale of the house in dispute, did not confer any right on the plaintiff to the prejudice of the vendee.

A case in which pre-emption is claimed and decreed on admission is an instance in which the custom is exercised, and is relevant in an enquiry into the custom in a subsequent suit. The value of the admission to a large extent depends on the circumstances of the particular case. Where there are numerous instances of such admissions in suits of this kind relating to the same place, it is generally a fair inference that they were due to the custom being too well-known to admit of dispute.—MUHAMMAD NAWAZ KHAN *v. Mussammat* BOBO SAHIB. **44 P R 1903=75 P L R 1903.**

17 *Kangra District—Government letter No. 323, dated 22nd April 1862.*

In the absence of proof of special custom right of pre-emption must be allowed in favour of persons enumerated in section 12 of the Punjab Laws Act as regards vil-

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lages in the Kangra District. The directions contained in Government letter No. 323 dated 22nd April 1862 cannot be held to prevail over statute law. KIRPA RAM *v.* GULAB DIN. **7 P L R 1906**.

18 *Lahore city Mohalla Mahalyan—Punjab Laws Act (IV of 1872), Section 11—Sub-division*

Held, that the plaintiff, on whom the onus lay, had failed to prove a custom of pre-emption in regard to houses situated in *Mohalla Mohaliyan* of Lahore City.

Held, also, that *Mohalla Mohaliyan* must be treated as a sub-division of Lahore City within the meaning of section 11 of the Punjab Laws Act. *189 P. R., 1882, 42 P. R., 1891, 8 P. R, 1893, 17 P. R, 1895, 83 P. R., 1901, 42 P. R, 1903, s. c., 89 P. L. R, 1903, 44 P. R, 1903, s. c., 75 P. L R., 1903, 52 P. R, 1903, s. c. 169 P. L. R., 1903 referred to.* GOKAL CHAND *v.* MOHAN LAL. **19 P L R 1905=6 P R., 1905**.

19 *Lahore Kucha Gulzari Shah, Mohalla Wachhowali—Pre emption in respect of sale of house property.*

The custom of pre emption, on sales of house property, based on vicinage, exists in *Kucha Gulzari Shah*, part of *Mohalla Wachhowali*, a sub-division of Lahore. SUNDRA DAS *v.* DHANPAT RAI **16 P R 1907=104 P L R 1908**.

20 *Lahore — Custom — Pre-emption — Houses—Towns—Town of Mozang—Sub divisions*—Kot *Abdulla Shah—Punjab Laws Act (IV of 1872), Section 11.*

Held, that *Kot* Abdulla Shah is a sub-division of Mozang, a suburb of Lahore, within the meaning of section 11 of the Punjab Laws Act, and that the custom of pre emption in respect of houses prevailed in the Kot. ALI BAKHSH *v.* MAHYA. **169. P. L. R. 1903=52 P. R, 1903.**

21 *Mukerian Town, Hoshiarpur District.*

Held, that no custom of pre-emption in respect of houses situate in the Town of Mukerian District Hoshiarpur, was established. RAM BAKHSH *v.* THAKUR DAS. **117. P. L. R., 1902=70 P R 1902**.

22 *Nur Mahal town in Jallandhar District.*

Held, that the custom of pre emption was established in respect to houses situated in the town of Nur Mahal in the District of Jallandhar RAMJAS *v.* BURA MAL. **58 P. L R. 1905=42 P. R. 1905.**

23 *Pari Mahal in Lahore city—Sarai or Katra—Sale for money and past services—Punjab Laws Act (IV of 1872). S. 11.*

Where a sale was made in lieu of money and past services—

Held, upon construction of the sale-deed, that the mention of past services was not mere surplusage but should be taken as part of the consideration, and further that an enquiry into market value rendered those services capable of being estimated in money.

Held, also, that Pari Mahal is not a

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sub-division of Lahore City, within the meaning of section 11 of the Punjab Laws Act, and being in the nature of a *sarai* or *katra* was not subject to pre-emption. SARDAR KISHEN SINGH *v.* RAI BAHADUR JAIKISHEN DAS. **53 P L R 1903=2 P R 1903**.

24 *Sonepat town in Delhi District—Evidence—Instances—Mohalla Mashad.*

Held, that it was not proved that the custom of pre-emption prevailed generally in the town of Sonepat or particularly in the *Mohalla* Mashad where the property in suit was situate.

The instances in which pre-emption was decreed on the basis of a compromise or admission are certainly relevant and possess certain probative force at showing the existence of the custom, but when set against other instances, though fewer in number, in which after contest the custom was negatived or held as not proved, they cannot form a substantial foundation for finding that the custom prevails generally in the town. ABDUL FARAH *v.* MUSSAMMAT SARWARI. **85 P. L. R. 1906.**

10 JAGIR VILLAGES.

25 *Jagir villages of the Goler Jagir, Kangra District—Punjab Laws Act. 1872, s. 12.*

Held. that the rule of pre-emption as laid down in a letter issued by the Punjab Government in 1862, and embodied in the village administration paper of many of the villages in the *khalsa* Kangra District is not binding as the "custom" of Jagir villages of the Goler Jagir in regard to which no administration papers were prepared in the first regular settlement at all. Hence the presumption would be that the rules of pre emption in those Jagir villages would be as laid down in Punjab Laws Act, s. 12. This presumption which was in favour of the plaintiff, landlord of the village, the defendant failed to rebut— HET RAM *v.* BAHADUR, **105 P. L. R. 1906=37 P. R. 1906.**

11 MORTGAGE.

26 *Custom — Pre-emption in respect of mortgages—Village Sahri in the Hushiarpur Tahsil—Construction of Wajib ul-arz.*

The record of rights of the last settlement declared that right of pre-emption in respect of mortgages existed in the village of Sahri in Hushiarpur Tahsil and the existing record of rights provided '*agarche ziada pabandi shufa ki nahin hai, magar jahan surat tanaza howi, wahan kanun ki mutabik amal howi*, *i. e.*, though there is not a very great restriction of pre-emption yet in cases of dispute law may be acted upon. The right of pre-emption was asserted only once before in the village.

Held, that the true meaning of the exist-

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ing record of rights was that S. 9 of the Punjab Laws Act was to apply and that the right of pre-emption arose, in cases of mortgages, only on foreclosure of the right of redemption. P. R. 10 of 1887 and 52 of 1896, referred to. BHAGWAN SINGH *v.* HUKAM SINGH. **85 P. L. R. 1901=11 P. R. 1901.**

27 *Custom — Pre-emption--Mortgage--Entry in* Wajib-ul-arz *of 1855--No entry in subsequent Settlements--Right never exercised or asserted--Court fee.*

In a suit for pre-mortgage of land paying revenue, Court-fee payable is five times the revenue assessed on the land.

Held, that the mere entry in the Wajib-ul-arz of the village, made at the Settlement of 1855, allowing the right of pre-mortgage, was not sufficient to establish custom of pre-emption with respect to mortgages, where it was not alleged that there was any other mention of pre-emption of mortgages in subsequent Settlements, and there had been no mortgage in the village up to the Settlement of 1855, and since then no assertion of the right had been made in respect of the mortgages effected subsequently. P. R. 98 of 1894 ; P. R. 73 of 1896 referred to. UMRA *v.* HARA. **106 P. L. R. 1903=46 P. R. 1903.**

28 *Custom—Pre emption—Mortgages*—Wajib-ul-arz. *Entries in--Previous* wajib-ul-arz *evidencing custom in favour of agnates—Subsequent* wajib-ul-arz *recognizing custom in accordance with law.*

The *wajib-ul-arz* of the village of the previous settlement evidenced custom of pre-emption as to gifts, sales and mortgages in favour of agnates but the subsequent *wajib-ul-arz* provided that the right of pre-emption as to mortgages was the same as that given by law in respect of sales.

Held, that the subsequent *wajib ul-arz* did not in any way contradict the first one and that the custom of pre-emption in respect of mortgages relating to the lands in the village was established by evidence. 98 *P. R.* 1894 *(F. B.) followed.* ALI MUHAMMAD *v.* PIRAN DITTA. **93 P. L. R. 1905.**

(12) Occupancy rights.

29 *Pre-emption--Punjab Laws Act, 1872 section 12—Punjab Tenancy Act, 1887, sections 53 and 111—Sale of occupancy rights.*

When the seller of occupancy rights is an old tenant who has full power of alienation under the *Wajib-ul-arz* the operation of Section 58 of the Punjab Tenancy Act is excluded by Section 111, the entry in the *Wajib-ul-arz* being tentamount to an agreement under section 112. The last clause of section 12 of the Punjab Laws Act only applies when Section 53 of the Tenancy Act is applicable, the first part being intended to save the rights of the landlord under the latter section. The rights of the two other classes only arise where the landlord refuses or neglects to exercise that right and on no other contingency.

When the landlord cannot exercise the right, the rights of the others under the last clause of section 12 of the Punjab Laws Act do not come into existence or in other words the whole clause is inoperative. The parties then are relegated to the position under the first part of section 12, and possess rights of pre-emption in the order provided therein. SUNDAR MAL *v.* SAWAN SINGH. **87 P R 1901.**

30 *Punjab Laws Act (IV of 1872 as amended by Act XII of 1878), Sections 9,10,11 and 12—Village communities.*

The expression "village communities" in section 10 of the Punjab Laws Act is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common and dividing between them the agricultural lands according to the custom of the village. It is used in a popular sense to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs and subject to the administrative control of the village officers.

A village community is not confined to the land owners in the village and occupancy tenants are members of a village community within the meaning of the Act, and so are all persons in an inferior position who belong to the village though they may be unconnected with the land and not entitled to any right of pre-emption under the Act. RAHIM-UD-DIN *v.* REWAL **66 P. R. 1903=90 P. L. R. 1903=7 C. W. N. 498=30 C. 635 (P. C)**

31 *Custom—Pre-emption — Punjab Laws Act (IV of 1872), Section 12—Transfer of occupancy and* mokarraridari *holdings.*

The plaintiff, who was brother of the vendor, sued for possession of land situate in Pindi Gheb and Dandi villages in the Rawalpind District by right of pre-emption. A part only of the Pindi Gheb holding was held by the pre-emptor and the vendor in occupancy right, and in the remainder and also in the lands in Dandi their status was that of *mokarraridars.* The vendees were recorded proprietors in the Pindi Gheb holding but not in that of Dandi where they were among the proprietors of village by purchase.

Held, that the claim as regards land in Pindi Gheb village relating to both occupancy and *mokarraridari* portions of the holding must be dismissed for the vendees had preferable right to occupancy portion under the Punjab Tenancy Act and to the *mokarraridari* portion under the custom of the village.

Held , also, that the plaintiff had preferable right under clause (*a*) of section 12 of the Punjab Laws Act as regards land

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in the Dandi village for he could not be in a worse position than he would be under clause (*f*) read with the last clause of the section. GAUHARA *v.* HAR BHAJ. **41 P. R. 1905=16 P. R., 1905.**

(13) OWNERSHIP OF OPPOSITE SITE.

32 *Amritsar pre-emption claimed by owner of a house opposite to the house in dispute, but separated by a lane—Proof of general custom insufficient.*

In a pre-emption suit of a house situate in *Katra Kanhayan* in Amritsar, the plaintiff whose house was situated opposite to the house in suit on the other side of a narrow *gully*, succeeded in proving that the custom of pre-emption prevailed generally in that place, but did not prove that it would apply in the case of houses not adjoining or contiguous but opposite to one another.

Held that the suit should be dismissed, as it was incumbent on the plaintiff to prove, not only the general custom, but such special incident as would make it applicable to his case 107 P. R. 1900, diss.; 109 P. R. 1900 and 68 P. R. 1906, *F.* 71 P. R. 1905, distinguished.

Per Johnstone, J:—Where the plaintiff's house is separated from the house in suit by a road or lane, then, even if the custom of pre-emption prevails in the mohalla or town generally, there is no initial presumption that plaintiff has a right of pre-emption as against a stranger vendee, but plaintiff must prove by instances in the usual way that he has such right. MAHTUB SINGH *v.* NIAZ ALI. **47 P. R. 1907=125 P. W. R. 1907=68 P. L. R. 1908.**

33 *Lahore, Mohalla Kakkezian Houses—Vicinage—Burden of proof—Right of owner of opposite house.*

A pre-emptor is bound not only to prove the existence of a custom of pre-emption in the particular locality where the property in dispute is situate, but all such incidents of that custom as would entitle him to succeed.

Held, that the plaintiff, whose house was opposite to the house sold on the other side of a blind alley, had failed to prove that he was by custom entitled to exercise the right of pre-emption as against the defendant who was a stranger, even if the custom of pre-emption prevailed in the locality. 107 P. R., 1900 *doubted*; 33 P. R., 1885; 10 P. R., 1886; 108 P. R., 1886; 24 P. R., 1887; 109 P. R., 1900; 189 P. R., 1882; 86 P. R., 1901 *referred to.* ILAHI BAKHSH *v.* MIRAN BAKHSH **123 P. L. R. 1906=68 P. R. 1906.**

(14)—OWNER OF SITE.

34 Right of owner of site to pre-empt buildings thereon—Moholla Khajuran-Wala, Jullundur city. 7 P R 1907. *See Custom of the Punjab Inheritance and Succession No 68.*

(15)—PATNI VILLAGE IN DERA GAZIKHAN.

35 *Custom—Pre-emption—Sharers who are collaterals of the vendor—Village Patni, Jampur-Tahsil Dera Ghazi Khan District.*

Held, that under custom prevailing in the village of Patni, Tahsil Jampur, D. G. Khan District, the collaterals of a vendor have a superior right of pre-emption to that of others who are equally co-sharers in the well to which the land sold belongs, but who are not themselves collaterals. DIN MUHAMMAD *v.* KARIM BAKHSH. **P R 73 of 1901.**

(16)—PATTIDARI VILLAGE.

36 *Punjab Laws Act (IV of 1872), Section 12 (b)—Custom—Pre-emtion—*Pattidari *village held on ancestral shares—Common land. Sale of.—*

On the sale of a share in the common land of a *Pattidari* village held on ancestral shares, a land owner in the village has a preferable right of pre-emption to a person owning merely a share in such land. DAIM *v.* CHIRAGH DIN. **95 P L R 1904.**

(17)—PRESUMPTION AS TO.

37 Village—Punjab Laws Act (IV of 1872) S. 10—Chaks—Construction of Act. 21 P R 1906—110 P L R 1906. *See Col 525 P I.*

(18)—PURCHASER'S IMPROVEMENTS.

38 *Muhalla Wadharian, Sialkot City—Purchaser's improvements.*

Held, That *custom* of pre-emption based on contiguity exists in Muhalla Wadharian, Sialkot City.

A purchaser of a house, subject to the right of pre-emption, made improvements on it, in spite of the pre-emptor's notice not to do so.

Held, that the purchaser would not generally be entitled to recover the market-value of the improvements and would only be allowed to remove them, when it could be done without injuring the house. But, where the improvements were not unusual and did not greatly enhance the value of the property so as to make it difficult for the plaintiff to pay for them, the plaintiff would have to pay the defendant's expenditure. BUTA SINGH *v.* TARA SINGH, **122 P R 1907=87 P W R 1907=49 P L R 1908.**

(19) RELATIONSHIP.

39 *Pre-emption Act (II of 1905), Section 12 (b)—Land held on ancestral shares.*

Found, that the village was not held in ancestral shares and the plaintiff was not entitled to pre-emption on the ground set up by him that he was own brother of the defendants. SHER SINGH . SAWAN

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SINGH. **35 P. L. R. 1907.**

40 *Custom—Pre-emption—Right allowed to relations—Right of nearer collaterals as against remote ones*

Held, that in accordance with custom of pre emption allowing the right to collaterals, the plaintiffs who were one degree more nearly related than the vendee to the vendor, were entitled to claim the property sold to the vendee.

Held, also, that the contention urged on behalf of the vendee that Hindus were not bound by the entry in the *Riwaj-i-am* relating to pre-emption had no force. KHOTA *v.* ALU. **17 P. R. 1905 = 43 P. L. R. 1905.**

41 *Act II of 1905 (Punjab) S. 12 (a)—Pre-emption on relationship—Reversioner of a female included within the meaning of the section—Hindu Law—Inheritance.*

A daughter succeeded to her father. Her male descendant sold the property. The male descendant of her real brother claimed pre emption under S. 12 (*a*) of the Punjab Pre-emption Act, 1905, as the persons entitled to succeed to her male descendant in the event of his dying without heirs.

The lower appellate Court, disagreeing with the first Court, dismissed the suit on the ground that the plaintiffs would succeed in default of male lineal descendants of B, not by inheritance but by reversion, and they cannot therefore claim to be "persons who but for such sale would be entitled to *inherit* the property" within the meaning of S. 12 *(a)* of Punjab Pre-emption Act, 1905.

Held, that, the above contention was not sound. According to 32 P. R. 1895 (F. B.), B, when he took the property acted as a mere *conduit pipe* for eventually transferring it to the real heirs, *viz.*, the male descendants of her father, who would be the persons entitled to succeed in the event of A dying without heirs and therefore entitled to pre-empt under S. 12 (*a*) of the Act. The fact that A had other male heirs did not matter, for, they had not troubled to assert their right, and it is open to the more remote heirs to sue for pre emption if the nearer heirs decline or omit to assert their rights. 21 P. R. 1908—46 P. W. R. 1908 and 32 P. R. 1895 (F. B.) followed.

Held, also that under Hindu Law, which is the personal law of the parties, the plaintiffs are *bandhus* and therefore ultimate heirs of the vendor. DAT RAM *v.* SHIV RAM. **131 P. W. R. 1908.**

(20) RESALE TO VENDOR.

42 *Pre-emption—Re-sale to vendor.*

Where before the institution of a suit for pre-emption of land the vendee had resold the land to the vendor and it was contended that the re-sale was a bar to the suit,

Held, that the contention was not valid 29 A. 125 dissented from. SUKHA *v.* ARURA MAL. **135 P. W. R. 1908 = 165 P. L. R. 1908.**

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(21)—REWAJ-I-AM.

43 *Sale completed before Pre-emption Act, in favour of one having as preferential right under Punjab Laws Act 1872—Riwaj-i am not supported by instances—Effect of.—*

A sale was completed before the Pre-emption Act came into force in favour of a vendee with preferential rights under the Punjab Laws Act, 1872, and mutation was effected in favour of the vendee. The plaintiff respondent, having no preferential right under the Punjab Laws Act, related through a common ancestor, and one of the heirs to the property in suits, sued for pre emption, *held*, that the Pre-emption Act was inapplicable, by reason of the appellant, having as *vendee*, made payment in respect of the right of pre-emption to which he was entitled at the date of the sale 17 P R 1908 (F B) followed.

Where the special custom, in favour of relations descended from the vendor's ancestor and holding land in the village had not been established and the only evidence adduced by the plaintiff-respondent was the *Riwaj-i-am* of the *tahsil* which recited the custom set up, *held*, that as no instance of this custom having been enforced or acted on, had been cited, the rule that an entry in a *Riwaj-i am* was proof of the existence of an alleged custom must be modified 89 P R 1900, 108 P R 1900, *F*; 117 P R 1901, 17 P R 1908 (F B) and 87 P R 1906 cited. INAYAT *v.* HAQNAWAZ KHAN. **157 P W R 1908 = 90 P R 1908.**

(22)—SALE OR GIFT.

44 Transfer by husband to wife—Sale—Fraudulent concealment of right—Shamilat land. 4 P L R 1903. *See Col 1773 P I.*

(23)—SALE OR MORTGAGE.

45 *Construction of document*—Onus probandi—*Evidence—Onerous conditions—Consideration—Pre emptor a mortgagee of the property—Presumption*—Wajib ul-arz, *entries in—Weight of.*

When land has been alienated under a document purporting to be a deed of gift or of mortgage, it is open to a third party claiming to exercise a right of pre-emption to prove that the transaction was in reality one of sale, and that the document sought to be impugned was executed to conceal the real nature of the transaction and defraud the plaintiff of his legal rights.

In such cases it is open to the plaintiff to prove any facts relevant to the issue "whether there has been a sale" and to the defendant to prove that there has been no sale and to rely upon the document itself as part of his case. 117 *P R* 1890 *(F B) followed.*

What will be held to amount to sufficient proof in any particular case is a point

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upon which it is obviously impossible to formulate any general rules. In each case the Court must decide as to the real nature of the transaction, upon all the available material, including the terms of the document itself, the *onus* in the first instance being on the plaintiff to establish his case and the true question being as to the real intention of the parties when entering into the transaction. If it is established beyond reasonable doubt that the parties intended a permanent transfer, the Court will find the transaction to be one of sale, though the deed is in the form of a mortgage. If there is a reasonable doubt the plaintiff's case will fall on the ground that he has not succeeded in showing that the deed does not embody the true contract between the parties. The conditions of a mortgage may be intentionally onerous without giving rise to any irresistable presumption that the transfer was intended to be permanent or they may so plainly exclude any possibility of redemption that the only reasonable inference is that a sale and not merely a mortgage, was the true intention of the parties 100 P. R. 1895 (F. B.) referred to.

The land in suit was previously mortgaged with possession with the plaintiffs for 26 years and the mortgagor executed a deed purporting to be a mortgage for 40 years in favour of the defendant. The plaintiffs claimed right of pre-emption contending that the land was really sold and not mortgaged. The plaintiffs urged that from the following circumstances it appeared that the parties intended a permanent transfer *viz.*, that the mortgagor admitted that he had permanently parted with the land, that the ostensible mortgagee was an entire stranger in the village and had for a long time past been endeavouring to acquire land there, that the mortgagor practically got all he could out of his land, that he was resident of another village and took no further interest in the land in the village that the consideration for the deed was wholly fictitious, that the mortgage period was stated to be 40 years, that interest claimable was high, *i. e.*, one per cent per mensem, that the mortgagee was at liberty to make any improvements he liked and to charge the same, and that there was a condition under which the mortgage could operate as a sale.

Held, that the plaintiffs had failed to show that the deed of mortgage was intended to operate as a sale The statement made by the mortgagor though admissible as evidence was not credible, it was not proved that the mortgagor was anxious to permanently part with his land or that the cosideration entered in the mortgage deed was ficititious, nor were the terms of the mortgage deed such as to induce the Court to presume that the transaction was not intended to be a mortgage. 117 P. R. 1890 (*F. B.*), 20 P. R. 1899, 61 P. R. 1886, 40 P. L. R. 1903, referred to.

The entry in a *Wajib-ul arz* is *prima facie* proof of the existence of a custom of pre-emption even in those cases where the entry itself states that no sale or mortgage has occurred in the village up to date.

The force of a *Wajib-ul-arz* as evidence of custom is not confined to a limited period only and the mere fact that a provision in a *Wajib-ul-arz* is not repeated in the *Wajib-ul-arz* of a subsequent settlement is not sufficient to rebut the presumption in favour of the correctness of the previous entry.

Where the *Wajib ul arz* of the settlement of 1856 provided that no land of any proprietor had been sold or mortgaged and that if in future any proprietor wished to sell or mortgage his estate he must sell or mortgage it to specified persons and the *Wajib-ul-arz* of the settelment of 1868 allowed the right of pre-emption according to the law of the land (*Qanun-i-Sarkar*) and there was no other evidence as to the right of pre-emption in respect of mortgages.

Held, that the right of pre-emption in respect of mortgages could not be presumed 98 P. R. 1894, 52 P. R. 1896, 46 and 47 P R 1903, s. c , 56 P. L. R. 1903 referred to.—MUHAMMAD UMAR *v.* KIRPAL SINGH. **78 P R 1904**—*See also Col. 28 P. I.*

(24)—SHOPS.

46 Sale of shop—Right of owner of house at the back of pre empted house. 179 P L R 1905 Col 1812 P I.

47 *Pre emption regarding shops—Katra Patrangan.*

No right of pre-emption exists by reason of vicinage in respect of shops in *Katra* Patrangan, Amritsar City. 46 P R 1882, 99 P R 1906, 113 P R 1906 referred to. KARIM BAKHSH *v.* WATTA MAL, **13 P R 1907 =106 P W R 1907=7 P L R 1908.**

48 Darshani Darwaza,, *Amritsar city.*

Held, that the custom of pre-emption as to shops was not proved to exist in Darshani Darwaza of the City of Amritsar BISHEN SINGH *v. Mussammat* PARO. **19 P R 1905=78 P L R 1905.**

49 *Punjab Pre emption Act II of 1905 Ss. 12 and 13 cl (2)—Shops in villages.—*

Sub sec. 2 of S. 13 of the Act does not apply to shops in villages, and a right of pre-emption exists in respect of them subject to the provisions of S. 12. KIRPARAM *v.* KHUSHALI MAL, **80 P R 1907.**

50 *Katra Ahluwalia—Amritsar residential quarters converted into shops.—*

Property, which is primarily a residential house situate in *Katra* Ahluwalia, is subject to custom of pre-emption by vicinage. It is not sufficient, to change the character of the building as a residential quarter. that, for some time past, it has been occupied only by casual tenants, or that portions have

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been used as godowns by persons, who held their business shops elsewhere. DIAL SINGH v. BAKSHISH SINGH, 21 P R 1907=129 P W R 1907=24 P L R 1908

51 Katra *Ramgarhian of Amritsar City.*

Held, that the custom of pre-emption in respect to shops in Katra Ramgarhian of Amritsar City was not proved to exist. 54 *P R* 1907 *referred to*. RAM RAKHA v. SANT RAM, **68 P·R 1907=58 P L R 1907**.

52 *Punjab Laws Act (IV of 1872) S. 11* Katra *Ramgarhian, Amritsar City.*

Held, that the custom of pre emption in respect of shops was not proved to exist in *Katra* Ramgarhian of the City of Amritsar SUNDER SINGH v. MEHR SINGH. **54 P. R. 1907=61 P. W. R 1907=40 P. L. R. 1907.**

53 *Ludhiana Bazar, Ferozepore City.*

Held, that no special custom in regard to pre-emption in respect of shops in Ludhiana Bazar of Ferozepore City was established. BISHAN DAYAL v. RATTAN CHAND. **P. L. R., 66 of 1901.**

54 *Bazar Chauhatta, Mufti Bakar of Lahore City*

Held; that a custom of pre-emption in respect of shops situated in Bazar Chauhatta Mufti Bakar of Lahore City was not established.

A *baithak* on the top of a shop at the corner of two *bazars* cannot be considered a residential house. HAKIM RAI v. MUHAMMAD DIN P. R. No. **83 of 1901.**

55 *Kucha Chabuk Sawaran* alias *Kucha Kakkazian—Mohalla Qazi Sadar-ud-din, Lahore city.*

Section 11 of the Punjab Laws Act is intended to require stringency of proof as regards the right of pre-emption in towns.

Instances in other *mohallas* are relevant evidence but are not sufficient to prove the custom of pre-emption in the quarter in which the disputed property is situate. 17 *P. R., 1895, 100 P. R., 1892, 70 P. R., 1899, 58 P. R. 1900, followed.*

Held, that the custom of pre-emption was not shown to exist in respect of sales of houses in Mohalla Qazi Sadar-ud din of Lahore city in which is included Kucha Chabuk Sawaran otherwise known as Kucha Kakazian. IMAM DIN v. GULAM MOHAMMAD. **86 P. R. 1901.**

56 *Hisar city.*

Held, that the custom of pre-emption in respect of sales of shops in the town of Hissar was established by evidence. BHAGWANA v. HANWANTA. **90 P. R. 1901.**

(25) Shops and houses.

57 *Mohalla* Kabir Darwaza. *Gujarat, one shop and two houses—S. 11 of the Punjab Laws Act (IV of 1872)—Instances of adjoining Mohallas.*

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Held, that Kabir Darwaza Mohalla in the city of Gujrat is a District Sub-division within the meaning of S 11 of the Punjab Laws Act (IV of 1872), and that there is no custom of pre-emption in this *Mohalla* on the sale of shop or house property.

Held, also, that instances in the adjoining *Mohallas*, though relevant are not conclusive proof of the existence of the custom. RAHIM BAKHSH v. SHEIKH FAZAL ELAHI. **17 P. W. R. 1907.**

58 *Houses and shops in Mohallas Haripur and Nimwala Bazar Jagadhri vicinage—Instances in neighbouring Sub-divisions.*

Held, that Mohalla Haripur is a recognized Sub Division of Jagadhri Town, and that the custom of pre-emption of houses on the ground of vicinage prevails in it.

Held, also, that in *Nimwala Bazar*, which is a distinct Sub-division of Jagadhri Town, the custom of pre emption of shops on the score of vicinage does not prevail.

Held, further, that the existence of the right of pre-emption in other neighbouring Sub Divisions is relevant evidence of more or less strength, according to circumstances, of its existence in the Sub-Division in which the property is situate, but is not, of itself, sufficient proof of custom. RAMJIDAS v. JETHU MAL. **39 P. W. R. 1907.**

(26) Speculative pre-emption suit, Alienation for Necessity.

59 *Alienation of ancestral property.*

The question of necessity for an alienation has to be determined in each case on its particular facts. There may be cases, in which circumstances may justify the temporary alienation of ancestral land by a pre-emptor, for the purpose of raising the necessary funds to pay into Court the purchase money; but in all such cases, the contemplated benefit to the pre-emptor's estate, such as would support a finding as to the alienation being an act of good management, must be clearly established. The institution of a speculative suit for pre-emption, which may be successful and may have been undertaken simply to satisfy a mischievous craving for litigation, can, under no circumstances, be a sufficient justification for alienating ancestral land, and the alienees, who advance money to pre-emptors for such purposes, cannot reasonably ask the Court to regard the alienations made in their favour as for legal necessity. 67 P. L. R. 1903 referred to. SOBHA SINGH v. KISHORE CHAND. **65 P. R. 1907.**

(27) Sub-division.

60 *Punjab Laws Act (IV of 1872), Section 11—Custom—Pre-emption—*Tarf Ravi *suburbs of Multan city.*

Held, that the custom of pre-emption in respect to houses exists in the *Turf Ravi* sub-

Custom of the Punjab Pre emption *(Contd)*

division of the Multan city. ABDULLA *v.* PANNU RAM. **42 p. R. 1906.**

61 *Custom—Pre-emption—Punjab Laws Act (IV of 872), Section 12 (c) Kharkhoda village, Sampla* Tahsil, *Rohtak District.*

The plaintiff sued for pre emption, basing his claim upon custom. The record of rights of 1858, which was not shown to have been modified by any subsequent record-of-rights in respect of pre-emption, provided. Every proprietor in our village has power to sell, mortgage and give away his property on account of a personal necessity, or the payment of Government revenue, but the custom is that the alienor will alienate first to his brothers and near relatives, and in case of their declining, to the proprietors of the same *thulla.* In case the aforesaid persons decline, the alienor is at liberty to alienate to any one he pleases.

The village Kharkhoda in the Sampla *Tahsil* of the Rohtak District, in which the land in suit was situate, was divided into two *panas*, Mussalmanan and Hinduan, and each *pana* was divided into two *thullas.* The vendee, at the date of the sale in suit, owned land in *pana* Hinduan only, while the land in suit was in one *thulla* of *pana* Mussalmanan, and the plaintiff owned land in the other *thulla* of that *pana.*

Held, that Section (12) (c) of the Punjab Laws Act was applicable to the case, and the pre-emptive right of the plaintiff was superior to that of the vendee. A *pana* is a sub division within the meaning of Clause (c) of Section 12 of the Punjab Laws Act. HARNAM *v.* MUHAMMAD AMAN ALI, **3 p R 1903=30 p L R 1903.**

62 *See* 19 P L R 1905 *See No 18 supra.*

63 *Punjab Laws Act (IV of 1872), Section 12 (c)—Pre emption—Sub division of village—Zails of Pheru Shahr village in Ferozepur* Tahsil.

There must be some one or more well defined attributes to justify treatment of a section of the village as a sub-division for the purposes of section 12 (c) of the Punjab Laws Act, such for instance as homogeneity of area or descent of the proprietors, and in determining the point the first thing to be looked to is the history of the village so far as it can be ascertained from the Settlement record.

It appeared from Settlement records that the *zails* of Baghel Singh and Didar Singh like other *zails* Pheru Shahr village in the Ferozepur *Tahsil* were constituted by mere arbitrary grouping together of certain holdings, so as to form an association of proprietor with no connecting ties of any great sort, and that they had a *shamilat* in common and a common lambardar.

Held, that the two *zails* could not be considered as recognised sub-divisions for pre-emption purposes within the meaning of section 21 (c) of the Punjab Laws Act. SHER SINGH *v.* MALUK SINGH. **142 p. L. R. 1905.**

Custom of the Punjab Pre emption *(Contd.)*

(28) TARADDADKARS.

64 *Custom—Pre-emption*—Taraddadkars *in Jhang District.*

In the absence of proof of a special custom a *taraddadkar* in the Jhang District being in the position of a proprietor in a joint holding has no superior right of pre-emption to a co-sharer in the holding. 72 P. R., 1896; 61 P. R., 1876, 67 P. R., 1874, referred to. GANGA RAM *v.* WARYAM. **40 p. R. 1904.**

(29) VICINAGE.

65 *Amritsar city—Pre-emption by vicinage in Katra Missar Beli Ram, Amritsar City.*

The custom of pre-emption by vicinage exists in respect of sales of house property in Katra Missar Beli Ram—6 P. R. 1905, D; 154 P. R. 1882, 99 P. R. 1906 referred to. MAULA BAKHSH *v.* DEVI DITTA. **54 p W. R. 1907=6 p R 1907.**

66 *Amritsar city—Custom—Pre-emption—Houses*—Katra *Moti Ram of Amritsar city.*

Found, that the custom of pre-emption as regards houses obtains in *Katra* Moti Ram of Amritsar city. *Mussammat* MAMON *v.* GHAUNSA. **130 p. L. R 1906=99 p. R. 1906**

67 *Amritsar city—Punjab Laws Act (IV of 1872) S. 11—Custom — Pre-emption—Houses*—Katra—*Karam Singh of Amritsar City—Vicinage—Plaintiff's house on the back side of the house sold.*

Though there are, no doubt, exceptions, the custom of pre-emption in respect of houses obtains in a large number of the *katras* or sub-divisions of Amritsar City. 46 P. R. 1882, 154 P. R. 1882 and 58 P. R. 1900 referred to.

Held, that the existence of custom of pre-emption in respect of houses in *Katra* Karam Singh of Amritsar City was proved to exist.

The plaintiff's house being on the back side of the house, for possession of which claim, by right of pre-emption, is made or, being in another Municipal division, is no ground for dismissal of the suit, when the claim is otherwise valid. LACHMAN DAS *v.* KANSHI RAM. **140 p. L. R. 1906=95 p. R. 1907.**

68 *Amritsar city, Civil station of Amritsar—Sale of agricultural land—Pre-emption by reason of vicinage.*

There is no custom of pre emption, on sale of agricultural land, on the ground of vicinage, in the civil station of Amritsar, 21 P. R. 1906, 22 P. R. 1906 *Appr.* 7. P. R., 1896, 153 P. R. 1888, *Distinguished.* ISHWAR DAS *v.* DUNI CHAND. **27 p R. 1907=105 p. W. R. 1907=70 p. L. R. 1908.**

69 *Delhi City—Custom—Pre-emption—*

Custom of the Punjab Pre-emption (Cond.)

Houses—Vicinage—Pahari Dhiraj, suburb of Delhi City.

Held, that custom of pre-emption in respect to houses prevails in Pahari Dhiraj, suburb of Delhi. CHHANGA MAL *v.* JOTI PARSHAD. **75 P L R 1906**

70 *Delhi, Chandni Chowk Bazar—Shop—Vicinage.*

Held, that the custom of pre-emption in respect of sale of shops exists in the Chandni Chowk Bazar of Delhi City.

Held, also, that the owner of the premises at the back of the shop in dispute had a right of pre-emption as against the vendee who was a stranger.—88 P. R., 1905 ; s. c., 179 P. L. R., 1905 ; 17 P. R., 1895, *referred to.* PRAG RAJ *v.* MURARI LAL, **81 P. R. 1906 =75 P. L. R., 1907.**

71 Delhi—Kucha Masjid Khajur—Pre-emption—House vicinage—Burden of proof—Admission of right under mistake—Evidence given in another case 88. P. L. R. 1907=57. P. R. 1906—Col. 507; 508. No. 206

72 *Delhi—Gali Batasha—Custom—Pre-emption—Houses—Towns—Vicinage—Superior right—Burden of proof.*

Where vicinage confers the right of pre-emption in respect of houses in a town a plaintiff who asserts that his vicinage is of a superior kind to that of defendant must prove his assertion.

The plaintiff claimed a house situate in *galli* Batasha of Delhi by right of pre emption, on the ground that his house adjoined the house in dispute and opened into the same street which was a *kucha sarbista*, while the vendee defendant's house adjoined it on the back in part and the defendant's house opened into another street.

Held, that the plaintiff had failed to prove that his vicinage gave him a superior right of pre-emption to vendee defendants. *Rai Bahadur* BABU MAL *v.* SARDAR SINGH **70 P. L. R. 1903=17 P. R., 1903.**

73 *Custom—Pre-emption—House in towns—Vicinage—Superior diligence.*

When in a suit for pre emption the plaintiff based his claim to perference on the fact that the door-way of his house and of the house in dispute was common whereas the house belonging to the rival pre-emptor was back to back with the house in dispute and opened on another street.

Held, that the plaintiff had not proved that his right was preferential to that of the defendant, rival pre-emptor.

When rival pre-emptors assert superior right by vicinage, each has to prove his vicinage to be of a superior kind—P. R., 97. *of* 1883; 24 *of* 1887 ; 17, 82 *and* 199 *of* 1889 ; 83 *of* 1888 ; 36 *of* 1897; 109 *of* 1900, *referred to.*

In cases of suits for pre-emption by rival pre-emptors in respect of house-property in towns, the Court is competent to pass decree in favour of the plaintiff who has shown superior diligence in prosecuting his claim —*P. R.*, 102 *of* 1881 ; 83 *of* 1888 ; 32 *of* 1899 ; 20 *of* 1881 ; 29 *of* 1882 ; 73 *of* 1898 ; 20 *All.*, 100, *referred to.* RAHMAT ALI KHAN *v.* HAMID-UD-DIN **92 P. L. R. 1903=43 P. R. 1903**

Custom of the Punjab Pre-emption (Contd.)

74 *Delhi, Kucha Pati Ram—Sale of house property—Vicinage—Joint Hindu family.*

The custom of pre-emption exists in respect of sale of house property, based on vicinage, in Delhi City, Kucha Pati Ram.

Where the parties are members of a joint Hindu family, the right of pre-emption vests in every co-sharer of such joint family. ISRI PERSHAD *v.* BASHESHAR NATH. **92 P. W. R. 1908=179 P. L. R. 1908=35 P. R. 1908.**

75 *Jagadhri—Barwala—Custom—Pre emption—Houses—Mohalla.*

Held, that the custom of pre-emption in respect to houses in Mohalla Barwala of the town of Jagadhri was not proved to exist. *38 P. R. 1906 ; S. C., 89 P. L. R., 1906 ; 99 P. R., 1906, S. C. 130 P. L. R., 1906, referred to.* MANOHAR LAL *v.* PARS RAM. **51 P. L. R. 1907=38 P. W. R. 1907=67 P. R. 1907.**

76 *Kaithal—Mohalla Sheikh Tayyab—Karnal District—Custom—Pre-emption—Houses—Vicinage—Joint ownership.*

Held, that the custom of pre-emption in respect to houses was proved to exist in Mohalla Sheikh Tayyab in the town of Kaithal in Karnal District.

Held, also, that when there is a custom of pre emption in respect to houses by right of vicinage, joint owner-ship in the house sold gives preferential right over vicinage. *Mussammat* JAI DEVI *v.* NAUBAT RAI, **129 P. L. R. 1905=71. P. R. 1905.**

77 Lahore—Mohalla Mohaliyan. Pre-emption in regard to houses. 6. P. R. 1905. *See No 18 supra.*

78 Lahore—Kucha Gulzari Shah Wachhowali—Pre-emption in respect of sale of house property, 104 P. L. R. 1908 *See No 19 Supra*

78 (a) *Ludhiana City—Mohalla Adan—Houses.*

Held, that the custom of pre-emption exists in respect to houses situate in *Mohalla* Adan of the Ludhina City. *Mussammat* DHAN DEVI *v.* KANSHI RAM. **28 P. R. 1906=89. P. L. R. 1908.**

79 *Multan City—Bairun Pak Darwaza—Houses—Sub-division.*

Found, that the custom of pre-emption exists generally in the city of Multan and in the sub-division of the city known as *Bairun Pak Darwaza.* GHULAM MURTAZA *v.* RUPA MAL. **57 P. R. 1906=100 P. L. R. 1906.**

80 *Multan—Chahan Miran Khan village. Shujabad Tehsil—Agricultural land—Claim by right of vicinage.*

Held, that a custom which recognises a superior right of pre-emption in respect of agricultural land on the ground of vicinage is of an exceptional character and that the plaintiff had failed to prove that it existed

Custom of the Punjab Pre-emption (*Contd.*)

in respect of agricultural land in *Chahan* Miran Khan village, Shujabad *Tahsil* of the Multan District. 49 P. R., 1889, referred to. THAKUR DAS *v* MOTAN MAL. **77 P. R. 1906=67 P. L. R. 1907.**

81 Peshawar—Building site formerly occupied by shop—Instances in other sub-Divisions. 42 P. R. 1903 Col. 2044 P. I.

82 *Rawalpindi city—Mohalla Parachian—Pre-emption on vicinage—Sale of house—Value of cases decided on admission.*

Held, that the custom of pre-emption based on vicinage does exist in respect of sales of house property in Mohalla Parachiau or Matta or Waris Khan, Rawalpindi City. Where the right of pre-emption is shown to exist, there is *ex necessitate rei* a presumption in favour of vicinage. 83 P. R. 1888 referred to.

Confessions of judgment and admissions are, of course, of much less value than contested cases properly decided where the custom has been found to exist after due inquiry, but such admissions are not irrelevent and by no means valueless, as they may proceed from the consciousness of the existence of the right and the hopelessness of contesting it. 69 P. R 1901, 44 P. R. 1903, 42 P. R. 1905 referred to. THAN SINGH *v.* TARA SINGH. **26 P. R. 1907=109 P. W. R. 1907=69 P. L. R. 1908.**

(30) Waiver.

83 *Custom — Pre-emption — Pre-emptor agreeing to accept from vendor a portion of property sold—Effect of such agreement on pre-emptor's right.*

When the vendor sold 56 *kanals* of land to the vendee, and a pre-emptor entered into an agreement with the vendee by which, in consideration of vendee giving him 15 *kanals* of the land sold, he confirmed the sale of the remaining 41 *kanals* to the vendee, and another pre-emptor sued for possession of 56 *kanals* originally sold—

Held, that the plaintiff was entitled to succeed, as the agreement was equivalent to the pre-emptor who had entered into the agreement, taking over a portion only of the vendee's bargain, or to his associating a stranger with him in the purchase of the land. RALLA *v.* DAYAL. **34 P. R. 1903=64 P L R 1903.**

(31) Wajib-ul-arz.

84 Construction of document—Onus probandi—Evidence—*Wajib-ul-arz*—Entries in—Weight of—78 P R 1904—*See No 45 supra.*

85 *Custom—Pre-emption—Effect of entry in Wajib-ul-arz—Punjab Laws Act 1872, Section 10.*

In this case the Settlement records of 1855 and 1865 contained provisions as to the right of pre-emption in favour of the proprietors of the village and co-sharers, but the Settlement record of 1891-92 was silent on the subject. No suit for pre emption had ever been brought.

Held, that the defendants had failed to establish a custom opposed to that which must under section 10 of the Punjab Laws Act 1872, be presumed to exist. P. R. 41 of 1883, referred to. MAHMUD KHAN *v.* RAM DAS. **P. R. 16 of 1901=78 P. L. R. 1901.**

86 *Custom—Pre-emption—Entry in* Wajib-ul-arz *of 1852—No entry in subsequent settlements—Burden of proof—Village Nowshera Nangli Jadid in Amritsar District.*

The entry in the *Wajib-ul arz* of 1852 of the village Nowshera Naugli Jadid, Amritsar District, provided that no sale or mortgage had taken place in the village and allowed the right of pre-emption in favor of *Shurkayan-i-shikmi wa yak jaddi.* There was no entry as to pre-emption in the two succeeding settlements.

Held, that the entry did not operate as evidence of a mere agreement but it was *prima facie* proof of custom and that the mere non-repetition of the entry in subsequent settlements, in the absence of facts indicating that the custom was really different, was not sufficient by itself to show that the statement was erroneous.—98 P. R. 1894 (F. B.) followed.

Held, also, that the fact that no alienations had taken place in the village did not show that the custom did not exist or was not binding P. R. 87 of 1894, 8 of 1812, 52 of 1896 referred to.

Held, further, that the words *Shurkayan-i-shikmi* must be interpreted to include persons who had land which has descended to them from a common ancestor, though their holdings are not actually held in common, and are thus distinguished from owners in the village or *patti* who do not hold land so descended. P. R., 87 of 1895 followed. GAHL SINGH *v.* NATHA SINGH **124 P. L. R. 1903.**

87 *Custom—Pre-emption—Proof of custom—Entry in* Wajib-ul-arz *of 1852—Burden of proof—Presumption—Rebuttal.*

The entry as to pre-emption in the *Wajib-u-arz* of 1852 provided that no mortgage or sale had taken place in the village in the past, but in future, if any sale or mortgage is effected, the right of pre-emption will be (1) in the near relatives, and (2) in the share-holder of the *patti.* Since 1852 there had been more than 51 sales, and in no case was the right of pre-emption on account of relationship established.

Held, that the entry in the *Wajib-ul-arz* raised a presumption in favour of the relatives but the presumption was rebutted—P. R. 98 of 1894 (F. B.), 52 of 1896, 44 and 92 of 1892, referred to. RAM SARN DAS *v.* MULA SINGH. **64 P. R. 1903=172 P. L. R. 1903.**

88 *Custom—Pre-emption—Burden of proof*

Custom of the Punjab Pre-emption (*Contd.*)

—*Houses in* abadi—*Entry in* Wajib-ul-arz—*Presumption.*

It is open to any person to show that any existing custom has been incorrectly represented in a record-of-rights by others or even by himself but the burden of showing that it differs from what is stated by common consent lies on him. 98 P. R., 1896 (F. B.) followed.

Held, that the custom of pre-emption recorded in the *Wajib-ul-arz* of 1842, under which an agnate of the vendor had a preferential right over a shareholder was not shown to have been repealed or cancelled by the 1879-80 record-of-rights and that it extended to houses in the *abadi* of the village, the word used in the *Wajib-ul-arz* being *zamin* which may properly be held to include buildings on land. MAHA RAM *v.* RAM MOHAN. **65 P R 1903=139 P L R 1903.**

89 Wajib-ul-arz—Mortgage—46. P. R. 1903. See No 27 supra.

90 *Punjab Laws Act* (*IV of 1872*), *S.* 12—Wajib-ul-arz *in favour of* ek Jaddis *only*—*Ancestral property—Onus*

Held, that where the entry in the *Wajib-ul-arz* records custom of pre-emption in favour of *ek-jaddis* only the co-sharers in the village who are not *ek-jaddis* cannot succeed as against the vendee who owns no land in the village.

The term *ek jaddis* as used in the pre-emption clause of a *Wajib-ul-arz* means persons descended from the ancestor who once held the land which is the subject of the sale, and not agnates only of the vendor.

There is no presumption that land held by a person had descended to him from his father and was not acquired by him. JHONJU *v.* RAM DIAL. **92 P L R 1906.**

91 *Custom—Pre-emption—Entry as to custom in* Wajib-ul-arz *of 1851 allowing right to* Shurkayan Shikmi wa ek jaddi—*Entry in later* Wajib-ul-arz *allowing right as under Punjab Laws Act—Presumption.*

The entry in the *Wajib-ul-arz* of 1851 of the village Mangarh, Hoshiarpur District, provided that those first entitled to exercise the right of pre-emption were the *shurkayan shikmi wa ek juddi* and that in the *Wajib ul-arz* of later Settlement provided that the parties were governed by the law as laid down in Act IV of 1872.

Held, that the entry in the former Settlement was *prima facie* proof of custom, and the defendants had failed to rebut the entry in question. 52 P. R. 1896 followed. 98 P. R., 1894; 64 P. R. 1903, s. c. 172 P. L. R., 1903; 46 P. R., 1903, s. c., 106 P. L. R. 1903: 78 P. R. 1904 referred to. JOWAHIR *v.* RADHA. **35 P. R. 1905=15 P. L. R. 1905.**

92 *Wajib-ul-arz in favor of* Sharkayan shikmi, *Mauza Harpal, tahsil Zaffrawal, Sialkot District.*

Jointness of holding is not essential to the status of *sharak shikmi*, the term being applicable where the family bond of union still exists

Held, in a suit for pre-emption of a certain land situated in Harpal *Mauza*, Zaffarwal tahsil, Sialkot District, a collateral of the vendor had, under the terms of the *wajib-ul-arz* of the village, a preferential right on the ground of relationship. ALLAH DITTA *v.* SHAHUA. **12 P R 1908=22 P. W. R. 1908=175 P L R 1908**

93 Correctness of entry in Riwaj-i-am and supported by instances—Effect. 90 P R 1908. *See No 43 supra.*

XVI. Religious Endowments.

1 Succession—Escheat—Right of superior gaddi. 12 P L R 1906 *See Custom of the Punjab Escheat No 3.*

2 *Custom—Succession—Religious institution—Burden of proof—*Jogi Fakirs *of Bhera—Registration—Admissibility in evidence of compulsorily registrable unregistered document relating to immoveable property for collateral purpose.*

The office of *Mahant* is generally elective and not hereditary.

The plaintiff brought the present suit for possession as full owner of certain property of a minor religious institution (or *jhuggi*) which he alleged had belonged solely and absolutely to his *Pir*, a *Jogi Fakir* of Bhera. The plaintiff withdrew his claim to succeed as full proprietor and to treat the property in suit as private property subject to the ordinary rules of inheritance and contended that he was entitled to succeed as a *chela*, and that installation to the *gaddi* was not required by the custom of the institution.

Held, that the plaintiff had failed to show any custom enabling him to succeed irrespective of election or installation or nomination to the Headship of the *jhuggi* and that his being a *chela* of the last holder of the institution was not sufficient to support his claim.

It lies in the plaintiff to prove his title and it is not sufficient of him to attack the title of the defendant who is in possession.

A compulsorily registrable document affecting immoveable property though inadmissible as evidence of a transaction relating to the property may be admitted in evidence to prove collateral facts. *Babu* GANGA NATH *v.* RABEL NATH. **P W R 1906 P 128.**

3 *Custom—Endowment—Removal of* Mahant *—Grounds for removal.*

Before a *mahant* of a shrine can be removed the misconduct or mismanagement relied on by the plaintiff must be clearly proved and must be of so serious a nature as to render the retention of the *mahant* undesirable and detrimental in the interests of the shrine and its worshippers. P. R. 122 of

Custom of the Punjab Religious Endowments (*Contd.*)

1890, 3 of 1899, 89 of 1901, C. A. 359 of 1901 refd. to. RAM KISHEN *v.* CHET SINGH. **13 P. L. R. 1903**

XVII. Reversioner's Suit.

See custom of the Punjab—III alienation suits to contest alienation—Suits by reversioners.

XVIII. Son's right to contest alienation.

1 Lorai Lohars of Punjab, Gujrat District--Ancestral property. 98 P. L. R. 1906 *See* Custom of the Punjab Alienation No. 27.

2 Difinition of ancestral property- Onus of proving ancestral property on son 128 P. W. R. 1908 (P. C.) -*See* Custom of the Punjab Alienation No. 34.

3 Right of sons born before the adoption of their father to contest the alienation. 66 P. R., 1908 Col. 2093 P. I.

4 Suit by son contesting alienation--Jats of Amritsar District whose ancestor had emigrated from Rajputana. 58 P. R., 1905 Col. 2104 P. I.

5 Suit by son contesting alienation--Suit by reversioner--Suit by father of reversioner to have the alienation declared null and void. 68 P. R. 1905 Col. 2118 P. I.

6 Suit by son contesting alienation—Succession—Muhammadan Law--Sayads of Bannu Tahsil. 62 P R 1904. *See Custom of the Punjab Inheritance and Succession No 40.*

7 Suit by son contesting alienation--Sayads of Gurgaon District. 135 P R 1908. *See Custom of the Punjab Alienation (Suit to Contest Alienation).*

XIX Tribal Custom

1 Custom relating to a tribe in one locality, applicability of, to same tribe residing in another locality. 68 P W R 1907. *See* Custom of the Punjab Inheritance and Succession No 70.

XX Wajib-ul-arz.

1 Alienation by male proprietor—Will—Jhivars of Jugatpur Bazar, Amritsar District. 158 P L R 1908. *See* Custom of the Punjab Alienation No 6.

XXI Waiver.

Custom—Alienation by childless proprietor—Suit for pre-emption by collaterals—Waiver of right to contest alienation—Right of descendants of collateral.

A collateral bringing a suit for pre-emption in respect of a sale by childless proprietor thereby abandons any rights he has to challenge the sale on the ground of want of necessity or other reason sufficient to make it voidable by him--such a suit raises a presumption, though not conclusive, that

Custom of the Punjab Waiver (*Contd.*)

the sale was not bad on the ground of necessity, and it necessarily waives all right to set the sale aside for want of necessity. His descendants are also bound by the waiver on his part. LABH SINGH *v.* GOPAL. **15 P R 1905=55 P L R 1903.**

XXII. Widow.

I *Cutting trees---Punjab Courts Act (XVIII of 1884), Section 3 (2)—"Land suit"—Suit by reversioner restraining widow from cutting trees--Custom.*

Held, that a suit by reversioners to restrain a widow from cutting down trees standing on land of which they are reversioners relates to an interest in land within the meaning of Section 3 (2) of the Punjab Courts Act, and is a "land suit."

A widow is not entitled by custom to cut down trees on lands held by her as life estate so as to permanently diminish the value of the estate. The burden of proving a special custom to the contrary lies on her. *Mussammat* NIHAL KAUR *v.* HARI SINGH. **32 P. L. R. 1903.**

2 Estate right to collaterals succession--Gift by daughter's son—Mehton Rajputs of Jallandhar District. 111 P. L. R. 1905 Col. 2109 P. I.

3 Estate right to collaterals succession--Right of widow to succeed to husband's collaterals--Johal Jats of the Jagraon Tahsil, Ludhiana District. 117 P. L. R. 1906--*See Custom of the Punjab Inheritance and Succession No. 83.*

4 *Estate succession—Custom—Succession—Widow—Life estate-Maintenance*-Khan Khel Swathis of *Mansehra* Tahsil, *Hazara District.*

Held, that among *Khan Khel Swathis* of the Mansehra *Tahsil*, in the Hazara District, a widow can claim only maintenance and has no right to life estate in her husband's property. *Mussammat* BIBI JAN *v.* MUHAMMAD HUSSAN KHAN. **62 P. L. R. 1903.**

5 Estate succession—Brahmins of Karnal city--Ancestral property. 197 P. L. R. 1905 —*See Custom of the Punjab Inheritance and Succession No. 79.*

6 Estate succession—Gardezi Sayads of Multan District--Widow's life estate--Effect of entry in Wajib ul-arz. 119 P L R 1901. *See Custom of the Punjab Inheritance and Succession No 78.*

7 *Estate surrender of part of estate by widow in favour of next reversioner—Life estate—Reversioner's right during widow's lifetime to sue to set aside alienation made by her husband.*

Where a widow surrenders a part of the estate left by her husband in favour of next reversioner and the reversioner files a suit during the widow's lifetime to set aside a mortgage effected by her husband on the surrendered property, *held*, that he has

Custom of the Punjab Widow *(Contd.)*

no *locus standi* to institute the suit.

There cannot be a valid renunciation of a part of the widow's estate which can give rise to a right of succession to the reversioner to that part.—*19 Cal 236; 22 Cal 354: 21 Mad, 128; 10 Cal, 1102; P R, 9 of 1899 referred to.* WAZIR CHAND *v.* MAKHU. **17 P R 1902=16 P L R 1902.**

XXIII. Will (Will).

- (*a*). By childless proprietor to one of collaterals.
- (*b*). By donee.
- (*c*). By father.
- (*d*). In favour of daughter and daughter's daughter.
- (*e*). In favour of daughter's son.
- (*f*). In favour of wife.
- (*g*). By Pathans.
- (*h*). By power of gift and will.

(a) By childless proprietor to one of collaterals.

1 *By childless proprietor*—Sandhu Jats of *Tarn Taran* Tahsil, *Amritsar District.*

Held, that the power of transfer by Will among *Sandhu Jats* of Tarn Taran *Tahsil* of Amritsar District was not proved to be co extensive with the power of transfer *inter vivos*, and the defendant, on whom the *onus* lay, had failed to show that he was entitled to take under a Will ancestral property bequeathed to him by a childless proprietor to the detriment of the plaintiff who was a nearer collateral, although the legatee had served the testator, who was in need of service, after the plaintiff had refused to serve him. ISHAR SINGH *v.* LEHNA SINGH. **86 P R 1903=145 P L R 1903.**

2 By childless proprietor—Gift in liew of services—Jhiwars of Hushiarpur District. 96 P R 1905 Col 2100 P I.

3 By childless proprietor—Power to make will—Presumption. 34 P R 1905 Col 2121 P I.

4 By childless proprietor—Ancestral land by acquired property. 132 P R 1908 Col 2116 P I.

5 By childless proprietor—Mair Manas of Jhelum District—Right of agnates after his death in the presence of his widow. 65 P L R 1902 Col 2097 P I.

6 *Will by sonless proprietor in favor of daughter in presence of his brother—Awans of Rawalpindi Tahsil—Ancestral Property—Gifts and wills.*

Among the Awans of Rawalpindi *Tahsil*, a sonless proprietor can, by custom, make a valid bequest of ancestral property in favour of his daughter, in the presence of his own brother. 81 P R 1879, 64 P R 1892, 115 P R 1892, 31 P R 1893, 23 P R 1877, 39 P R 1877, 36 P R 1891, 81 P R 1894, 93 P R 1894, 126 P R 1894, 15 P R 1895, 9 P R 1899, 14 P R 1903, 8 P R 1906, 8 P R 1879, 7 P R 1891, 107 P R 1894, 13 P R 1902, 176 P R 1888, 53 P R 1899, 52 P R 1892, 79 P R 1896, 49 P R 1898, 46 P R 1900, 121 P R 1886, 171 P R 1889, 108 P R 1893, 188 P R 1895, 92 P R 1899, 26 P R 1901, 107 P R 1887 (F B) referred to.

In this respect gifts and wills are in the same footing 48 P R 1903 (F B) referred to. AMIR ALI *v.* BAGGO. **15 P R 1907=35 P W R 1907=4 P L R 1908.**

Custom of the Punjab Will *(Contd.)*

(b). By donee.

7 Succession on donee's death—25 P L R 1903. *See Custom of the Punjab Inheritance No 47 (a).*

(c) By Father.

8 *Custom—Will—Father's power to make—Afghans of Attock Tahsil—Acquiescence by son.*

In this case one J. K. sued to eject the defendants, his sons, who were in possession of their grandfather's land claiming under a will executed in 1879 and witnessed by the plaintiff. The will provided that all the testator's land except two '*hals*' should be held for life by his wife and should on her death devolve on the defendants. The plaintiff contended that the defendants had been holding the land in dispute without acquiring prescriptive right against him and that from the testator's death in 1881 up to the date of his wife's death, about eleven years before the present suit was filed, the land stood in her name and was held by her not on the strength of the will but in lieu of dower gifted to her by the testator before his death.

Held, that the plaintiff had acquiesced in his father's action, and, as the nearest reversioner, it was for him to have objected at the proper time and to have raised the question of custom it was now too late for him to do so. JUMA KHAN *v.* CHANNAN KHAN. **168 P L R 1901.**

9 By father—Awans of *Tahsil* Khushab—161 P. L. R., 1901=13 P. R. 1902 Col. 2101 P. I.

(d) In favour of daughter and daughter's daughter.

10 Will in favour of daughter and daughter's daughter—Kalal of Umballa District—67 P. R. 1904 Col. 2122 P. I.

(e) In favour of daughter's son.

11 *In favor of daughter's son—Family custom—Ancestral property.*

When a village founded by the common ancestor of the parties is abandoned by his descendants for a long period (in this case it was over 100 years) and some remote descendants re-take land, not ancestral shares, but what suits each of them, the original ownership is not to be taken into account in determining whether or not the property in suit is ancestral property of the parties, P. R. 81 of 1901 referred to.

Custom of the Punjab Will (Contd.)

When no positive custom at variance with Hindu Law is found to prevail, that law, subject to any clear modification in details that may appear to have occurred should be applied. SOHAN SINGH *v.* DIWAN CHAND. **178 P. L. R. 1905.**

12 To daughter's son—Awans of Shahpur --26 P. R. 1901 Col. 2108 P. I.

(f) IN FAVOUR OF WIFE.

13 *Will in favor of wife—Construction of--*

The testator, an *arora* by caste, made a Will of his property, which was found to be non-ancestral, in favor of his wife conferring upon her full power of alienation of immovable property, and the Will further stated that the testator had full power to dispose of the property and that no one but his widow was to have any interest whatever in the estate. On the death of the testator the widow became possessed of the estate and before her death made a Will directing mainly to benefiting her daughters and to aiding religious institutions and charities. A collateral of the testator contested both the Wills as invalid and contended that the former Will must be construed according to the general feelings of the Hindus and as conferring only a life-estate on the testator's widow and that as a Hindu widow she was not competent to make the second Will.

Held, that the contentions had no force, for the former Will in clear words showed that the testator's intention was to confer absolute estate on his widow and the latter was therefore competent to make the second Will, being absolute owner of the estate under the former Will. ATMA SINGH *v.* KALU. **162 P. L. R. 1905=93 P. R. 1905.**

g) BY PATHANS.

14 Pathans of Peshawar District 80 P. R. 1901 Col. 2122 P. I.

(h) BY POWER OF GIFT AND WILL.

15 Customary law--No distinction between the power of gift *inter-vivos* and a will--48 P. R. 1903 Col. 2121 P. I.

Customary rent.

1 *Agricultural land—Possession before trespass—Assessment upon produce—Net produce—Customary and competition rent.*

Principles for assessing mesne profits discussed in cases of dispossessions. For true measure of damages the character of possession before trespass should be ascertained because such possession is a fair index of intention as to the mode of occupation, if there were no trespass.

The character and use of land for a long

Custom of the Punjab Customary rent (Contd.)

series of years indicate that the plaintiff, if he had been in possession, would have used the land for cultivating it himself with ordinary food crops.

Held, that, mesne profits, should be assessed on the basis of produce and not rent.

If the defendant used the land to suit his own fancy, if he did not use it in the most advantageous way, if he took the risk of cultivating it with indigo on the chance of getting high profits by manufacturing indigo, or if he adopted the more comfortable use of the land by letting it to tenants, and was satisfied with a comparatively small income, the plaintiff ought to not be a loser thereby. He must not suffer for the indolent or speculative conduct of a trespasser. 12 C. W. N. 285—7 C. L. J. 197; 6 C. W. N. 409; 6 C. W. N. 732; 30 C. 536, referred to.

The difficulties of ascertaining mesne profits on the basis of produce are great and the net and not the gross produce is the true measure of damages.

The resultant net produce after taking into account the costs of production and the risks of the agriculturist differs very little from competition or rack rent. Assuming complete freedom of competition, the rent paid by a tenant at will would practically coincide with the whole net produce of any given piece of land.

Customary rents paid by most of the raiyats in a village tend to keep down the rent of *zerait* lands. PUNDIT LUCHMI NARAYAN *v.* SHEIKH MAZHAR HASSAN **12 C. W. N. 650.**

Customary right to dam channel.

1 Right to construct dams on a stream 29 C. 100 Col. 1385 P. I.

Customary right to privacy.

Privacy—Suit to enforce right of--Customary right of privacy,

The plaintiff brought a suit against the defendant for removing the windows in the third story of the defendant's house which overlooked the female apartments of the plaintiff It was decreed by the first Court. An appeal from that decree was dismissed. In second appeal it was *held* that as it was not denied that the plaintiff did enjoy such privacy before the defendant appellant erected his present house and that it had been materially interfered with by the opening of the doors in the wall of the third story which overlooked the apartments occupied by the ladies, the suit was rightly decreed.

Held, also, that the fact that the two houses were separated by a thoroughfare did not prevent the existence of a custom of privacy which could be enforced (*Gokal Prasad* v. *Radho*, 10 All., 358, referred to). LALA BHAGWAN DAS *v.* SHAHZADA MIRZA MASUD QADAR. **7 O. C. 126.**

Cutchi Memons.

1 Cutchi Memons—Marriage disputed—Evidence Omission to mention *nika* wife in a will executed after the marriage. Unchastity of widow—Effect on maintenance. 27 B. 485 Col 183 P. I.

2 *Cutchi Memon Mohammadan Law—Relinquishment of share—Gift.*

The brother of a deceased person, an heir under the Muhammadan Law, relinquished his share in favor of the deceased's minor daughter in order to remove the difficulties in the way of the Collector in getting himself appointed guardian of the minor's property under the Guardian and Wards Act. Some other heirs also likewise assigned their interests in favour of the minor. It was contended by a creditor of the brother of the deceased that the transaction was illegal.

Held, that the contention was not valid, for the relinquishment was not a mere gift. It was a transfer of property, supported by consideration which the law regards as valuable.

That the rule of Muhammadan Law, which requires that a gift must be accompanied by possession to render it valid and binding upon the donor did not apply to the transaction because it was not a mere gift. MAHAMMADUNISSA BEGUM *v.* J. C. BACHELOR. 7 B L. R. 477.

See also 581 P. I.

3 *Cutchi memons—Hindu Law—Will—Attestation—Muhammadan Law.*

Cutchi Memons are ordinarily governed by Hindu Law and custom as regards succession; but in other matters they are governed by Muhammadan Law. Hence, a Will made by a *Cutchi Memon* is valid although not attested, *In re* PROBATE OF THE WILL OF ABA SATAR HAJI ABOOBUKER. 7 B. L. R. 558.

4 *Cutchi memons—Hindu Law—Custom—Succession—Will—Marriage.—*

In the absence of proof of any special custom of inheritance the Hindu Law of inheritance applies to *Cutchi Memons.*

Among *Cutchi Memons* mother of a widow is excluded from inheritance by a nephew of her husband.

The validity of a marriage among *Kutchi Memons* is not to be determined by reference to the principles of Hindu Law.

Where the Will provided for an annual expenditure for the anniversary ceremonies of the testator, his father, mother and wife and for Maulud Sheriff and Agirai Hajrat Pir.—

Held, that the provisions were not invalid on the ground of their being contrary to the law against perpetuities. HAJI ABDUL RAHIM *v.* HAJI HAMID MOOSA. 5 B. L. R. 1010

5 *Cutchi Memons—Survivorship, doctrine of—Law governing—Mahomedan Law—Family firm.*

The doctrine of devolution by survivorship applies to a family firm of Cutchi Memons; but the Mahomedan and not the Hindu, law is applicable to the relationship between the manager and the members of a Cutchi Memon family firm. Hence, persons advancing loans to the manager of such firm are under no obligation to inquire whether advance of monies to the firm was strictly necessary. A family firm is not a partnership within the meaning of the Indian Contract Act, because such an association requires the individual assent of all the members to it. The position of a family firm carried on by Cutchi Memons is between that of a joint Hindu family and that of a partnership under the Indian Contract Act. Cutchi Memons acquire their father's estate as Hindu "Universitas," If that estate comprises a family firm it survives to them as Hindus. After-born members acquire an interest in it on their birth. But in the conduct of business they are governed by the Mahomedan Law.-HAJI NOOR MAHOMED *v.* N. C. MACLEOD. (RUSSELL J.). 9 B. L. R. 274.

6 *Cutchi memons—Will—Construction—Muhammadan Law—Widow—Stridhan.*

When the will executed by a Cutchi Memon provided that two-thirds of his property shall be divided according to Muhammadan Law, *held*, that the testator intended to give the share bequeathed to his widow absolutely. HOORBAI *v.* SOOLEMAN ABDOOL. 3 B L. R. 790.

7 Cutchi Memons—*Succession—Marriage—Hindu Law.*

In the absence of proof of any special custom of succession, the Hindu Law of inheritance applies to *Cutchi Memons.* 9 *Bom.*, 115.

The legal consequences of the classes of marriage, the approved and the disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not, and suggest the inference that it is the quality and not the form of the marriage that decides the course of devolution: where the marriage is approved the husband and his side come in, when disapproved they do not.

When the widow of a *Cutchi Memon* dies intestate and without issue, property acquired by her from her deceased husband does not descend to her own relations, but to the relations of her deceased husband. (1866) 2 *B. H. C.* 276 *referred to.*

Among *Cutchi Memons* mother of a widow is excluded from inheritance by nephew of her husband.

5 *Bom*, *L. R.*, 1010 *uphled.* MOOSA HAJI JOONUS *v.* HAJI ABDUL RAHIM. 7 B. L. R. 447.

Cypres doctrine.

1 Cypres doctrine—Religious institutions—Trust—Powers of court 15 M. L. J. 133= 28 M. 319 Col. 1212 P. I.

2 *Cypres doctrine—Will—Gift to charitable*

Custom of the Punjab Cypres doctrine (*Contd.*)

purpose—Unnecessary and useless object—Trust incapable of being carried out at testator's death Diversion of funds to useful and beneficial purpose—Power of Court.

On the authority of *In re Campden Charities* (1881) 18 Ch. D. 310 and of other cases it is clear that when under altered circumstances, through lapse of time or through other causes, it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefaction, the Court ought not to hesitate to give its sanction to a scheme which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original intentions of such donor.

Each case in which an application is made to divert charity funds into other channels *cypres* must necessarily depend upon its own facts and circumstances and upon the evidencef adduced before the Court. *In the matter of* HORMASJI FRAMJI WARDEN. **9 B. L. R. 1203 -32 B 214.**

3 *Cypress doctrine—Bequest to idol—Residue, appropriation of.*

Where a testator had dedicated under his will a portion of his estate to the worship of his family idol and a residue was left after the performance of all the expenses in this respect—

Held, that the Court could divert a portion of the residue of the estate to other useful charitable purposes. NANU NARAYAN KOTHORE *v.* THE ADVOCATE-GENERAL OF BOMBAY. **9 B. L. R 370.**

D

Dak cess.

1 Liability for Dak cess—Kabuliat—Construction of. 28 C. 293 Col. 380 P. II. No. 4.

Dam in the bed of a stream.

Riparian Rights—Obstruction—Damage—Right to sue.

If a man erects in the bed of a stream a dam which has the effect of diverting the water from its natural water course on to the land of the plaintiff and damage is thereby done. the plaintiff *prima facie* has a good right of action. MADHAR SHEVRAM *v.* RAKHAMA BHANSHET. **9 B. L. R. 864.**

Damages.

1 Abusive language for,
2 Accruing of.
3 Adequate remedy—Injunction.
4 Assault for.
5 Breach of contract.
6 Costs incurred in carrying on in criminal prosecution.
7 Co owners suit against.
8 Damages on rent.
9 Defamation for.
10 Distraint.
11 Decree for.
12 Executory contract for.
13 Execution proceedings.
14 Failure of consideration of sale.
15 False imprisonment.
16 Illegal attachment.
17 Illegal distraint.
18 Injunction.
19 Injury by act under a statute.
20 Insurance.
21 Interest.
22 Joint wrong doers.
23 Joint possession.
24 Lease.
25 Legal representative, suit against.
26 Limitation Act.
27 Malacious prosecution.
28 Measure of.
29 Mortgage—Contract, breach of.
30 Negotiable instruments.
31 Non-realization of V. P. by Post.
32 Principal and agent.
33 Question of amount.
34 Remote and indirect.
35 Rain Water, damage by.—
36 Rent.
37 Suit to recover money on an award.
38 Suit for specific performance.
39 Trade mark.
40 Unchastity imputed.
41 Vendor and purchaser.
42 Wrongful attachment.

1 *Abusive language—Amount of damage,—Question of fact—Second appeal.*

If the abusive language, having regard to the respectability and position of the person abused is calculated to outrage his feelings or lower his estimation in which he is held by persons of his own class and so bring him into disrepute, the slander is actionable without proof of special damage.

A charge of adultery against a respectable man is such a slander,

The question of the amount of damages is a question of fact and it is not open to the High Court to interfere in second appeal upon a question like that. JOGESWAR SARMA *v.* DINARAM SARMA, **3 C L J 140.**

See Abusive language Col. 18,19 P. I.

2 Accruing after suit—Continuing cause of action. 29 B. 107 Col. 294 P. 1.

3 Adequate remedy—Injunction—Obstructing use of a joint stair case. Ouster from joint property 29 C. 500 Col. 450 P. I.

4 *Assault. Damages for—Cause of action—Conviction for assault no bar to Civil action.*

In a suit for damages for an assault, the Court found that the assault was of a

Damages *(Contd.)*

very gross character and not justified but dismissed the suit, holding that the plaintiff had no good cause of action, as the defendant had been adequately punished by the Criminal Court.

Held, that the dismissal of the suit was wrong, and the fact that the defendant had been punished by the Criminal Court was no bar to the suit. AKHIL CHANDRA BISWAS *v.* AKHIL CHANDRA DEY. **6 C. W. N. 915.**

5 *Interest—Interest Acts, 1839 and 1855—Written demand—Implied agreement—Damages.*

In the absence of agreement or usage giving a right to interest, and of a written demand giving notice that interest would be claimed, the creditor is not entitled to interest.

In the case of actions for debt in which the requirements of the Act XXXII of 1839 cannot be satisfied, interest cannot be awarded as damages. 20 Mad 481; 73 P. R., 1892. 36 P. R., 1894 referred to. BURA *v.* MAILIA SHAH. **10 P R 1901=19 P L R 1902.**

6 *Malicious prosecution—Want of reasonable and probable cause—Malice—Damages—Nominal damages.*

To sustain an action for malicious prosecution five factors must co-exist, (1) a prosecution of the plaintiff by the defendant, (2) want of reasonable and probable cause for the prosecution, 3 malice express or implied, (4) the determination of the prosecution in favor of the party prosecuted, (5) loss or damage caused to that party by the prosecution. If any one of these factors is absent, no action will lie.

Where the plaintiff was prosecuted by the defendant and convicted by the original Court for defamation and the conviction was upheld on appeal but set aside by the Chief Court on revision, the defamatory statements being found substantially true, it must be held that the defendant had no reasonable or probable cause for the charge and that the charge was malicious in the legal sense. The plaintiff was awarded only nominal damages. BADRI DAS *v.* *Babu* NATHU MAL. **176 P L R 1901.**

7 Breach of contract—Readiness and willingness to pay without making actual tender of money. 30 C. 865 Col. 308 P. I.

8 *Breach of contract—Procuring a breach of contract—Knowledge of the contract—Action for damages—Tort.*

To support an action to recover damages for procuring a breach of contract, the plaintiff must establish not merely that the defendant procured others to commit a breach of contract, but also that he did so knowing that there was that contract. PANDURANG BALAJI APTE *v.* NAGU DAGDU CHAUGULA. **8 B. L. R. 610=30 B. 598.**

9 Breach of contract—Vendor and purchaser—Contract to sell immoveable property 9 B. L. R. 1037=32 B. 165 Col. 335 P. I.

Damages *(Contd.)*

10 Breach of contract—Penalty—Stipulation by way of damages—Compound interest 1 N L R 9 Col. 342 P. I.

11 Breach of contract—Damages, how and when accrue and how calculated—6 C. L. J. 398 Col. 335 P. I.

12 Breach of contract—Tender to supply gram to commissariat Department—1 P. L. R. 1905 Col 603 P. I.

13 *Breach of contract—Original Side, High Court's Jurisdiction in—Parties resided—Agreement executed and property affected was, in moffusil.*

The owner of an estate had entered into an agreement with A, undertaking to furnish A with funds to enable him to prosecute certain appeals then pending in the High Court of Calcutta in cosideration of A's selling him the subject-matter of the appeal which was situate in Gaya. A sued B for damages for breach of the abovesaid agreement. B contended that the High Court, on the Original Side, had no jurisdiction to try the suit inasmuch as the agreements on which the suit was based were made by parties, who resided outside the jurisdiction and who did not contemplate anything which necessarily had to be performed within the jurisdiction and the agreements related to property which was outside the jurisdiction.

Held, the documents were executed, the parties resided and the property affected by them was in the Moffusil. The looking after and managing the appeals was not necessarily to be done in Calcutta. It was not necessary that the instructions should be given or cost be paid within the jurisdiction of the High Court. Consequently, the High Court had no jurisdiction to entertain the suit. UMA SHANKAR PROSAD *v.* DWARKA NATH MITTER, **1 C. L. J. 219.**

14 Breach of contract of sale—Consideration. 4 B. L. R. 814 Col. 333 P. I.

15 Breach of contract—Vendor and purchaser—Sale of jote for arrears of rent—7 C. W. N. 905 Col. 235 P. I.

16 Breach of contract of power of marriage—Pan money paid—Public policy—Onus—Marriage contract. 1 C. L. J. 261 Col. 319 P. I.

17 Breach of contract by decree-holder market rate. Evidence of—Computation of 1 L. B. R. 1900-1902 P. 262 Col. 604 P. II.

18 Breach of contract—Principal of assesment. 1 L. B. R. 1900 1902 P. 21 Col. 338 P. I.

19 Breach of statutory covenant for title and quiet enjoyment. 5 O. C. 78 Col. 599 P. I.

20 Burden of proof—Proof of inferior quality—Evidence—Method of ascertaining damages—Trade Custom. 6 C. W. N. 495. *See Custom No. 68.*

21 Continuing offers and not contract—Rescission of contract. 72 P. R. 1904 Col. 603 P. II.

Damages *(Contd.)*

22 Costs incurred in carrying on Criminal Prosecution—Damages for assault. 32 C. 429 Col. 674 P. II.

23 *Costs incurred by plaintiff who was a complainant in a previous criminal prosecution of the defendant can not be recovered by a civil suit.*

A suit will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a Criminal Court. Lekhraj Bansidhar *v.* Rambhagat (IV C P L R. 131) dissented from. 8 A. 452, 9 A. 474, 4 A. 97, 4 C. P. L. R. 131. 12 A. 166 referred to. DOMA TELI *v.* JAGAN NATH AND PANDU. **15 C. P. L. R. 129.**

24 Co-owners — Right of others to sue them for damages—Refusal by some of joint landlords to sign puttah. 13 M. L. J. 222 Col. 688 P. II.

25 Damages or rent—Suit for—Whether a suit for rent payable by tenant under lease to superior landlord is one for rent or damages. 9 C. W. N. 96 Col. 90 P. II.

26 *Defamation for—Minister of a charitable institution intimating a lady of his mission, his disapproval of her proposed marriage —Communication privileged—Malice—Onus.*

A minister in charge of a charitable institution at P. having promised to perform the marriage between a lady attached to the mission and the plaintiff, subsequently wrote to the lady, on further information supplied to him, regretting that he could not conscientiously have anything whatever to do with her marriage with the plaintiff, informing her at the same time that he had not sought for information and made inquiries, but that facts had been brought to his notice which he had taken trouble to look into, and that he was forced to the painful conclusion that the plaintiff was altogether unworthey of her, held, that such communication by the clergyman was a privileged communication, and that a suit to recover damages for defamation by the plaintiff could not be sustained, no malice having been proved. Where the existence of a privileged occasion is established, the plaintiff must give affirmative proof of malice, that is, dishonest or reckless ill-will, in order to succeed. It is not for the defendant to prove that his belief was founded on reasonable grounds, and there is no difference in this respect between different kinds of privileged communication. To constitute malice there must be something more than the absence of reasonable ground for belief in the matter communicated. X. *v.* Z. **83 P. R. 1908.**

27 Distraint permissible for arrears of rent and interest, but not for damages. 28 C. 364 Col. 123 P. II.

27 (a) Distraint—Damages caused by reason of contract—Suit by subtenant against tenant for value of crops distrained for arrears of rent due to landlord, SURAJMAN *v.* BHAGWAN SINGH. **7 O. C. 351.**

See Sub-tenant.

28 Decree for damages in a suit for

Damages *(Contd.)*

specific performance of a contract—49 P. R. 1905 Col. 251 P. I.

29 Executory contract—Damages for breach of—27 B. 618 Col. 333 P. I.

30 Execution proceedings—Damages from acts done in execution—Suit for—6 C. L. J. 527 Col. 1107 P. I.

31 Failure of consideration—Sale of joint family property—Consequent partition-Suit for damages—SHIV RAM *v.* BALDAJI. **26 B. 519** *See Vendor and Purchaser.*

32 *False imprisonment—Information given to the Police—Prosecution after investigation —Acquittal of accused—Suit for false imprisonment against informant, maintainability of.*—

A. informed the Police that certain persons had attempted to murder him and named the plaintiff and others as being those who had done the act. The Police, after holding an investigation, sent them to a Magistrate. After holding a preliminary inquiry the Magistrate committed them for trial to the Court of Sessions. The trial resulted in the acquittal of the accused. *A.* was now sued for damages for false imprisonment.

Held, that the suit was not maintainable. 26 *Mad.*, 362 *applied.* BALBHADDAR PANDE *v.* BASDEO PANDE. **3 A. L. J. 650=W. N. A. 1906 p 263.**

33 *Fatal accident for—Assessment of damages under Act XIII of 1855 (Fatal accident) —Measure of damages—Monitary loss—Mental suffering—Survivors.*

In assessing damages, the pecuniary loss sustained by the family of the deceased is all that can be considered and nothing can be allowed the survivors as compensation for mental suffering, etc.—7 B. H. C. 113, 8 B. H. C. 130, 18 Q. B. 93—21 L. J. Q. B. 233, and 8 Ex. 221=42 L. J. Ex. 153, referred to. RATILAL KALIDAS *v.* THE MADRAS RAILWAY Co., **4 M. L. T. 233.**

34 Illegal attachment—Damages for plaintiffs property having been wrongly attached as that of the accused under S. 88, Criminal Procedure Code—28 C. 540 Col. 60 P. I.

35 Illegal distraint of standing crops — Suit for damages—Limitation Act Art. 2 Applicability of. 9 C W N 376=32 C. 459 Col. 1811 P. I.

36 Injunction—Easement—Light and air —5 B. L. R. 446 Col. 2090 P. I.

37 Injunction—Preventive injunction. 3 B L R 542 -26 B. 136 Col. 260 P. II.

38 *Injury caused by execution of powers given by Statute—Right to sue.*

No suit lies on be half of a person who sustains a private injury by the execution of powers given by a Statute, these powers being exercised by judgment and caution. If the injury can be avoided by reasonable and practicable precautions, a suit for damages will lie. BHOGILAL MAGANLAL *v.* THE AHMEDABAD MUNICIPALITY, **3 B. L. R. 415.**

Damages *(Contd.)*

39 Insurance through agent—Mistake—Rectification of deed for discretion—5 B. L. R. 853 Col. 416 P. I.

40 Interest—Damages—Charge on proceeds of mortgaged property sold for arrears of revenue—5 W. N., O. 356 Col. 1921 P. I

41 Interest 19 P. L. R., 1902—*See No. 5 supra.*

42 Interest—Suit for breach of contract—Liability for interest on arrears of rent. 26 A 299—7 O. C. 116 Col. 337 P. I.

43 Interest—Measure. 26 M. 445 Col. 339 P. I.

44 Interest—Suit by superior against an under-proprietor. 1 O. C. 94 Col. 337 P. I.

45 Interest—Breach of contract—Suit by superior proprietor against under-proprietor for arrears of rent. 1 O. C. 270 Col. 604 P. II.

46 Interest—Payment of interest—Interest payable as damages—Creditor dying with will without executors—4 M. L. T. 335 Col. 621 P. II.

47 Joint wrong-doers, extent of liability of each or one of—KRISHNAN KRISHNAN NAMBURI *v.* THE DEWAN OF TRAVANCORE. **21 T. L. R. 211.**

See Torts.

48 *Joint possession, ouster from—Right to damages.*

A plaintiff, being only entitled, under a lease, to joint possession of a certain property, claimed exclusive possession of a specific portion of the property as against a member of a family from whom he was undivided, held, he was not, if ousted from his exclusive possession, entitled to receive damages on the footing that the ousting was wrongful as regards his interest in the property as an undivided member of the family. MARRI RAMANNA *v.* GHATTAMANENI. **3 M. L. T. 277=18 M. L. J. 258.**

49 *Lease—Landlord and tenant*—Howladari *lease—Excavations by lessee—Destruction of land.*

Upon the construction of a *howladari* lease of a permanent character it appeared that the lessee had power to make excavations in the lands demised.

Held, that the lease could not be construed to mean that the lessee was at liberty to use the land in such a way as to cause its destruction. GIRISH CHANDRA CHANDO *v.* SIRISH CHANDRA DAS. **9 C. W. N. 255.**

50 Lessee—Damages for dispossession—Covenant for quiet enjoyment—Landlord and tenant—Assignmet of lease. 3 A. L. J. 501 Col. 532 P. II.

51 Lessee—Suit for damages—Suit for rent—Whether a suit for rent payable by tenant under lease to superior landlord is one for rent or damages. 32 C. 169 Col. 90 P. II.

52 Libel, suit for—Claim for Rs. 10,000 damages—Privy Council. Appeal to—Application for leave—Value of subject-matter in dispute—Practice. 9 C. W. N. 370 Col. 1298 P. I.

53 *Legal representatives—Suit for—Right to sue.*

In the case of torts to property the right to sue as against the legal representative of a deceased defendant does not survive unless property or the proceeds or value of property belonging to another have been added by the deceased to his own estate. 52 L. J. ch. 833, 24 C. 672; 13 B. 677 referred to. SHRAWAN *v.* BHIWA. **16 C. P. L. R. 65.**

54 Limitation Act Art. 116—Suit for compensation for the breach of a contract in writing registered. A. W. N. 1908 P. 160 Col. 1896 P I.

55 Limitation Act. Art. 116—Contract in writing registered - Contract signed by only one party, but acted on by both—12 C. W. N. 628—35 C. 683 Col. 1895 P. I.

56 Loss of horse—Tort—Attack by vicious animal—Right of defence of persons and property. A. W. N. 1905 P. 77—27 A. 531 Col. 770 P. I.

57 *Malicious prosecution—Master and servant—Servant acting wrongfully in the interest of master—Liability of master for the acts of his servants—Damages—Tort.*

There was a long standing dispute between the plaintiff's master and the defendant No. 3. The defendant No. 2 was the Naib of defendant No. 3, and the defendant No. 1 was a peon under defendant No. 2. The defendant No. 1 prosecuted the plaintiff in the Criminal Court, but the prosecution failed, the plaintiff being acquitted as not guilty. Thereupon the plaintiff brought a suit to recover damages from the defendants Nos. 1-3 for malicious prosecution. It was found that not only was the prosecution started in the interest and for the benefit of defendant No. 3, but that all the expenses incurred in the prosecution of the Criminal case were borne by the estate of that defendant and that there was an implied authority in defendant No 2 under whose orders the defendant No. 1 was acting in starting the prosecution in order to advance the cause of their master the defendant No. 3.

Held, that the master, *i.e.*, defendant No. 3 was answerable for the wrongful acts of his servants, defendants Nos. 1, 2. SARAT CHANDRA ROY CHAUDHURY *v.* DAWLAT SINGH *alias* DAMRI SINGH. **10 C. W. N. 723.**

58 *Malicious prosecution-Suit for damages for setting the law in motion—Criminal Procedure Code* 1898, *Section* 144.

An action will not lie for setting the law in motion to the prejudice of another party, unless the plaintiff can show malice and absence of reasonable and probable cause.

Damages awarded to the plaintiff against the defendants where on the defendants' application the Magistrate had passed an order prohibiting the plaintiff from

Damages *(Contd.)*

entering upon certain lands in dispute, and it was found that the lands were not the defendants' and they were not entitled to possession of them. The High Court observed—'on the allegations in the plaint which have been held by the Lower Appellate Court to have been proved, *viz*, that the plaintiff's allegations as to possession were true, and the defendants allegation false, it must be taken that the defendants in presenting their petition to the Magistrate acted maliciously and without reasonable and probable cause.'

Under Section 144, Criminal Procedure Code, a Magistrate has no jurisdiction to adjudicate upon any question of title or possession. He has power to make an order with the object of preventing a breach of the peace, if he considers a breach of the peace is imminent. This is the only question for him to consider. APPALA NARSIMIHULU *v.* MAHANT HARI NARAYANA DAS BAVAJI. **M. L. J. 1901 p. 122.**

59 *Malicious prosecution—Damages—Information to Police - Informant engaging pleader for prosecution—Reasonable and probable cause —Conviction of plaintiff by Court of first instance not conclusive.*

If a person gives false information to the Police, he cannot escape liability for the natural and intended consequences of the act, merely because there was a subsequent investigation and the prosecution was set in motion by the Police. When, further, he is found to have conducted the prosecution by engaging a pleader and a mukhtear, it cannot be urged that the Police, and not he, was responsible for the prosecution.

A person connot be held liable for damages for malicious prosecution, if it is not found that there was want of reasonable and probable cause, or that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause for the prosecution

The fact that the plaintiff was convicted by the court of first instance and was only acquitted on appeal ought to be considered in determining whether there was reasonable or probable cause, but it cannot be regarded as conclusive in favour of the defendant. BHULA CHAND PATRO *v.* PALUN BAS. **12 C. W. N. 813** *(Note)*.

60 *Malicious prosecution — Damages — Prosecution started by Police upon information.*

A private individual, upon whose information to the Police a prosecution was started, cannot escape liability for damages for malicious prosecution by urging that the Police, and not he, prosecuted, if it appears that he himself was the real prosecutor. 12 C. W. N. 818 Note, F, and 9 C. B. R. N. S. 505 (583) referred to. HARI CHARAN SANT *v.* KAILASH CHANDRA BHUYAN. **12 C. W. N. 817.**

61 Measure of — Character of possession for trespas to be ascertained to arrive at true

Damages *(Contd.)*

measure of. 12 C. W. N. 650. *See Customary Rent No. 1.*

62 Measure of — Conversion of stolen Hundi—Suit on — Payment by drawee to wrong person—9 C. W. N. 811 Col. 615 P. II.

63 Measure of—Contract of sale—Damages. 4 B. L. R. 818 Col. 334 P. I.

64 Measure of—Mode of assessing damages where no proof of market price—Breach of contract. 26 B. 744 Col. 332 P. I.

65 Measure of—Breach of contract to deliver goods—Market price at due date. 26 B. 235 Col. 752 P. I.

66 Measure of—Application for distraint permissible for arrears of rent and interest but not for damages. 28 C. 364 Col. 123, P. II.

67 Measure of—Damages previous and after the institution of suit. 29 B. 107 Col. 294 P. I.

68 *Measure of—Nominal damages—English and Indian Law — Slander -- Imputation of moral misconduct--Substantial Loss.*

Language imputing moral misconduct is actionable in this country. But in the absence of proof of substantial loss having resulted from such language, the plaintiff can get only nominal damages. The artificial rule obtaining in England whereby suits for oral defamation are restricted to imputations of commission of a criminal offence, or of being subject to contagious disease and of misconduct in trade and calling, does not prevail in India. SAGAR RAM *v.* BADU RAM. **1 A. L. J. 102.**

69 Measure of — Negligence of Railway Company—Trains overshooting the platform —Injury to passangers. 6 B. L. R. 673 Col. 824 P. I.

70 *Measure of -- Negligence—Vis major— Insufficiency of precauctions to cope with ordinary contingencies--Act of God, an excuse— Substantial injury necessary for action of damages--Injunction--Practice.*

Vis major, to be a valid plea, must be the proximate cause, the *causa causans* and not merely a *causa sine qua non* of the damage complained of.

Neglect to provide for conditions not exceptional may involve liability, although *vis major* or exceptional conditions be also established.

Where the damage caused was due to the insufficiency of precautions taken by the defendant to cope with conditions which might reasonably have been anticipated, the defendant is liable. The mere fact that *vis major* co-existed or rather followed on negligence is no adequate defence. Before an act of God may be admitted as an excuse the defendant must himself have done all that he was bound to do.

A plaintiff before he can ask for an injunction must prove that he has sustained such a substantial injury by the act of the defendant as would have entitled him to a verdict at law in an action for damages.

The plaintiff sued to obtain an injunc-

Damages *(Contd.)*

tion against the Corporation of the City of Bombay, in respect of obstruction to the flow of the water of a creek alleged to have been caused by embankment and bridges erected by the defendant Corporation, and in respect of injury alleged to have accrued or to be likely to accrue therefrom to the plaintiff's land. The lower appellate Court granted an injunction, ordering the defendant Corporation to provide "sufficient water-ways in their duct line so that plaintiff's land shall not be flooded in consequence of the line acting as material obstruction to the floods."

Held, that it was desirable in such a case to avoid all approach to particularity of direction; and that the injunction should be in general terms, *viz*, an injunction restraining the defendant Corporation from flooding the lands of the plaintiff or causing them or permitting them to be flooded by the works of the defendant Corporation. *L R 30 I A 63 followed.* THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY *v.* VASUDEO RAMCHANDRA. **6 B L R 899.**

71 *Measure of—Power of sale exercised by defendant after suit—Goods undersold.*

Where plaintiffs exercise a power of sale over the goods belonging to the defendants after the institution of the suit and undersell the goods, the wrongful act brings the case within the principle of Armory *v.* Delamirie 1 Sm. L C, 356 and the damages may be estimated accordingly. On such a sale the plaintiff is not entitled to a commission.—NANCHAND *v.* MUSSA. **6 B L R 692.**

72 Measure of—Breach of contract of sale—Damages—Rate of—30 C 477 Col 603 P II.

73 Measure of—Liability of the firm for damages—Stolen Hundi—Payment by drawee to wrong person—10 C W N 1053 Col. 644 P II.

74 *Measure of—Injunction — Nuisance—Damages—Municipal drains.*

Under the Municipal law, no private person can claim a right to foul an ordinary drain by discharging into it what it was not intended to carry off. Where the defendant, the owner of a shellac factory, discharged into the Municipal drain, which was not constructed or intended for carrying off such stuff, refuse liquid of an offensive character, which interfered with the ordinary comfort of the plaintiff's occupation of property and caused him special injury;

Held that the plaintiff was entitled to restrain him. *St. Helen's Smelting Company* v. *Tipping*, (11 H L C 642); *Crump* v. *Lambert*, (L R 3 Eq. 409) referred to. Where, moreover, the defendant discharged the liquid into the drain knowing from the condition of the drain and the nature of the liquid that it could not be efficiently carried away, but must stagnate, decompose

Damages *(Contd.)*

and create a nuisance:

Held that the defendant must be responsible for the necessary consequences of his action, and was not entitled to shift the responsibility on to the Municipality by contending that, if the latter would improve the drain, there would be no nuisance.

Held also that an injunction for the permanent stoppage of the nuisance was the only effectual remedy in the case. Substantial damages should be awarded against a defendant, who has persisted in a nuisance causing material injury to the plaintiff.—GALSTAUN *v.* DOONIA LAL SEAL, **9 C W N 612 32 C 697.**

75 *Measure of—Suit for—Remote and indirect damage—Delivery of goods within reasonable time.*

P. bought 8 logs of Sal at *Sonaripur* and made them over to the R & K. R. Co. at the S. station on the 14th May, 1899, for delivery to him at L. The distance between the two places was 69 miles. P. did not receive the logs till the 29th June. P. claimed R. 359-6 6 damages on the following grounds:—*First*, that the logs ought to have been delivered to him within a reasonable time and that for 69 miles one week would be a reasonable time; *Secondly*, that he had contracted to build a house at L. by the 1st June, 1899; *Thirdly*, that owing to the non-delivery of the logs by the 21st May he suffered loss, by having had to purchase other logs and pay penalty to the owner of the house under the terms of his contract for delay in completion. But P. omitted to allege in the plaint, that the Railway Company had any notice of the contract at the time the logs were booked.

Held, that for P. to succeed in a claim of this kind it would have to be found that the goods were not delivered to him within a reasonable time, and the measure of damages would be the difference in the market-value of the goods at the time they ought to have been delivered and at the time they were actually delivered.

P.'s suit as framed was not based on any loss or damage which naturally arose in the usual course of things from the delay in delivery, but on the loss which he suffered from his failure to complete a contract of which the Railway Company had no knowledge. The damage alleged was too remote and indirect to entitle P. to compensation. KHEM CHAND *v.* ROHILKHAND AND KUMAON RAILWAY COMPANY. **5 O. C. 328.**

76 Measure of—Breach of contract sale and purchase—Market rate—Artificial inflation of prices—Legitimate mercantile transaction—1 L. B. R. 1900-1902 P. 146 Col. 235 P. II.

77 Mortgage—Contract to lend money on mortgage—Suit for breach of contract. 8 O. C. 5 Col. 406 P. I.

78 *Negotiable instruments—Damages—*

Damages *(Contd.)*

Drawee dishonoring cheque when he had funds of the drawer.

Section 584, Civil Procedure Code, does not allow the High Court to interfere with the amount of damages assessed on a right and proper principle.

Substantial damages may be awarded to a drawer when the drawee has dishonored a cheque drawn on him if at the time of dishonoring it the drawee had funds sufficient of the drawer in his hand. SRI DHAR *v.* MAJOR R. TYRWHITT. **W. N. A. 1901 p. 113**

79 Non-realisation by post—Value-payable insured parcel – Breach of contract – Parcel delivered, but money not recovered—Measure of damages – 28 M. 213. Col. 871 P. I.

80 *Ordinary damages recoverable even if special damages not proved.*

In actions of tort the plaintiff is not precluded from recovering ordinary damages by reason of his failing to prove the special damage laid unless such special damage be the gist of the action. 10 M. I. A. 563, 8 W. R. 44, 23 W. R. 230, 24 W. R. 97, 11 W. R. 143, 25 W. R. 547, referred to—PURAN TELI *v.* GOVIND RAM RAMCHANDRA MALIK, MT. CHANDRABAI **15 C. P. L R. 39.**

81 Principal and agent—Agent not competent to sell against instructions of principal—Pledge Pleedgee's right of sale - Liability of non-contracting member of a family. 12 M. L. J. 375, Col. 2077 P. I.

82 Question of amount. 3 C. L. J. 140. *See No. 3 Supra.*

83 Question of amount and liability to—Remand – Preliminary point. 8 C. L. J. 159 Col. 1670 P. I.

84 Remote and indirect. 5 O. C. 328. *See No. 78 Supra.*

85 *Rent—Landlord and Tenant—Non-agricultural lease—Notice to quit—Termination of tenancy—Right to enhance rent—Damages for use and occupation.*

Where a tenant has no right of occupancy, and no lease or special terms, he may be given notice to quit, and such notice cannot be held to be a bad and insufficient notice merely because it holds out an offer to the tenant to remain on fresh terms from a given date, if the tenant prefers that alternative, provided always that the notice is clear and definite in its terms, which must be such as to terminate the current tenancy.

A notice to quit, with an offer of the alternative of staying on on fresh terms, such as paying a higher rent, in a notice which is clear and mistakeable, is sufficient to terminate the tenancy on the date fixed, if the notice given is not defeasible on any other ground. Whether the notice is of such a nature is in each particular case a question of fact. When in a notice to quit with an offer of staying on an enhanced rate of rent has been given and the tenant does not vacate, it will depend upon the facts disclosed in each case whether the tenant is to be presumed to have accepted the terms offered, in which case rent would be decreed in accordance with such terms, or it may be held that no such consent can be presumed, but that, either owing to insufficient time granted, or for other sufficient cause, the tenant has not vacated but has held over contumaciously. In such a case the Court would award a reasonable sum for use and occupation. In considering what sum should be allowed for use and occupation, or for damages for contumacious holding over, the whole circumstances of the tenancy and the sufficiency in point of time of the notice, may properly be taken into consideration. As to what are reasonable damages the penalty of double the rent may sometimes be taken as a fitting standard.

If the terms of the existing tenancy do not indicate the period of notice required, the notice must be such as is reasonable in each particular case, and the fact that the buildings themselves or their materials belong to the tenant is a factor to be taken into account should that be found to be the fact.

Where a notice required the tenant to vacate the house rented by him on or before a date mentioned therein and stated that in case of default, after the said date and until further notice, the rent would be a sum of money stated therein.

Held, that the notice was clearly calculated to terminate the old tenancy from the date given in it. PIRBHU DIAL *v.* RAM CHAND. **42 P. L. R. 1904 = 5 P. R. 1904.**

86 Revision of contract—Breach of contract—Tender to supply gram to Commissariate Department. 1 P. R. 1905 Col. 603 P. II.

87 Suit to recover money due on an award—Specific performance. 28 B. I. Col. 604 P. I.

88 *Suit for right to water—Infringement of water right, whether contractual or proprietary when likely to cause damages may be restrained by injunction though no evidence of actual damage is given :*

Ryotwari lands belonging to the plaintiff had been irrigated for a period of more than 60 years by a channel without any interference on the part of Government. The defendant without any justifying cause blocked up the mouth of the channel cutting of the entire supply of water. The plaintiff without claiming any damages but stating in a general way that he had been damnified by the act of the defendant sued to restrain the defendants by injunction from interfering with the channel:—

Held, that the plaintiff was entitled to the injunction sued for whether his right to the water was based on a contract with Government or whether his right was a proprietary right appurtenant to his ownership of land. In either view of the case, the plaintiff is entitled to succeed without an express finding as to damage. It is enough if the act

Damages *(Contd.)*

is such as to be likely to cause damage to the plaintiff and the stoppage of the entire supply of water is such an act. The interference with contractual relations without sufficient justification is a violation of legal right which gives a right of action to the party whose rights are infringed. (1901 A. C., 495 at p. 510), 2. E. and B. 216, I. Q. B. 147, 24. M. 36, 28. M. 72, 1893. I. Q B. 715 referred to. RAMA ODAYAN *v.* SUBRAMANIA AIYAR. **18 M. L. T. 178=31 M. 17.**

89 Suit for specific performance of contract Damages—49 P. R. 1905 Col. 251 P. I.

90 Trade mark discriptive of goods of another person—Injuction. 9 C. W. N. 281 Cols. 316 P. II.

91 *Torts—Rain water—Damages to neighbour's property—Injunction.*

The plaintiff brought the persent suit for damages against the defendant on the allegation that the defendant had caused damage to her house by allowing the rain water collected into a trench dug by the defendant on his land to percolate into the foundations of her house. The defendant pleaded that he had a right to build on his land and for the purpose of building to make tranches for foundations and that he was not liable for damage done to the property of the plaintiff by percolation.

Held, that the plea was valid.

If a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his own peril and is liable for the consequences if it escapes and does injury to his neighbour's land. But before a person can be held liable in damages for injury caused to his neighbour's land it must be shown that the thing was brought or collected on his land by him voluntarily for his own purposes in a non-natural user of it, otherwise he is not liable. MOHOLAL MAGANLAL *v.* BAI JIVKORE. **6 B. L. R. 529=28 B. 472**

92 Unchastity-Impution of—Defamation—Special damage 34 C. 48 Col. 343 P. II.

93 *Vendor and purchaser—Agreement to sell—Vendor's right to re-sell property on purchaser's default.*

Where it was expressly and unconditionally provided in an agreement for sale of property that on the vendee's failure to pay the consideration-money and complete the purchase by the date fixed, it should be open to the vendor to execute a deed of sale in favour of some other person.

Held, that the vendor was entitled to sell the property, on the vendee's default, to a stranger, and claim the difference between the price realized by him and that agreed to in the contract of sale. It was not necessary for the vendor, before selling the property, to give notice to the vendee, calling upon him to fulfill his part of the contract, and that on his default he would re-sell the property TUKUN SINGH *v.* HONUMAL DAS. **7 C. W. N 108.**

94 Wrongful attachment—Abuse of Civil

Damages *(Contd.)*

process—6 B. L. R. 704 Col. 1834 P. I.

Damdupat.

1 *Rule of—How far affected by the contract and Transfer of Property Acts—Applicability to mortgages.*

The Contract Act has not in any way touched the rule of Damdupat. The Damdupat rule has been abrogated in respect of mortgages governed by the Transfer of Property Act. 21 C. 841 dist. MADHWA SIDHANTA NIDHI ONAHANI *v.* VENKATRAMANJULU NAIDU. **26 M. 662 at 670.**

See for other facts Col. 543 P. II.

2 *Damdupat, rule of, when applicable—Civil Procedure Code (Act XIV of 1882) Ss. 351 and 352—Proof of claim, in insolvency proceedings, effect of.*

An order admitting a creditor's claim made in insolvency proceedings, amounts to a decree and the rule of damdupat is not applicable to a claim so admitted. The rule of damdupat applies only during the existence of the relation of debtor and creditor, and ceases to apply when the contractual relation has come to an end by reason of a decree. HARI LAL MULLIC, *in the matter of.* **10 C. W. N. 834=33 C. 1269.**

3 *Damdupat — Interest accrued due not effected by the rule of damdupat.*

Plaintiff advanced Rs. 714 to the defendant. The whole of this sum was repaid by the defendant. The plaintiff then sued to recover Rs. 33-9-2, being the amount of interest over the amount from the date of the loan to the date of its repayment. The defendant raised the plea of *damdupat*, alleging that no sum was due as principal at the date of suit, so none could be recovered by way of interest.

Held, that the claim should be allowed; since the rule of *damdupat* had no application to right that has already accrued. The rule of *damdupat* does not divest rights that have accrued; it merely limits accruing rights. A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off. NUSSERWANJI *v.* LAXMAN. **8 B. L R. 82=30 B. 452.**

4 Mortgage—Suit for redemption—Application of the rule of damdupat. 26 A. 354 Col. 2091 P. I.

5 *Rule of.*

The rule of damdupat does not absolve a debtor from liability for the interest due when he re-pays the principal; it merely prescribes that the amount of the former must not exceed that of the latter. By paying off the principal, he does not escape liability for the interest that he was bound to pay with the principal, nor, under such circumstances, is it any defence to a suit to recover the interest to plead that at the date of the suit no principal is outstanding. 30 B. 452, 20 B. 611 *referred to.* KARAMCHAND SADHUMAL *v.* BALCHAND SEUMAL. **2 S.**

Damdupat *(Contd.)*

L. R. 10.

Darkhast grant.

1 *Lease from year to year—Notice to quit* —Darkhast *grant obtained by fraud not binding on Government.*

Where land was held under an oral lease from year to year, and a notice was given, in March 1899, by the lessor to the lessee, to quit and surrender the land in April 1899 (*i. e.*, within a month), *held*, that the notice was not reasonable.

When question was raised, as regards the validity of the *darkhast* grant, under which the plaintiff claimed, which the defendants contended, was obtained by framed—

Held, that the proper course for the defendants was to move the revenue authorities in the matter and apply for a grant of *pattah* to themselves in suppression of the grant made in the plaintiff's favour; that a grant obtained by practising fraud upon the revenue authorities, would not bind the Government and might be revoked by the revenue authorities. ANNAMMAL *v.* VENKATARAGAVACHARI. **13 M L J 137.**

Darkhast Rules.

1 *Grant of land on darkhast—Grant good if made by competent authority, unless set aside on appeal—Omission to consult one whose opinion is not binding does not vitiate the grant:*

A grant of land purporting to have been made under the darkhast rules by the officer empowered by the rules to make the grant is binding on the Crown unless it is revoked by an officer of a higher grade on appeal. The omission on the part of the officer making the grant to consult an authority whom he is directed to consult by an order of Govenment, which, however, does not make the opinion of such authority binding on him, is a mere irregularity which does not invalidate the grant. HUMMADE BEARI *v.* SECRETARY OF STATE FOR INDIA. **31 M 264.**

2 Jurisdiction of Civil Court—Suit for grant made by a Government officer on behalf of the Crown—Power of officer to make grant. 26 M 268 Col 924 P I.

3 Jurisdiction of collector—Grant by Tehsildar without consulting Municipal Council. 25 M 742 Col 463 P II.

4 Power of Civil Court to question reasons assigned by revenue authorities for granting or refusing applications for Darkhast—29 M 461 appeal thereon 30 M 270 Col 420 P II.

Darputni lease

1 *Landlord and Tenant—Lease—Denial of tenancy—Repudiation or rescission of lease—Rent. Suit for—Effect of repudiation.*

Darputni lease *(Contd.)*

H., the father of defendants Nos. 1, 5, granted a *putni* lease of certain lands to defendant No. 6, who in turn granted a *dar putni* lease of the same lands to the plaintiff. The plaintiff sued for a declaration of her title and to recover possession of the leased lands. It was contended by defendant No. 1 that in suits brought by H. against defendant No. 6 for rent, the defendant had pleaded that he was not bound to pay rent for the lands because he was not put in possession of them; and that the defendant No. 6 had rescinded the *putni* lease by his above declaration, and that the plaintiff could acquire no right under the *dar-putni* lease.

Held, that the conduct of the defendant No. 6 in the litigation between him and H. could not be treated as a repudiation or rescission of the *putni* lease in regard to the lands in suit. HARA SUNDARI DEBYA *v.* JOGENDRA NATH MOZUMDAR. **9 C. W. N 307.**

2 Mortgage of—Protected interest—Right title and interest of the debtors—29 C. 813 Col. 1741 P. I.

Daughter, Daughter's daughter. Daughter's daughter's son-Daughter's son,—Daughter's son-in-law.

See Custom of the Punjab—Alienation, Gift, Inheritance and Succession, Hindu Law, Daughter's Estate—Gift and Inheritance, and Mohammadan Law.

Dayabhag.

See Hindu Law.

Death.

1 Death of appellant after appeal filed, but before hearing of appeal—Abatement —Defamation 26 B. 597 Col. 1280 P. I.

2 Death of appellant—Representative not brought upon record—Decree—Revision. 26 B. 317 Col. 1330 P. I.

3 Death of decree holder—Execution of decree—Right of person who has obtained succession certificate to the decretal debt. 126 P. L. R. 1904 Col. 1503 P. I.

4 Death of donor—Deed of gift of immoveable property—Validity of. 25 M. 672 Col. 460 P. I.

5 Death of joint appellant, pending appeal —Legal representatives of deceased appellant not brought on the record. 27 B. 284 Col. 1280 P. I.

5 (a) Death of judgement debtor—Death of judgement debtor before the expiration of that time. 24 M. 637 Col. 1156 P. I.

6 Death of judgment debtor—Application of judgement debtor to have the ex-parte decree set aside. 29 C. 33 Col. 1464 P. I.

7 Death of party—Death of one of several appellants—Abatement of appeal. 25 A. 27 Col. 1280 P. I.

Death *(Contd.)*

7 (a) Death of party—Execution proceeding—Revival—Sufficient cause—Application for execution by two out of the three executors. 39 P R 1903 Col 1584 P I.

8 Death of plaintiff Suit against government—Notice by intending plaintiff—His death before institution of suit. A W N 1903 P 13—25 A 187 Col 1198 P I.

9 Death, presumption of—When death presumed—Person not heard for seven years. 5 C L J 649—35 C 25 Col 227 P I.

10 Death of respondents pending appeal—Abatement of appeal—Execution of decree 23 A 22 Col 1283 P I.

11 *Death of a surety—Absolving surety from liability.*

The death of a surety who has made himself liable for repayment of a debt does not operate to extinguish the security. MT. PARBATI BAI *v.* GANPAT (DECEASED) HEIR BROTHER KRISHNA. **16 C. P L R 8.**

Death, illness.

1 *Mahomedan Law — Divorce — Marz-ul maut—Death-bed illness, tests for determining.*

The tests to determine whether illness is to be regarded as death-bed illness (Marz-ul maut) under Mahomedan Law are:—

(1) Proximate danger of death so that there is a preponderance of *Khauf* or apprehension that at the given time death must be more probable than life.

(2) There must be some degree of subjective apprehension of death in the mind of the sick person.

(3) There must be external indicia, chief among which would be the inability to attend to ordinary avocations.

Sarabai *v.* Rabiabai (1905), 30 Bom 537, followed. RASHID *v.* SHERBANOO **9 B L R 252=31 B 264.**

Dead man.

1 Appeal presented on behalf of a dead person—Legal representative brought on record. 18 M L J 461 Col 1732 P I.

Dead person.

1 Decree against dead person—Representative—Heir—Law. Wrong proposition of—Admission of, 4 B. L. R. 340 Col. 161 P. I.

Debt

1 Appropriation of debt due to minor by third party—Cause of action—Joint tort feasors. 147 P. L. R. 1906 Col. 338 P. II.

2 Arrears of rent—Attachment of—Liability to be attached and sold under S. 266 Civ. Pro. Code. 5 A. L. J. 265 Col. 1159 P. I.

3 Arrears of revenue—Revenue sale Arrears of Government revenue—Title of purchaser—Date of sale. 10 C. W. N. 948 Col. 313 P. I.

Debt *(Contd.)*

4 Assignment of—Judgement—Order dismissing application by a judgement-debtor for a sum of money in the hands of the official assignee to be paid to him. PUNIN THAVELU MUDALIAR *v.* BHASHYAM AYYANGAR. **25 M. 406.** *See Insolvency Act S. 23.*

5 Attachment of monthly allowance—Debt payable in future—Attachment of part of allowance accrued due. 9 C. W. N. 703 Col. 1164 P. I.

6 Collection of—Order passed in exercise of power to punish contempt of court—Decree—Appeal treated as revision. A. W. N. 1905 P. 10=27 A. 380 Col. 904 P. I.

7 Defamation—Meaning of—Succession Certificate Act 32 C. 418 Col. 799 P. I.

8 *Discharge of debt with proceeds of debtor's jewels on debtor's authority—Pledge—Subsequent redemption—Revival of debt.*

Where a creditor discharged a debt due to him with the proceeds of the pledge of the jewels which the debtor authorised him to pledge, the fact that the creditor subsequently chose to redeem the jewels could not revive the debt which had once been discharged. NILAKANTAM ASARI *v.* CHOCKALINGAM ASARI **3 M. L T. 293.**

8 (a) Hindu Law—Debt—*See Hindu Law—Debt.*

9 Imprisonment for debt—Period of imprisonment—Jurisdiction. 5 C W N 145 Col. 1156 P. I.

10 Improper collection of—Inherit powers of, to compel repayment of money improperly taken out of court—Collection of debt by purchaser — Attachment before judgement of debts due to defendant. A. W. N. 1905 P. 9—27 A. 378 Col. 696 P. I.

11 Insolvency—Fresh application—Constitution of previous application. 30 C. 407 —See Col. 1990 P. I.

12 Mahomedan Law—Debt. *See Mahomedan Law, debt.*

13 Part payment of—S. 20 of the Limitation Act. 26 A. 36 Col. 1790 P. I.

13 Part payment of — Interest — Surety. 28 B. 248 Col. 1790 P. I.

14 Part payment of, by authorised agent—Endorsement—Limitation Act. 4 L. B. R. 1907 P. I. Col. 1790 P. 1.

15 Part payment of principal of debt—Person making the same. 3 B. L. R. 834 Col. 1791 P. I.

16 *Promissory note—Note forged — Decree on proof of loan.*

Where the plaintiffs brought a suit for recovery of money on the allegation that the defendant had taken from the plaintiffs a loan by executing a note in favour of one of the plaintiffs—

Held, that even if the promissory note be a forgery, the plaintiffs would succeed if they could prove the loan by independent evidence. MOTI LAL SAHA *v.* MONMOHAN GOSSAMI. **5 C. W. N. 56.**

17 Repayment of money lent—Lender not

Debt *(Contd.)*

bound to accept payment in instalment unless he has so agreed. 24 A. 461 Col. 647 P. I.

18 Right to debt and remedy--Set off--Barred items, sett. of--S. 111 of the C. P. C. 12 C. W. N. 60 Col. 642 P. II.

19 *Trust property--Charitable endowments--Trust--Debts incurred on trust--Decree, form of--Trust property not to be made behalf of liable but only the income.*

Trust property, as such, cannot be made liable by a decree in respect of debts contracted for the purposes of the trust; but only the yearly income thereof can be made liable for its just debts. SEETHA LAKSHMI AMMAL *v.* SRINIVASA IYENGAR. **16 M. L. J. 412.**

Debtor

1 Arrest of--Liability of judgement-debtor to be re-arrested after interim protection order. 26 B. 652 Col. 1156 P. I.

2 Arrest of --Judgement-debtor arrested and released immediately without being imprisoned may be re-arrested. U. B. R. 1901 P. 121 Col. 1157 P. I.

3 Arrest of--Execution of decree-Re-arrest of judgement-debtor after his release for non-payment of subsistance money by decree-holder. 26 A. 317 Col. 1156 P. I.

4 *Arrest of--Insolvents Act (11 and 12 Vic., Chap. 42), Section 8--Debtor. Adjudication of.—*

Three things are necessary to enable Court to adjudicate a debtor under Section 8 of the Indian Insolvency Act:--(1) that the debtor should have been in jail for 21 days without satisfying the debt for non-payment of which he was imprisoned; (2) that the petitioning creditor should be the detaining creditor; and (3) that the debtor shall be in prison (not shall have been) at the time the petition is presented or possibly at the time it is heard. *In re* AHMED ISMAIL MUNSHI. **4 B. L. R. 458=26 B. 649.**

5 Arrest of—Suit by new administrator against the estate of deceased executor—Cause of action. 7 C. W. N. 476 Col. 1917 P. I.

6 Fraudulent conveyance--Transfer of Property Act S. 53--Consideration--25. B. 202 Col. 581 P. I.

7 Fraudulent conveyance—Suit to set aside circumstances surrounding the transaction and conduct of parties—Bona fide transaction--Fraud—Acquiescence—Misjoinder of causes of action. 26 B. 577 Col. 352 P. II.

8 Fraudulent assignment—Suit by creditor to set aside 26 B. 577 Col. 351 P. II.

9 Ready to pay—Entitled to reasonable facilities for payment—Notice to debtor 4 M. L. T. 335 Col. 620. 621—Contract Act No. 1

10 Securities—Deposit—Loan—Executor. 31 C. 519 Col. 1824 P. I.

Debtor and creditor.

See Debtor.

1 Receiver—Liability of estate in his charge to creditors—Bania's lien on good 30 C. 937 Col. 8 P. II.

2 *Tender--Deposit of money due on simple bond in Court before suit.*

A debtor has no power enabling him to deposit in Court money due by him on a simple bond before any suit is brought on the bond. ESHAHUQ MOLLA *v.* ABDUL BARI HALDAR. **31 C. 183.**

3 Place of payment—When debtor follow his creditor—Principal and agent. 11 O. C. 191 Col. 1056 P. I.

4 Discharge of principal--Discharge of surety--Transfer of Property Act S. 134--Consequence. 1 L. B. R. 1900-1902 P. 150 Col. 356 Col. 356 P. I.

Debutter Estate.

1 Estate in Debutter represented by female trustee as fully as by male trustee—Limitation Act Art 141, applicability of. LILABATI MISRAIN *v.* BISHAN CHOBEY. **6 C L J 621.**

See Estopel.

2 *Permanent lease by shebait void and voidable—Adverse possession—Acceptance of rent, effect of.*

A permanent lease of debutter property is void if not executed for legal necessity.

The plaintiff's predecessor who had a karsha lease obtained a permanent lease from the shebait of an idol, the predecessor of defendant No. 2 on payment of a bonus, and the latter who is the present *shebait* continued to receive rent from the plaintiff Subsequently defendant No, 2 determined plaintiff's lease and took possession. In a suit for possession by the plaintiff

Held, that plaintiff's possession under the permanent lease, which was found to have been executed without legal necessity, and therefore held to be void, cannot be regarded as adverse to defendant No. 2, nor can the latter's acceptance of rent from the plaintiff either operate as an admission of the plaintiff's having a permanent right in the land or cause an extinction of his own previous title. NITYA GOPAL SEN PODDAR *v.* MANI CHANDRA CHAKRABUTTY. **12 C W N 63.**

3 *Personal decree against* shebait—*Execution against* debutter *estate—Claim of idol allowed—Compromise binding* debutter *estate—Legality—Prudence.*

A *shebait* of an idol having taken a lease the landlord sought to obtain a decree against the *debutter* estate, but a personal decree only was made against the *shebait.* In execution, the landlord attached certain property, to which the *shebait* preferred a claim on behalf of the idol, and the claim was allowed. The *shebait* then entered into an agreement with the landlord, under which he undertook to surrender the lease and to pay a certain sum in settlement of

Debtor Estate *(Contd.)*

all claims. The greater portion of this sum was paid in cash, and for the balance, he assigned rents due from certain tenants, and it was stipulated that, if the rents proved insufficient, the balance might be recovered from the *debutter* estate.

Held, that, under the circumstances, the *shebait* had acted prudently and for the ultimate protection of the *debutter* estate in entering into the agreement, and it was binding from the *debutter* estate.

The position of a *shebait* in relation to the idol examined by Mookerjee, J. NAWAB SIR SYED HOSSEIN ALI KHAN *v.* MOHANT BHAGWAN DAS. **11 C. W. N. 261 =6 C. L. J. 442=34 C. 249.**

4 Private—Conversion into secular property—Consensus of family—Debutter, nominal or real—Test. GOBINDA KUMA ROY CHOWDHURY *v.* DEBENDRA KUMAR ROY CHOWDHURY. **12 C. W. N. 98.**

See Religious Endowment.

5 Religious endownments—Second appeal—Grounds for—Construction of documents—Title 9 C W N 154 Col 1251 P I.

Debutter estate.

See Hindu Law.

1 Suit for recovery of money paid to pleaders engaged by *shebait* for benefit of a debutter estate. 9 C W N 421—32 C 582 Col 329 P I.

2 *Suit by a person acting under the authority of shebait — Resjudicata — Subject-matter need not be the same—Admissibility of previous Judgment—Evidence Act (I of 1872), S. 13.*

A judgment passed in a suit instituted in his own name by a person who was in possession of, and had authority to represent, the *debutter* estate under an *arpannama* from the *shebait*, and who, in fact, did represent the *debutter* estate, is binding on a succeeding *shebait*, on the principle of the case in 2 I A. 145, 11 C. W. N. 489—6 C. L. J. 404, 12 M. 235 and 9 B. 198—2 I. A. 145 referred to. (*a*).—RAJA RANJIT SINHA BAHADUR *v.* BASUNTA KUMAR GHOSE. **12 C. W. N. 739.**

Declaration.

1 Suit for proprietary—Where tenant sets up under-proprietary rights against proprietor—Declaratory suit. RAJA MUMTAZ ALI *v.* SARJU SINGH. **9 O. C. 292.**

See possession.

2 *Jurisdiction—Revenue Court — Resumption of a rent-free land—Declaration—Suit for possession—Rent Act—Amendment Act (IV of 1901), S. 6.*

Previous to the coming into force of Act IV of 1901 (the Oudh Rent Act Amendment Act) the plaintiff obtained from the District Court a declaration that the land held rent-free by the defendant was liable to resumption. After the passing of the said Act, which conferred upon the Revenue Courts exclusive jurisdiction over matters of resumption, the plaintiff brought a civil suit for possession of the land on the basis of the declaration.

Held, that the suit was not cognizable by the Civil Court. DWARKA PERSHAD *v.* RANI CHANDER KUAR. **6 O. C. 383.**

3 *Jurisdiction — Landlord and tenant—Suit for possession—Declaration that defendant has no under-proprietary rights—Jurisdiction of Civil Court—Rent Act (XXII of 1886), ss. 108, 124 B.*

If a tenant contests a notice of ejectment and succeeds in the Rent Court on the ground that he held under-proprietary rights; the landlord can sue in the Civil Court for a declaration that he had no such rights and having obtained the declaratory decree may institute proceedings to eject in the Revenue Court.

A Civil Court cannot pass a decree for possession on ejectment of tenant from the holding (S. C. No. 260, followed).

Quære—Whether sec. 124B can be construed so as to authorize a plaintiff to join in one suit a cause of action triable exclusively by a Civil Court and another cause of action triable exclusively by a Revenue Court.—SHEO RATAN SINGH *v.* ABBAS PANDE, **4 O C 175.**

4 *Jurisdiction—Civil Court—Cancelment of lease—Rent Act (XXII of 1886), S. 56, 108, cls. (4) and (8)—Suit by lessor for possession or declaration.*

At the first regular settlement a suit was instituted by certain persons against certain others for the sub-settlement of a certain village. This suit was adjusted by a compromise and a decree was passed in favour of the plaintiffs for a perpetual lease of the village in accordance with the terms of the compromise which provided that the rent payable by the lessees should be paid at the dates fixed for its payment and that if it were not so paid the lessors might cancel the lease, that the lessees should not alienate the village or any part thereof directly or indirectly and that if they did so the lessors might cancel the lease and take possession of the village. The representative in interest of one of the lessors sued one lessee and the heirs of the other lessees and certain alienees for possession of the village alleging that the rent was never paid at the proper time and that the condition against alienation had been broken He claimed the following reliefs:—That the lease should be cancelled to the extent of his share in the village and possession of such share should be given to him, and that the alienations specified in the plaint should be declared void; that if the Civil Courts were not competent to give him possession, it should be declared that the lease was cancelled for breach of the conditions, and that the lessees and their representatives could be ejected by notice through the Rent Court. The question was whether the Civil Courts had jurisdiction to enter-

Declaration *(Contd.)*

tain the suit.

Held, that, in view of S 56 and S. 108, clauses (4) and (8) of the Oudh Rent Act the Civil Courts had no jurisdiction to entertain the suit.—LAL JAGDISH BAHADUR SINGH *v.* SHEORAJI, **6 O C 289**.

5 Land Revenue Act S. 65—A Thekedar—Ejectment—Proprietor—Cause of action. 16 C P L R 1903 P 33 Col 365 P I.

6 Legitimacy—Mahomedan Law—Declaration made by father of his son's legitimacy—Conduct, admission not amounting to. 1 O C 49 Col 503 P I

7 Premature, concerning mortgage money—mortgage Deed. JAWAHIR SINGH *v.* CHANDIKA BAKHSH. **2 O. C. 145**. *See mortgage.*

8 *Of right to hold-Market-Right of* Zemindar *to hold, on his land, in proximity to previously established market, belonging to another* Zemindar—*General declaration to hold market on his land on all days—Suit by* Zemindar *for.*—

A *Zemindar* is entitled to establish a market on his own land even in close proximity to a previously established market belonging to another *Zemindar*, and to hold it on the same days on which the previously established market is held.—BRAHMA NAND *v* SHEO RATAN LAL, **5 O. C. 380**.

9 *Of tenancy at-will—Jurisdiction—Civil Court—Declaration of tenancy-at-will—Rent Act (XXII of 1886), s. 108, cl. (6).*

The plaintiff sued the defendants who claimed to be occupancy tenants and were so entered by the Settlement Officers for possession of certain land and for a declaration that they were mere tenants-at-will.

Held, that the suit, in so far as it was one for a declaration, is not covered by s. 108, cl. (6) of the Oudh Rent Act and was within the cognisance of the Civil Courts.—SARABJIT SINGH *v.* MADHO SINGH, **4 O. C., 180**.

Declaration of title.

1 Suit for declaration of title to land—Valuation fixed for purposes of jurisdiction. 8 B. L. R. 885—31 B 73 Col 106 P. I.

2 *Trust—Hindu Law—Declaration of trust in favour of joint-family—Joint-family property acquired from joint funds of* Mitakshara—Taluqdari *estate—Oudh Estates Act (I of 1869), Ss. 3, 8.*

Plaintiff's father, D., and the defendant's father, M., were the sons of one R., a *Taluqdar*, whose name was entered in the Lists I, III and V of the Lists prepared under section 8 of Act 1 of 1869. The facts were that G. B., and R. were members of a joint family at the time of the Summary Settlement and of the *Sanad*; that 6 villages were summarily settled with these 3 persons jointly; that, as regards the 2 other villages which were summarily settled with R. alone, R represented that G. and B. were his co-sharers; that the *Sanad* was

Declaration of title *(Contd.)*

acquired by R. solely by virtue of an agreement with his co-sharers that application should be made for the appointment of one of them as *Taluqdar*; that in connection with this application R. represented that G. and B. were his co-sharers in the 7 villages, then owned by the joint-family and that there had been no differences between them; that subsequently in the lifetime of both R. and M. the "*Taluqdari*" estate was treated as joint-property. The villages comprising the estate were not specified in the *Sanad*, and no "*kabuliat*" was executed by R. as *Taluqdar* and consequently the 2 villages, which had been summarily settled with R., were not included in any list attached to such *kabuliat*.

Held, that whether all or only some of 8 villages came within the meaning of "estate" as defined in Act 1 of 1869, there was a declaration of trust by R. in respect of these villages in favour of the joint-family consisting of G., B. and himself, and that they were held by him in trust for the family as joint-family estate governed by the *Mitakshara* Law.

Held, that the plaintiffs were consequently, under the circumstances, entitled to a decree for possession of the shares claimed by them in the villages which were comprised in R.'s *Taluqa* and they were also entitled to a ¼ share, being their share under the *Mitakshara* Law, in the villages acquired by purchase or mortgage by R. and M. from the funds of the joint-family of which D. and the plaintiffs were members with M. and the defendants. GAJRAJ SINGH *v.* NAUNEHAL SINGH. **1 O. C., S. 24**.

Declaratory decree.

1 Adoption—Compromise by certificated guardian of minor adopted son. Suit by such guardian to contest adoption. 30 C. 613 Col. 1614 P. I.

2 *Against adoption—Hindu Law—Adoption—Reversioner, suit by, to set aside adoption.*

Although in suits relating to alienations by a qualified owner, the presumptive reversioner cannot, on the current of authority, be held to represent remote reversioners, yet in suits to set aside an adoption, the presumptive reversioner ought on principle to be held to represent the remote reversioner, provided the matter is decided after a fair trial; and this principle will apply equally when a remote reversioner is allowed to sue under special circumstances to set aside an adoption. An unauthorised alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of alienation to all reversioners. In such cases there is only one cause of action to be sued upon. The true purpose of the concession of a right of suit in these cases is the protection of the in-

Declaratory decree *(Contd.)*

terest of the person or persons who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. The reversioner actually suing does not only do so for himself but also on behalf of all the rest. Rani Anund Koer v. The Court of Wards, (L. R. 8 I. A. 14 at p. 22), referred to. Brojo Kishoree v. Sreenath Bose (9 W. R. 463 at p. 465), referred to. Suits involving questions as to adoptions stand on quite different grounds from those impeaching the validity of alienations. The grave and important nature of disputes relating to adoptions, makes it desirable that the adjudication in such cases should be made final as far as possible. Where the presumptive reversioner or with the permission of the Court, a more remote reversioner brings such a suit, the Court ought to require him to disclose the names of other persons interested in the reversion and direct notices to be served on them, to enable them to be made parties, should they so desire. Ayyadorai Pillai v. Solai Ammal (I. L. R. 24 Mad. 405), approved. Adilakshmi v. Venkataramayya (13 M. L. J. 359), not followed.—CHIRUVOLU PUNNAMMA v. CHIRUVOLU PERRAZU, **16 M L J 307; F B=1 M L T 183=26 M 390 (F B)**

3 Against adoption—Declaration that defendant is not the adopted son of the plaintiff—29 M. 48 Col 438 P. I.

4 *Amendment of prayer of plaint—Mutation of names in Revenue Register of holdings —Declaration of title.—*

Although a suit for mutation of names in a Revenue Register of holdings cannot lie, the Court may allow the prayer of the plaint in such a suit to be altered to a prayer for possession. Maung Shwe Lin v. Ma Le, 2 L. B. R., 4 referred to. MAUNG THA CHU AND ONE v. MAUNG PO KAUK. **2 L. B. R. 1604 P. 243**

5 *Cancellation of bond. Specific Relief Act (I of 1877), Section 42—Declaratory suit—Suit for cancellation of document when consequential relief is not prayed for.*

A suit for cancellation of a mortgage-deed on the ground of frauds must be dismissed when the fraud set up by the plaintiff is not proved. The plaintiff is not entitled to a declaration, that the deed is a security for a smaller sum than the amount stated in the deed when he has not asked for consequential relief which he could claim. CHAKKA SUBBIAH v. MADDALI LAKSHMINARAYANA. 29 M. 203.

6 Consequential relief—Suit to set aside decree—30 C. 788 Col. 106 P. I. (*See Specific Relief Act I of 1871 S. 42*).

7 Declaration—Suit for—Denial of right —Discretion of first appellate and second appellate Court—Practice. 6 B. L. R. 283 Col. 425 P. I.

Declaratory decree *(Contd.)*

8 Without consequential Relief — Suit—Valuation Act Section 11 and S. 283 of the Civ. Pro. Code. 1 L. B. R. 1900-1902 P. I Col. 138 P. I.

9 Discretion — The nearest reversioner concurring in alienation by a Hindu Widow —Right of remote reversioners to sue. 28 M. 57. *See Col. 445 P. I.*

10 Discretion—Declaratory decree. 2 C. L. J. 534. *See Declaratory Decree No. 23.*

11 Discretion—Cause of action to reversionary heir—Adverse title set up as defence to suit for declaratory decree. 26 A 238 (P. C.) Col. 426 P. I.

12 Discretion--Suit for declaration—Joint Family—Non-joinder of parties. 1 A. L. J. 512—27 A. 38 Col. 426 P. I.

13 *Discretion—Declaratory Decree, Suit for —Discretion of Court--Inexpediency--Next reversionary refuses to sue.*

The grounds on which in a declaratory suit relief was refused were, (1) that the *locus standi* was in issue, (2) that there might be protracted inquiry into the genuineness and legal effect of the will, and (3) that the plaintiffs were not the immediate reversioners, and the widow might survive them.

Held, that "if the nearest reversionary heir refuses to sue without sufficient cause, or he has precluded himself from suing by his own act or conduct, or has colluded with the widow, or has been concerned in the alleged wrongful act, the next presumable reversioner will be entitled to sue." *(Rani Anand Kuar* v. *The Court of Wards*, 6 Cal., 763 referred to).

Held, further, that the above grounds do not make a strong case of inexpediency so as to justify the refusal of declaratory relief to the reversioner. (*Hunsbutti Koerain* v. *Ishri Dutt Koer*, 10 Cal., 324, referred to.)—CHANDRES SINGH v. NAND KISHORE. **3 C. C. 385.**

14 Documents—Suit as to—Construction of lease--Grant "as a zemindari village"—Form of suit. 25 A. 1 Col. 421 P. I.

15 Document — Pending suit — Another suit barred on the defence in the first suit. Cancellation of instrument. 27 B. 607 Col. 419 P. I.

16 Endowment — Suit for declaration, that the defendants were not Dharmakartas of certain temples and for the appointment of trustee. 26 M. 450 Col. 423 P. 1.

17 *Execution--Declaratory decree or not—Executability — Held:--Per Curiam agreeing with Boddam J (Michell J. dissentiente)*

That a decree which *inter alia* provided that "the plaintiff as an archaka is entitled to the possession of the keys of the shrine for the purposes of carrying on the duties of archaka and not otherwise" was in the circumstances of the case, though in form declaratory, capable of being enforced by execution.

Per Michell J. A decree plainly and unambiguously declaratory in terms, cannot be construed as a mandatory decree, and as such

Declaratory decree *(Contd.)*

executable, except where the judgment-debtor is estopped from contending otherwise by prior orders in execution. RATNA MUDALIAR v. KRISHNA BHATTAR. 17 M. L. J. 423.

18 Execution of a decree as to Puja and giving of honours to a diety "according to usage" of a religious institution. 2 M. L. T. 94 Col. 1445 P. I.

19 Execution of—Rateable share of sale proceeds—Application to court holding the assets. 1 L. B. R. 1900-1902 P. 121 Col. 1191 P. I.

20 Lessor's suit for possession or declaration. 6 O. C. 289. *See Declaration No. 5.*

21 Membership of Tarwad. Value of a suit to have it declared that certain persons are or are not members of a tarwad. 24 M. 275 Col. 435 P. I.

22 Mortgage—Usufructuary mortgagee in possession seeking a declaration that the property is not saleable in execution of a decree on a prior mortgage. A. W. N. 1901 P. 212—24 A. 170 Col. 433 P. I.

23 *Power of Courts of appeal and second appeal to question correctness of—Separate tenancy — Co-sharer landlord — Declaratory decree.*

A *kabuliat*, by which a tenant under the whole body of landlords, agrees to pay rent at a specified rate to a co-sharer landlord for his undivided half share of the lands and further to pay additional rent at a fixed rate for additional area found on measurement to be held by him under such co-sharer, creates a separate tenancy and is not merely an agreement to pay the share of rent separately. 19 C. 610, 7 C. W. N. 670 followed. 25 C. 917 distinguished.

Where a declaratory decree has been given by the Court of first instance, it is not open to the lower Appellate Court nor to the High Court, in second appeal, to question the correctness of the decree on the ground that, from the plaint itself, apart from the written statement, no hostility of the defendants to the plaintiff's claim was shown. 7 C. 343 followed. SAILENDRA NATH MITTER v. KARALI CHARAN SINGH. 2 C. L. J. 534.

24 Puja — Decree directing performance of Puja and giving of honours to diety according to the usage of a religious institution —Nature and execution of decree. 2 M. L. T. 94 Col. 1145 P. I.

25 Removing attachment—Rights of attaching creditor—Suit by one attaching creditor for declaration that property cannot be attached by another creditor on the ground that the second creditor's decree was bad in law. 25 A. 347 Col. 339 P. II.

26 Under proprietary rights, acquisition by—Prayer for possession—New plea—Second appeal. 4 O. C. 207 Col. 429 P. I.

27 Will — Suit for construction of a Hindu Will and for declaration incidental thereto. 3 C. L. J. 224 Col. 685 P. II.

28 Will—Suit for declaration of invalidity of will on ground that it bequeathed family property. No claim for partition. 25 M. 504 Col. 434 P. I.

Declaratory Relief.

See Act I. of 1877. Specific Relief Act. S. 42.

Declaratory suit.

1 Application for Registration—Suit—Right of—Substitution, application for—4 C. L. J. 568—11 C. W. N. 186 Col. 1282 P. I.

2 Cancellation of deed—Voluntary conveyance—Suit to set aside sale—Bona fide transaction—Fraud—Acquiescence—Misjoinder of causes of action—26 B. 577 Col. 352 P. II.

3 Candidate of Municipal election by—Omission of a name from the candidates list—Declaration and injunction. 8 B. L. R. 209—30 B. 409 Col. 446 P. I.

4 *Cause of action—Need not necessarily be brought where no doubt of plaintiff's title.*

Two persons joined in a suit and claimed the offices of karnam and shroff as being hereditary. The offices formed portions of a permanently settled estate, of which first defendant was proprietor. The second defendant was alleged to have possession of the offices, the second plaintiff, who had the titular right to them, being thus wrongly kept out.

Held, that it was not necessary that the suit should have been for a declaration, there being no doubt as to the second plaintiff's title, and that it was properly brought for possession.—SADASIVA PILLAI v. KALAPPA MUDALIAR. 24 M. 39.

5 Cause of action—Lease—Document construction of—Istamrari mokurari—Grant—Impartible estate. 30 C. 20. *See Col. 539 P. II.*

6 *Chowdhris fees for suit for declaration of right to receive fees as "Chowdhris" of certain bazars—Suit not maintainable.*

The plaintiffs sued for a declaration that they were the "Chowdhris" of the bazars in the villages Muhammadabad, Ghona Khairabad and Behna, and that the defendants were not the "Chowdhris" of the said bazars and were not entitled to take chowdhris' dues.

Held, that such a suit was not maintainable. *Bhinuk Chowdhree* v. *The Collector of Jaunpur*, N. W. P. H. C. Rep., 1867, p. 271 *Beharee Lall* v *Baboo*; N. W. P., H. C. Rep. 1867 p. 80 and *Ram Dehul* v. *Chukhoo*, N. W. P. H. C. Rep 1869, p. 291, followed. BARSATI v. CHAMRU 29 A 633.

7 Claims under—Appeal—Jurisdiction—Value of suit for purposes of jurisdiction—Declaratory suit for release of property from attachment. 71 P L R 1906—*See Col. 761 P. I.*

8 Claims under—Section 42 of the Specific Relief Act not applicable to—Suits under

Declaratory suit *(Contd.)*

Section 283 Civil Procedure Code—Prayer for further relief not necessary. 29 M. 151 Col. 439 P. I.

9 Claims under valuation of—Execution of decree—Attachment—Objection against—Value of suit for purposes of jurisdiction A W N 1905 P. 37—27 A 440 Col. 101 P. I.

10 Declaration as to right—Mortgage—Rights in property effected—Subsequent conduct of defaulter—8 C. L. J. 185 Col. 650 P. I.

11 Defendant was not pregnant in her husband's life time—Claim for declaratory—Not maintainable—Pleader's fees.

N sued for a declaration that B, his aunt, is not pregnant and was not pregnant at the time of her late husband's death, and the suit was valued for jurisdictional purposes at Rs. 5,500:—

Held, that the suit is of purely a speculative nature and the Courts should refuse to exercise their discretionary power of relief in favour of persons who bring suits of this description.

Held, also, that where a plaint in a declaratory suit like the above has been rejected, it is not proper to allow pleader's fee on the jurisdictional value. SARDAR NARAIN SINGH *v.* MUSSAMMAT BASANT KAUR, **124 P. W. R. 1908.**

12 Discretion-Court's discretionary power as to grant of decree in declaratory suit—Power inherent in court to stay or dismiss vexatious suits—Plaints for mere declaration—Advalorem Court fees not leviable on. 28 M. 560 Cols. 4244, 32 P. I.

13 Discretion of first and second appellate Court—Denial of right—6 B. L. R. 283 Col 425 P. I.

14 Discretion exercised in favour of plaintiff—Remote reversioner by first Court—Appeal Court—Declaratory suit by next male reversioner while daughter is living—1 A. L. J. 380 Col. 443 No 152 read for 1 A. L. J. 388.

15 Discretion—The nearest reversioners concurring in alienation by a Hindu widow—Right of remote reversioners to sue. 28 M. 57 Col. 445 P. I.

16 Discretion—Nearer heir-Encumbrance likely to be discharged by widow 5 C. W. N. 445 Col. 425 P. I.

17 Further relief—Omission to seek further relief—Amendment. 128 P R 1907 Col 444 P I.

18 *Further relief—Specific Relief Act (I of 1877) S. 42, proviso—One plaintiff out of possession—Other plaintiff in possession in defendant's right—Declaratory suit—Second suit for possession.*

Where, out of two plaintiffs to a suit for declaration of title, it appeared that one was not in possession of the property claimed, and the other was in possession but in the right, of the defendant who had previously been in possession—

Held, that the suit was barred by the express provisions of section 42, Specific Relief Act, and ought to be dismissed. But the dismissal of this suit would not affect the right of these plaintiffs, if they were entitled to possession, from instituting and maintaining a suit for possession. AKBAR KHAN *v.* TURABAN, **5 A L J 640.**

19 Hereditary trust—Consequential relief not claimed—Right of adopted son 15 M L J 456 Col 433 P I.

20 *As to heirship of a Taluqdar—Oudh Estates Act—(I of 1869) Succession to a talukdari—Effect of declaration by holder as to who should be his heir.*

The official enquiries made of *talukdars* at an early period of British administration, as to who were to be their successors, were not intended to derogate from the rights of *talukdars* in their heritable and transferable estates. To such an enquiry an answer, in 1862, made by a *sanad holding talukdar*, since deceased, who was entered in Lists I and II, (under the Oudh Estates Act, 1869), stated that she appointed to be her heir the father of the present plaintiff appellant. The father, however, died before the *talukdar* and the son now claimed that this nomination amounted to a gift of the *talukdari* estate, subject to a trust for the life of the *talukdar*.

Held, that the answer of 1862 did not operate to confer any estate upon the person named.—BALBHADDAR SINGH *v.* SHEO NARAIN SINGH, **27 C 344=2 O C 372=26 I A 194.**

21 Injunction — Consequential relief — Maintainability of—Where relief by way of injunction, which can be asked for is not asked for—3 A L J 316—A W N 1906 P 149 Col 433 P I.

22 Kamiana dues were not payable by plaintiffs—Jurisdiction of Civil and Revenue Courts 113 P. L. R. 1905 Col. 440 P. I.

23 *Khatib—Suit of civil nature—Declaration of exclusive right to act as Khatib and for injunction.*

A declaration of plaintiff's exclusive right to act as a Khatib in a village and an injunction restraining others from acting as Khatib cannot be granted in the absence of any allegation by the plaintiff of his being distributed in the exercise of his office. 15 M. 355, 19 M. 62, 2 M. L. J. 83 referred to. MIRA MOHIDIN *v.* ASAN MOHIDIN. **17 M. L. J. 421.**

24 Limitation—Suit for possession of immoveable property when factum or validity of an adoption is in question. 13 M. L. J. 27—29 M. 291—*See Col. 1904 P. I.*

25 Nature of declaratory decree—Alienation by widow partly for binding purposes, whether void—Condition for setting it aside GOURI *v.* TIRUMAYA BHATTA. **18 M. L. J 17.** *See Hindu Law—Reversioner.*

26 *Negative declaration—Succession to Foreign State—Tipperah Raj, succession to—Act of State—Declaratory suit—Contingent right—Right of suit.*

The Courts in British India have no

Declaratory suit *(Contd.)*

jurisdiction to decide a question as to who is entitled to succeed to the Raj of a Foreign Sovereign State or to any immoveable property, which goes with the Raj, although situated in British territory. *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 Moo. I. A. 523, discussed and distinguished. *Beerchunder Manikhya* v. *Rajcoomar Nobodeep Chunder Deb Burmonon* I. L. R. 9 Calc. 535, approved. A person cannot sue for a declaration of his right to immoveable property, which may never come into existence; a mere contingent right, which may never ripen into an actual existing right, is not always sufficient to ground an action for such a declaration. *Kathama Natchiar* v. *Dorasinga Tevar*, L. R. 2 I. A. 169, *Pranputtee Koer* v. *Lalla Futteh Bahadur*, 2 Hay, 608. SAMARENDRA CHANDRA DEB *v.* BIRENDRA KISHORE DEB. **12 C. W. N. 777=4 M L T. 27=35 C 777.**

27 Parties, non-joinder of—Suit for declaration. A. W. N. 1904 P. 190—27 A. 138 Col. 426 P. I.

28 Presumptive heir, right to contest alienation—In presence of widow's issueless daughter. 149 P. R. 1908 Col. 2119 P. I.

29 Plaintiffs chance of succession to the property in suit very remote — Dismissal of suit. 51 P. L. R. 1908 Col. 442 P. I.

30 *Rajputs—Declaratory suit—Declaration that plaintiffs were Rajputs—Cause of action.*

The defendant made a statement before the revenue authorities wherein they stated that the plaintiffs were Sheikhs and as such not entitled to various rights in the village to which Rajputs alone were entitled. They added that if plaintiffs considered that they were legally entitled to these rights it was open to them to bring a suit in the Civil Court to enforce them.

The plaintiffs brought a suit for a declaration that they were Rajputs of the specified *got* and for other relief. The Divisional Court dismissed the suit on the ground that a suit for the declaration asked for did not lie as no cause of action had arisen in their favor.

Held, that the judgment of the Divisional Court was wrong and the suit was maintainable for the statement made by the defendants gave a cause of action to the plaintiffs. CHAUDHRI TASADDUQ HUSAIN KHAN *v.* CHAUDHRI WAZIR ALI KHAN. **9 P. L. R. 1906.**

31 Recite text in a temple—Suit for declaration of plaintiffs right—Maintainability of suit. 28 M. 23 Col. 930 P. I.

32 Registry—Limitation — Khoti sharer refusing his consent. 3 B. L. R. 181 Col. 1910 P. I.

33 Religious endowments—Suit for declaration that plaintiff is to be appointed manager in preference to defendants not maintainable—Misfeasance or breach of trust not alleged. Application for leave to institute suit—4 A. L. J. 774—A. W. N. 1907 P. 287 Col. 72 P. I.

34 *Right to recover losses and expenses*

Declaratory suit *(Contd.)*

contingent on an uncertain future event—Decree, whether executable—Civil Procedure Code. (1908) S. 47.—

Where a decree directed that the plaintiff should satisfy certain debts due jointly by him and the defendant, and that, if he failed to do so, and if any creditors made defendant pay any amount, the plaintiff should be liable to pay the same along "with losses and expenses," to the defendant, who should be entitled to have the money by execution through the Court, *held*, that the right to recover losses and expenses, being a right contingent on uncertain future events, could not be ascertained in execution of the decree itself, but was merely declaratory. It could only be enforced in a regular suit instituted in that behalf. 1 S. L. R. 184 referred to.

Held, also, that the direction that the defendant could by execution recover something which was altogether *dehors* the decree was therefore meaningless and incapable of being enforced. GOKALDAS DWARKADAS *v.* OTANDAS DWARKADAS. **2 Sind. L. R. 33.**

35 Rent for land liable to resumption—6 O. C. 383 *See Declaration No 2.*

36 Reversioners—Declaratory suit by remote reversioners—Existence of nearer reversioner—Grounds of suit—32 C. 62 Col. 437 P. I.

37 Reversioners—Suit by heir presumptive against life tenant to restrain waste by life tenant—A. W. N. 1905 P. 6 Col. 431 P. I.

38 Reversioners—Suit by reversioner for declaration of their right to redeem a mortgage by a woman—Discretion—2 M L J 67 Col 441 P I.

39 *Reversioners, right of, to maintain suit for declaration of their right against widow, in lifetime of daughter—Hindu law—Birth of daughter's son subsequent to institution of suit, effect of—Decree in reversioner's suit, principle according to which should be given.*

The brother of B., a deceased Hindu, sued the widow of B. and the person to whom she had mortgaged part of her husband's property, for a declaration that the mortgage was made without legal necessity and was, therefore, void beyond the widow's lifetime. At first there was no mention in the plaint of the fact that there was a daughter of B. living. The plaint as originally framed stated that, if the plaintiffs survived the widow, they would be entitled to possession of the property. The defendants pleaded that, as there was a daughter of B. living, the plaintiffs had no right to sue. The plaintiffs amended the plaint to the effect that the daughter was excluded from inheriting by family custom, and the plaintiffs would be entitled on the widow's death, if they survived her, to possession of the property, and that the daughter was colluding with the widow and was living with her. The Munsiff found that the cus-

Declaratory suit *(Contd.)*

tom was not proved and that the suit was not maintainable, and dismissed it.

The Subordinate Judge agreed with the Munsiff that the alleged custom was not proved, but he was of opinion that, as the plaintiffs were the nearest presumptive reversionary heirs to the full ownership of the estate of B, they could maintain the suit, the existence of the daughter not withstanding.

Held, that the plaintiffs, who were the nearest presumptive heirs to the full ownership of the estate of B., could maintain the suit without proving that the daughter had refused without sufficient cause to sue, or had precluded herself by her own act or conduct from suing, or had colluded with the widow, or was concerned in the alienation. The decree would be given with reference to the fact that the plaintiffs were presumptively entitled to possession of the property, and not with reference to the question as to when their interest would come into possession, which was not material. (Anant Bahadur Singh *v.* Raghunath Kuar, 9 I A 53—8 Cal. 769 followed)

The daughter gave birth to a son during the pendency of the appeal and the appellant urged that the plaintiffs could not maintain the suit owing to the daughter's son being a reversionary heir nearer than them.

Held, that the plaintiff's right to sue existed when they brought the suit and they could not be deprived of it simply because they caused to be the nearest male reversionary heirs since they commenced the suit. (*Govinda* v. *Perumdevi*, 12 Mad. 136 followed). UDA *v.* DURGA DIN. **5 O. C. 360.**

(See Custom-Punjab-alienation-Reversioners, suit by).

40 Right as to—Mortgage—Rights in property effected—Subsequent conduct of defaulter. 8 C L J 185 Col 650 P II.

41 Right as to—Bank of Bombay—Right of a shareholder to inspect register of shareholder of the Bank. 12 C W N 825—32 B 466 (P C) Col 9 P II.

42 Right of worship by different sects—Dedication to particular sect. 35 C 294 Col 2161 P I.

43 Suit by a secured joint creditor of a partnership business against the other joint creditors and the partners and their separate creditors—Suit for declaration of the right of plaintiff and other joint creditors to priority over separate creditor and for injunction against payment of certain money in court to the latter, maintainability of suit —WOOPENDRA NARAIN SEN *v.* AGHORE NATH CHATTERJEE. **9 C. W. N. 498.** *See also Right of Suit.*

44 Son's declaratory suit against father's mortgage—Attachment of joint Hindu family property in execution of decree against father. 1 O. C. 53 Col. 428 P. I.

45 Talukdar's liability to assessment, not in issue — Separate tenancy — Measurement. THE BANK OF HINDUSTAN, CHINA, JAPAN LD. *v.* BABU SHIB DYAL TEWARY. **8 C. L. J. 329.**

See Reg. VIII. of 1793 (Bengal Decennial Settlement).

46 *Title—Onus of proof as to title—Adverse possession; effect of—Grant of Patta, whether confers new title.*

A party, who is in full possession of certain property of his, and is in exercise of all rights in respect of it but seeks for a mere declaration in connection with the same, is bound to establish his title thereto by means of positive evidence of such title. But, however, although he may fail to make out that he acquired his title to the property in the very manner alleged by him, yet, if, admittedly, he is found to have been in possession of the property, for over 12 years, the effect of such possession would be to extinguish other titles, if any existed, and he would be entitled to the declaratory decree sought to be obtained by him. 10 T. L. R. 70 followed.

Held, also, that a mere grant of a Putta confers no new title except in those special cases where the Patta itself constitutes the title deed for the land. 2 M. 333; 20 W. R. 104; 20 B. 798; 21 I. A. 99 and 14 T. L. R. 140 referred to. PADMANABHAN NILAKANDAN *v.* KUNCHEEN NADHAN. **21 T. L. R. 67.**

47 Title—Valuation fixed for purposes of jurisdiction—Court's power to fix valuation when it is disputed. 31 B. 73 Col. 106 P. I.

48 Title—Suit by a person in possession for a declaration of his title to certain immoveable property — Defendant entered as owner in revenue papers. 140 P. R, 1907 Col. 1909 P. I.

49 *Title not proved—Possession as basis for declaration.*

No declaration can be given on the mere ground of possession; title must be proved. RAJ NARAIN *v.* KHOBDARI RAI. **5 C. W. N. 724.**

50 Under-proprietary rights—Defendant has none—Jurisdiction of Civil Court—Landlord and tenant. 4 O. C. 175. *See Declaration No. 3.*

51 Will—Court-fees — Declaration of invalidity of adoption—Jurisdiction—Rejection of plaint. 28 M. 260 Col. 432 P. I.

Decree.

1 Accounts—Restraint of trade—Continuous cause of action—Damages previous and after the institution of suit—Decree directing accounts. 7 B L R 107—29 B 107 Col 294 P I.

2 Additions in—Power to amend decree —Jurisdiction. 31 B 447 Col 1484 P I.

3 Adjudication—Withdrawal of suit on appeal—Partition suit. 29 B 13 Col 1281 P I.

4 Adjudication — Order—Appeal — Interpleader suit—4 A L J 683—30 A 22 Col 906 P I.

Decree *(Contd.)*

5 Adjustment of decree by a subsequent decree—Purchaser from judgement debtors. 7 C W N 54 Col 2030 P I.

6 Adjustment—Question relating to execution—No application for execution before Court—Appeal. 7 C W N 172 Col 1104 P I.

7 Adjustment — Parties — Party against whom a suit is dismissed. Objections to attachment by. 29 C 696 *See Col 1122 P I.*

8 Administration—Suit, form of—Joint property—Exclusive enjoyment—One cosharer dealing exclusively with joint property. 27. A. 88. *See Col. 657. P. II.*

9 Against defaulting proprietor—Parties—Revenue Sale—Auction purchaser not a representative of defaulting proprietor—Evidence—Thak map—9 C. W. N. 383. *See Col. 988 P. I.*

10 Against several co-widows—Appeal by one of them—Power of Appellate Court to disturb the decree as against non-appealing widows. 24 P. L. R. 1903 Col. 150 P. I.

11 Alteration of—Execution of decree—Agreement varying or satisfying decree—Sanction of court. 14 M. L. J. 359 Col. 950 P. I.

12 *Alternative relief—Contending defendants—Practice. Power of Appelate Court.*

If in a mortgage-suit, in which the plaintiffs ask for relief against two sets of defendants in the alternative, the first Court gives a decree against one set of defendants and dismisses the suit as against the other, the Appellate Court has, on appeal by one set of defendants, in which the other set of defendants is made a party respondent, power to alter the decree, so as to make the latter liable, the real contest in the case being between the defendants. *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*, I. L. R. 25 Calc. 565, *Hudson* v. *Basdeo Bajpye* I. L. R. 6 Calc. 109, and *Rupjaun Bibee* v. *Abdul Kadir Bhuyan*, I. L R. 31 Calc. 643, followed. ISWARDHARI *v.* SAHEBZADI. **12 C W N 720=35 C. 538.**

13 *Ambiguity—Executing court, duty of.*

Where there is no ambiguity in a decree, the duty of the executing court is to carry the orders of the decree into effect as being conclusive between the parties, whether it may or may not be disputable in point of law. MAHARAJAH OF BHARATPUR *v.* RAM KONNO DEI (LORD HOBHOUSE.). **5 C. W. N. 137=3 B. L. R. 51=28 I. A. 35=23 A. 181, (P. C).**

14 Amendment of—Sufficient cause—Appeal—Limitation. 32 C. 908—*See Col. 1739 P. I.*

15 Amendment of—Order amending a decree not in conformity with the judgement—Appeal from such an order. 28 C. 177 Col. 1341 P. I.

16 Amendment of—Gift to Khanadamad by childless male proprietor—Waraich Jats of Gujrat District. 28 P. R. 1905—82 P. L. R. 1905 Col. 2113 P. I.

17 Amendment of decree after satisfaction—Decree for joint possession—Fresh suit. 12 M. L. J. 96 Col. 1486 P. I.

18 Amendment—Consent decree 7 C W N 880 Col 1483 P I.

19 Amendment—Costs—Execution of decree—Limitation. 24 M 25 Col 2010 P I.

20 Amendment—Appeal—Revision Order—Amendment decree. 21 M 616 Col 1347 P I.

21 Appellate order of a Collector in a rent suit returning a plaint for presentation to proper Court. 27 A 21 Col 423 P II.

22 Application for postponement—Appeal against order refusing assignee to be brought on record. 24 M 252 Col 412 P II.

23 Application for amount—Appeal to Privy Council—Order "made on appeal"—30 C 679 Col 1292 P I.

24 Assignee—Decree in the alternative, legality of 28 M 505 Col 1979 P I.

25 Assignee not party to appeal—Restitution—Execution by assignee of decree. 5 C W N 426 Col 1366 P I. No 1717.

Note—5 C W N 426 read for 6 C W N 426.

26 Assignment—Decree for rent obtained by a landlord who ceases to have interest in the land—Execution of decree. 6 C. W. N. 91 Col. 144 P. II

27 Attachment of—Decree attached after sale but before confirmation. 11 C. W. N. 158 Col. 1172 P. I.

28 Award a decree — Land acquisition—Award—Execution proceedings — Appeal—Contempt of court. 53 P. R 1906 Col 860 P. I.

29 Awarding interest—Decree as to interest amended. A. W. N 1905 P. 63 Col. 1485 P. I.

30 *Badly drawn up—Ambiguous or defective decree—Decree interpreted with reference to the pleadings in the suit.*

Where a Court has to execute a decree which is badly drawn up and ambiguous, it is permissible to refer to the pleadings in the suit in which the decree was passed, in order to ascertain its precise meaning A. W. N. (1890), p. 75, 13 A. 343, 13 A. 344, N. W. P. H. C R. 1870, p. 415 referred to NISAR HUSSAIN *v.* ALLAH BAKHSH **5 A. L J. 742 = A. W. N. 1908 p 257.**

31 Based upon private award Award set aside by court—Appeal A. W. N. 1908 P. 54—5 A. L J. 160—30 A. 151 Col. 1709 P. I.

32 Benamidar against—Beneficial owner—Bound by the decree 30 A. 30 Col. 21 P. II.

32 (a) Cancellation of—Decree obtained by fraud—Remedy. 5 C. W. N., 559 Col. 180 P. I.

33 *Challenging by—Review or suit—*Res-judicata.

The validity of a decree may be challenged either by an application for review or by a suit to set it aside 10 C., 612 followed.

When, however, a party has elected to proceed by way of review and the matter has been decided against him, he cannot be

Decree *(Contd.)*

allowed to have recourse to the remedy by way of suit, even though he seeks, in the suit to challenge the validity of the decree on grounds which he did not take but might have taken in the review proceedings.

The decision upon the questions raised and decided in the review proceedings is *resjudicata*. 25 C. 571 and 28=78 relied upon, RAM GOPAL MAJUMDAR *v.* PRASANNA KUMAR SAMAD. **2 C. L. J. 508.**

34 Character—Landlord and tenant—Decree for rent—Execution. 7 C. L. J. 652=35 C. 737 Col. 122 P. II.

35 Collectors—Decision—Summary suit—Madras Rent Recovery Act S. 69—Appeal 26 M. 518 Col. 909 P. I.

36 *Common grounds of appeal—Finding—Section 544 of the Code of Civil Procedure.*

It is only when the Court below has made a decree against several defendants upon a finding which applies equally to all of them that the Appellate Court may, on the appeal of any one of the defendants, reverse or modify the decree in favour of all the defendants (section 544 of the Code of Civil Procedure). 20 A 8; 22 A 386 referred to. RAJA SETH GOKALDAS AND R. B. BALLABDAS *v.* THE JODHPUR-BIKANIR RAILWAY COMPANY. **15 C P L R 1902 P 116.**

37 Compromise—S. 375, 629—Scope of decree passed on compromise. 5 C W N 485 Col 1601 P I.

38 Compromise—No appeal—Compromise decree—Directions as to costs, appeal against, maintainability of. 2 N L R 49 Col 679 P II.

39 Compromise before it is incorporated in decree. 109 P L R 1903 Col 1597 P I.

40 *Compromise decree—Review—Subsequent suit to set aside the decree—Matters in issue same—One ground not taken in review—Trial by piece meal—Resjudicata—Fresh suit—Maintainability.*

The plaintiffs brought three suits and the appeals arising out of them were compromised in the Court of the District Judge and decrees were passed accordingly. Being dissatisfied with these decrees, they applied for review of judgment and in course of the proceedings, a second compromise was arrived at and a modified decree was passed. The plaintiffs, however, again applied for review, but the District Judge rejected the application. They then obtained rules from the High Court which were discharged. Failing in this, they instituted a suit to have the compromise decree set aside. The main ground of the plaintiffs for the application for review was that their pleader had no authority to compromise the case.

Held that in such a case, two modes of procedure were open to them, either to proceed by way of suit or by an application for review of the judgment sought to be set aside, the latter being the more regular mode of procedure. Ashootosh Chandra *v.* Tara Prosanna Ray (I L R 10 Cal 612), relied upon. The plaintiffs having elected to proceed by way of review, and there having been the common question regarding the authority of the pleader, directly and substantially in issue which was heard and finally decided in the proceedings for review, the subsequent suit is barred by res-judicata Koylas Chandra *v.* Tarak Nath (I L R 25 Cal 571) and *Bhagwanbuttee* v. *A. H. Forbes* (I. L. R 28 Cal. 78) referred to. The fact that one of the grounds taken in the regular suit namely, that the compromise went beyond the subject matter of the original suit, was not set up upon the application for review cannot give them jurisdiction to bring the subsequent suit. The plaintiffs ought to have raised in review all the points they intended to rely upon, and they are not entitled to pursue their remedy piece meal. RAM GOPAL MOZUMDAR *v.* PRASUNNA KUMAR SANYAL, **10 C W N 529.**

41 *Condition—When such decree simply confirms decree of lower Court, it does not enlarge the time fixed by the original decree for the performance of condition precedent—Appeal, decree in.*

The decree of the lower Court provided that 'on the plaintiff's paying into Court the balance of consideration, Rs 10, within a month from this date,' defendant should execute a sale-deed of the suit land. The money was not paid within the month and the defendant preferred an appeal after the expiry of the month. The Appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the appellate decree the plaintiff deposited Rs. 10 and applied for execution of the decree.

Held, that he was not entitled to execute the decree, as he had not made payment within the time fixed by the original decree and as the appellate decree cannot under the circumstances be held to have enlarged the time fixed by the original decree. The appellate decree simply confirming the original decree cannot be read as giving the plaintiff one month from the date of the decision on appeal. Such an extension can be claimed only if expressly or impliedly given by the Appellate Court. Bhup Indar Singh *v.* Bijai Bahadur Singh, (I. L. R. 23 All. 155), distinguished. RAMASWAMI KONE *v.* SUNDARA KONE. **17 M. L. T. 495=3 M. L. T. 26=31 M. 28.**

42 Conditional for sale in mortgage suit puts an end to the suit—Application after preliminary decree for sale in mortgage suit—An application for bringing the representatives of a mortgagee who died after the preliminary decree for sale is not governed by Act 175 A. Limitation Act (1877)—MEHARI BIBI *v.* YAKUB ALI. **11 C. W. N. 156**

43 Consent decree—Execution of decree executing Court can not question juridic-

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tion of court passing decree. 7 B L R 659 Col. 142 P. I.

44 Consent decree—Compromise—Jurisdiction—5 C. W. N, 877 Col. 1593 P. I.

44 (a) Consent decree—Effect of breach of the terms of the decree on the part of plaintiff—5 C. W. N. 1901 P. 536=28 C. 557 Col. 337 P. I.

45 *Construction of—Suit for money against father and sons—Decree in first Court—Appeal to High Court—Execution by decree-holder—Attachment—Decree modified by High Court—Effect of modification upon attachment.*

The plaintiff sued the father and his sons for recovery of money and obtained a decree in the first Court. On appeal the decree was modified and it was directed that the share of the father was liable but that no order was to be passed in respect of the sons except that they should bear their own costs. Before the decree of the Appellate Court the creditor attached the joint property of the father and his sons (including the shares of the latter).

Held, (1) that only the father's share was liable and that the shares of the sons were not liable, and (2) that the decree not being reversed the attachment as regards the father's share subsisted. VENKATARAMA IYER *v.* DURAISAMI IYER. 15 M. L. J. 377.

46 *Construction of—Award and decree upon award passed against minor son of the mortgagor—Effect of.*

Venkatarao and his brother, Dashrath, executed a mortgage bond, whereby certain Watan property was charged. After the death of Dashrath, Venkatarao purporting to act on behalf of his brother's minor son as well as for himself, agreed to an award which provided that in default of payment of mortgage-money in the manner agreed the plaintiff was to recover the debt from the defendants by recourse to execution. At the date of the decree Dashrath's son was major, but it did not appear that the decree was passed in his presence. In execution of this decree the mortgagee sought a sale of the Watan property.

Held, that the award was not an award against the minor son in his personal capacity. There was no personal decree which could be executed by a sale of the son's interest in the Watan, nor was that interest assets of Dashrath's estate. NARAYAN DASHRATH *v.* RAMRAO BHUJANGRAO. 8 B L R. 482.

47 *Construction of—Affirmation on appeal—Mesne profits.*

Where the original court granted a decree for possession with future mesne profits, and on appeal Her Majesty in Council affirmed that decree without expressly mentioning the mesne profits:—

Held, that the Queen's order granted mesne profits by reference to the original decree. RAJA BHUB INDAR BAHADUR SINGH *v.* BIJAI BAHADUR SINGH. 5 C. W. N. 52.

48 Construction of—Execution against the Judgment-debtor admittedly not in possession of the moveable property 60 P. W. R. 1908 Col: 1485 P. I.

49 *Construction of—Execution of decree—Execution Court not competent to vary decree in execution proceedings.*

In execution of a decree for possession of lands passed by the Subordinate Judge and mainly confirmed by the High Court, the defendants alleged that the parcels of land sued for by the plaintiffs as *kasht* land are *kamat* land, and can only belong to the proprietors of the village in which it lies, and that as the plaintiffs' claim to the *mouzas* in suit in which the parcels of land in dispute lay had been negatived, they could have no claim to the parcels in question. The Subordinate Judge pointed out how the case stood upon the pleadings and decrees; intimated that it was not for him to inquire how the High Court would have acted if it had been proved that the land claimed as *kasht* was really *kamat*, and held that the plaintiff must get possession according to the decree under execution. On appeal the High Court remanded the case for further inquiry.

Held, setting aside the order passed by the High Court that the decree to be executed was plain and not ambiguous and there was no difficulty in identifying the parcels of land awarded to the plaintiffs. To say that the plaintiffs shall not have them because in the process of execution, the defendants raise a new question as to the nature of their relation to the *mouza*, is to rehear the decree, and not to execute it. UDWANT SINGH *v.* TOKHAN SINGH, 3 B. L. R. 313=23 C. 353 (P.C.)

50 *Construction—License—Profit "a prendre"—Res judicata.*

A previous decree recognising the right of a party as licensee should not be so construed as to magnify his privilege into proprietorship. A decree cannot effect a transfer of property. SAIYID WAJID ALI SHAH *v.* MUSAMMAT UMRAI BIBI. 1 A. L. J. 621.

51 *Construction of decree—Decree of Appellate Court dismissing appeal—Construction for purposes of execution—Decree when to be interpreted in light of judgment—Execution of decree.*

The decree which the Lower Court passed against D. and in favour of P. was for the execution of a deed of sale in terms of "the draft sale-deed A5." The appellate decree merely dismissed the appeal. When P. applied in execution of decree to have the sale-deed executed in terms of the draft sale-deed A5, D. objected that the decree was incapable of execution.

Held, that because the decree of the Appellate Court did not contain any direction as to the nature of the sale-deed to be executed, it was not incapable of execution.

Decree *(Contd.)*

Held, that where the decree to be executed is the decree of an Appellate Court, and where such decree merely confirms the decree of the Court below, the terms of the decree of the Lower Court must be looked at for the purposes of the execution of the decree of the Appellate Court.

Held, that a Court cannot look at its judgment to interpet its decree, when the language of the decree is plain and unambiguous. It is only when the terms of a decree are ambiguous, that it can be interpreted in the light of the judgment. KASIM ALI *v.* MANIK CHAND. **5 O. C. 35.**

52 Construction of—Purchaser under a registered deed whether entitled to priority over purchaser in execution of a subsequent decree obtained by a prior mortgage under an unregistered deed. 5 C W N 419—28 C 139 Col 491 P I.

53 Construction of—Decree upon mortgage of immoveable property—Money—Decree. 6 C W N 5 Col 1554 P I.

54 Construction of.—*See Construction of decree Col 527, 528 P II.*

55 Contempt of court—Order passed in exercise of power to punish—Appeal treated as revision—2 A L J 18—27 A 380 Col 904 P I.

56 Contract in darogation of—Question to execution—Court incompetent to go behind decree. 6 C W N 796 Col 606 P II.

57 Copy of—Necessity for appeal—Appeal filed without a copy of decree—Sufficient cause. 91 P L R 1903—22 P R 1903 Col 1873 P I.

58 Co-sharer Execution of one by another from possession and enjoyment of joint property—Form of decree—2 A L J 256 Col 658 P II.

59 Co-sharer dealing exclusively with joint property—Remedy of other co sharers —Declaratory decree—27 A 88 Col 657 P II.

60 Co-sharers—Joint property—Tress—Planted with the consent of co-owners—Suit for joint possession and removal of the trees—Form of decree. A W N 1905 P 160 Col 649 P II.

61 Creating charge on property—Property ascertainable though not specified. Identification of property—24 M 689 Col 392 P II

62 Directing sale of mortgage property —Costs if can be recovered from the mortgagor personally. 12 C W N 364. Col 693 P I.

63 Directing of wakf property Claim as trust property against its attachment —18 M L J 21 Col 1125 P I.

64 Describing property—Execution of decree—Amendment of decree after rejection of appeal under S. 551 C P C, 74 P R 1905 Col 1.57 P. I.

65 Definition—Decree directing accounts —Company Liability to account. 29 B 107 Col 294 P I.

Decree *(Contd.)*

66 Dismissal—Order rejecting an application under S. 50 is a decree and appealable. 8 C W N 743 Col 522 P I.

67 Dismissal—Effect of dismissal of appeal—Amendment of decree. 30 A 240 Col 1655 P I.

68 *Effect of previous suit—Previous suit on the basis of possession without title, dismissal of—Dispossession by plaintiff in the previous suit—Previous decree, effect of—Title, want of, of plaintiff in subsequent suit.*

Defendants brought a suit in 1886 for a declaration of their title and to recover possession of the lands in suit against the plaintiff. The suit was dismissed, defendants having failed in that suit to prove their title. Defendants subsequently dispossessed the plaintiff in 1890 and plaintiff instituted the persent suit in 1896 but could not prove his title.

Held, that the effect of the decree in the previous suit was to declare as against the present defendants, that plaintiff's possession was lawful; and such being the case and the defendants being wrongdoers and having no title, the plaintiff in the present suit, on the basis of the decree in the previous suit and his previous lawful possession, is entitled to recover possession if the lands are the same. Nasu Chand Gaita and others *v.* Kan Chiram Bagani (1899) 3 C. W. N. 568 Govind Chunder Kondo and others *v.* Taruk Chunder Bose and others (1877) I L R 3 C 145 Ismail Ariff *v.* Mahomed Ghous (1893) I L R 20 C 834 distinguished. FAZLUR RAHMAN CHOWDHRY *v.* RAJ CHANDER SEN. **5 C W N 234.**

69—*Erroneous—Civil Procedure Code (Act XIV of 1882), Section 244—Execution of decree—Decree for redemption wrongly framed—Fresh suit for possession on false allegations—Pleadings.*

The plaintiff held a usufructuary mortgage of 13 *bighas* of land which was subject to five prior mortgages. He sued for redemption of one of these prior mortgages which was last in point of time. The prior mortgagee contended that the mortgagor must redeem all the five mortgages in his favour. The earlier four mortgages affected an area of 15 *bighas* and also a part of the 13 *bighas* mortgaged with the plaintiff. A decree was passed for redemption of the five mortgages according to the contention of the prior mortgagee. The amount adjudged due was paid into Court and the plaintiff applied to be put into possession of the 13 *bighas* and of the 15 *bighas*. As by mistake the redemption decree omitted to award possession of 15 *bighas*, the Court refused to allow possession of that land in execution. The plaintiff brought the present suit for recovery of proprietary possession of 15 *bighas* of the land alleging that he was in lawful possession of it and the defendant, prior mortgagee, had wrongfully dispossessed him. It was found that the

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plaintiff was never in possession and therefore was never ejected.

Held, that the plaintiff's suit must be dismissed for the cause of action alleged by the plaintiff had not accrued When the plaintiff's application was refused by the execution Court in regard to the land in suit there were two courses open to him. If he considered the execution Court had wrongly interpreted the redemption decree he might have appealed against that order under section 244 of the Civil Procedure Code, or if he considered that the decree was wrong, as it manifestly was, in not giving him possession as mortgagee of the 15 *bighas*, he might either have appealed against the decree as it stood, or, have applied to the Court in review to amend the mistake. Suit for recovery of proprietary possession on false allegations of facts could not be decreed. BASAWAN KURMI *v.* NAKCHHEDI PANDE. **W. N., A., 1904, p 207=27 A. 174.**

70 *Error--Decree. Suit to set aside--Mistake--Maintainability--Landlord and Tenant --Ejectment--Specific prayer in plaint--Jurisdiction.*

Held, that a suit to set aside a decree, made in the presence of both parties and which is conclusive between them and is not tainted by fraud, is not maintainable. *3 W N Cal., 375 followed.*

In a suit for rent, even if there is no specific prayer in the plaint for ejectment of the defendant under aiyat, it is competent for the Court to pass a decree for ejectment under section 66 (2), Bengal Tenancy Act, on failure to pay the arrears claimed within a given time, if a claim for such relief is made by the plaintiff in the course of the trial. *8 W N Cal. 473 distinguished.* CHAND MEA *v* SRIMATI ASIMA BANU. **10 C W N 1024.**

70 a Estoppel—Amendment of plaint—Mortgage 7 C W N 575 Col 212 P I.

71 Execution—Interpretation of, with reference to judgment Duty of execution Court 167 P L R 1906 Col 1183 P I.

72 Execution — Partition decree — Civil Court. W N 1906 P 53 -28 A 375 Col 1152 P 1

73 Execution—Partition decree—Execution by defendants—No liability of defendant to pay Court fee. 29 B 79 Col 706 P II.

74 *Execution of Decree--Mortgage--Mitakshara family--Civil Procedure Code (Act XIV of 1882) S. 248, notice under--Order for substitution of the heirs of the deceased judgment debtor--Sale proclamation--Order of sale --Postponement--Estoppel--Res judicata--Hindu Law--Joint family.*

Held, that a legal representative of a deceased judgment-debtor, who was the managing member of a family governed by the Mitakshara system of Hindu Law, having allowed execution to proceed actively for nearly a year without the slightest objection, having twice successfully obtained stay of sale from Court on the plea that he would satisfy the decree, if time were allowed, and having approbated the execution proceedings by paying the decree-holder a part of the debt and thus inducing him to consent to time being granted for payment of the balance, cannot be permitted by the ordinary principle of estoppel to say that the decree is incapable of execution against him. Sadasiva Pillai *v.* Ramlinga Pillai (L R 2 I A 219; 15 B L R 383; 24 W R 143), referred to.

Held, further, on the principle of *res judicata* that the orders of the Court directing the issue of processes of attachment and sale proclamation were binding on the said legal representative, and that he was precluded from questioning the validity of the said orders. Mungal Pershad Dichit *v.* Grija Kant Lahiri (L R 8 I A 123; I L R 8 Cal 51; 11 C L R 113), Lakshmanan Chetti *v.* Kuttayan Chetti (I L R 24 Mad 669); Bhola Nath Dass *v.* Prafulla Nath Kundu Chowdhry, (I L R 28 Cal 122) and Sheoraj Singh *v.* Kameshar Nath (I L R 24 All 282).—COVENTRY *v.* TUSHI PERSHAD NARAYAN SINGH, **8 C W N 672 =31 C 822.**

75 *Execution—Right of purchaser—Estoppel by conduct—Mortgage.—Sale.*

In connection of a money-decree certain property was purchased. The said property was subject to a mortgage, but not a mortgage executed by the judgment debtor although the judgment debtor would himself have been estopped from denying liability under the mortgage on account of his conduct in the mortgage transaction.

Held, that the purchaser was equally bound as the judgment debtor inasmuch as the right, title, and interest of the judgment-debtor had passed to the purchaser, and his purchase was therefore subject to the mortgage *Poresh Nath Mukerji* v. *Anath Nath Deb*, I L R 9 Calc. 265 *Mahomed Muzaffer Hossein* v *Kishore Mohan Roy*, I. L. R., 22 Cal. 909 *Ramcoomar Koondu* v. *Macqueen*, L. R. I. A. Sup 40; 11 B L. R 16, *Sarat Chunder Dey* v *Gopal Chunder Laha*, I. L. R. 20 Calc 296 L. R, 19 I A. 203 *Porter* v *Incell*, 10 C. W. N. 313 referred to. PRAYAG RAJ *v.* SIDHU PRASAD TEWARI. **35 C. 877.**

76 Execution—Liability of judgment-debtor to be re-arrested after entering protection order. 26. B. 652 *See Debtor No I.*

77 Execution Court—Objection as to validity of decree—Question of jurisdiction. 28 M. 26 Col. 1095 P. I.

78 Execution Court—Decree of appellate Court silent as to interest Void contract—Mistake of fact. 28 B. 393 Col. 320 P. I.

79 Expart—Transfer of—Decree set aside —Maintainability of suit by transferee on original cause of action. 135 P. L. R. 1905 Col. 1160 P I.

80 Expart—Application to set aside-Lenient treatment of defaulting parties—72 P. R.

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1905 Col. 1456 P. I.

81 Expart—Death of defendant—Application by representatives of defendant to be brought on record. 28 M. 361 Col. 1148 P. I.

82 Expart—Appeal -Onus on plaintiff to show summons duly served. 23 A. 99 Col. 1433 P. I.

83 Expart—Court's inherent power set it aside--Certificate. 35 C. 767 Col. 799 P. I.

84 Expart- *Civil Procedure Code (Act. XIV of 1882), Sections 13 and 244 (c)—Fraud—Suit to set aside expart decree and sale in execution on the ground of fraud after rejections of applications to set aside the decree and the sale.*

Held, that Sections 13 and 244 (*c*) of the Civil Procedure Code are no bar to a suit on the ground of fraud to set aside an *ex-parte* decree and a sale held in execution of it by the plaintiff having unsuccessfully made applications under Section 108 to set aside the *ex-parte* decree by reason of non-service of summons, and under Section 511 to set aside the sale on the ground of material irregularity in publishing the sale. These sections limit the attention of the Court to specific matters. KHAGENDRA NATH MAHATA *v* PRAN NATH ROY. **4. B. L. R. 363=6 C. W. N. 473=29 I. A. 99=29 C, 395 (P. C.)**

85 Expectancy—Attachment of future rents and profits of Ghatwali estate. 28 C. 483 Col. 1158 P. I.

86 *Final decree—Appeal against—Partition suit—Right of appellant to question the correctness of the preliminary decree.*

Held, by the Full Bench (Maclean C. J. and Rampini J dissenting), that in an appeal against the final decree in a partition suit, it is open to the appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law. Boloram Dey *v.* Ram Chundra Dev (I L R 23 Cal 279) overruled —KHADEM HOSSEIN *v.* EMDAD HOSSEIN. **29 C 753**

87 Final decree—Sale under a decree of redemption - Rights of purchaser, the decree having become final—21 A 549 Col 620 P I.

88 *Final decree—Decree for pre-emption—Execution of.*

A decree can not be regarded as having become final, before the date on which the period for performing an appeal expires. 1 A 132, 7 A 107 followed. GOPAL DASS *v.* MAMMAN KUNWAR. **5 A L J 186=A W N 1908 P 13.**

89 Final order for foreclosure or redemption is a decree and appealable—Redemption after due date—3 N L R 116 Col 663 P I

90 Foreclosure—Mortgage by conditional sale - Informal and irregular decree—Execution--Absolute order—4 C L J 533 Col 663 P I.

91 Form of—Administration suit when allowable in an administration suit after the passing of the preliminary decree. 32 C. 561 Col. 484 P. II.

92 *Form of—Hypothecation of moveable property—Decree to enforce.*

The defendants borrowed by a deed three *khandis* of paddy from the plaintiff and promised to return it, with an increase of 50 per cent. to the plaintiff in about eight months' time, hypothecating two bullocks as security for the debt and retaining possession of the same. The plaintiff sued to recover the value of the three *khandis* of paddy and not the paddy itself, by the sale of the hypothecated bullocks, and from the defendants personally.

Having regard to the terms of the contract the High Court directed decree to be passed as follows:—

That on replacement within six months from the date of the order of the paddy still due (specifying the amount) the mortgage to be released but that on default of replacement of the paddy aforesaid within six months aforesaid there should be sale of the surviving bullock and the proceeds should be applied towards replacing the paddy aforesaid.

The decree to be a decree *nisi* in the first instance to be made absolute on the expiration of the six months as on an ordinary mortgage of lands. The order to reserve liberty to apply in case the required amount be not realized

Held, that as six months were allowed for payment the question of instalments did not arise. SHIVRAM *v.* DHAU. **4 B. L. R., 577.**

93 Form of--Hindu Law--Necessity for part of the amount raised--Rights of reversioners 25 A. 330 Col. 2134 P. I.

94 *Form of--Right of, in India--Invasion of right--Remedy--Decree, form of--Privacy.*

A right of privacy is not recognized by law in England, but it is recognized undoubtedly in India where the conditions of life are different. In a case of invasion of privacy, the decree to be given to the plaintiff should be one requiring the defendant to demolish any constructions made by him, which interfere with the plaintiffs' right of privacy, and restraining him from making any such constructions in the future but not a decree with a mandatory injunction to the defendant directing him to erect a wall on the roof so as to prevent a view of the plaintiff's house being had from the roof.—SHEONATH RAI *v.* ALI HUSSAIN. **1 A L J 113.**

95 Form of—Exclusive dealing with joint property by one of several—Declaration of interest—Profits. A W N 1905 P 233—28 A 161 Col 648 P II.

96 *Form of—Mutt—Debt incurred by holder- Binding character of—Decree, form of:—*

The estate belonging to a mutt is liable

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in the hands of its holder for debts incurred by his predecessor in title for purposes necessary for the maintenance of the institution, even though the debts were not made a charge on the estate by the predecessor, just as much as the estate of an infant is liable for a contract by his guardian even without any express charge over the estate.

Held also:—That the decree of the lower appellate Court limiting the liability of the estate to the income of the mutt property was the proper decree to be passed. 27 M 435, 4 I A 52 (P C) 17 M 106, 20 B 61; referred to. NATARAJA DESIKAR *v.* NOOR MAHOMED ROWTHEN. **17 M L J 553.**

97 Form of—Joint possession suit—One co-sharer excluding other co-sharers from the property. 27 A 153 Col 618 P II.

98 Form of – Joint property—Suit for joint possession and removal of the trees—A W N 1905 P 160 Col 649 P II.

99 Form of—Resjudicata—Sanction of Court—Decree against one administrator is binding on his successor—Decree against deceased's estate. 29 B 96 Col 1047 P I.

100 Form of—Administration suit—Exclusive enjoyment—One co-sharer dealing exclusively with joint property. 27 A 88 Col. 657 P II.

101 Form of co-sharer's building on joint land, right of—Way of necessity — Contents of. 30 C. 901 Col. 916 P. I.

102 Form of vendor and purchaser—Notice of prior agreement — Priority — Trust. 26 B. 159 Col. 415 P. I.

103 *Fraud, to be proved to set aside decree.*

To set aside a decree on the ground of fraud, a plaintiff must prove some fraud practised upon him, whereby he was prevented from defending the claim in the manner most to his advantage. 21 C. 612 followed. The fraud must be that which occurs in the very concoction or procuring of the judgment itself, and something not known to the opposite party at the time and for not knowing which he is not chargeable with neglect or inattention. 10 Ch. D.327; 67 L. J. Q. B. 31; 67 L. J. Q. B. 698, refd. to. RAJA RATAN SINGH *v.* THAKUR MAN SINGH. **1 N. L. R. 20.**

105 Fraud — Shebait — Suit to set aside decree—Limitation. 4 C. L. J. 472 Col. 1874 P. I.

106 *Fraud and misrepresentation* — bona fide *purchaser from the auction purchaser who was a decree holder—Decree reversed—Right of judgment debtor to recover property—Error of Court about a compromise — Decree through fraud and misrepresentation—Duty of a purchaser to refer to a decree under which the property was sold.*

A stranger who purchased property from a decree-holder auction purchaser, in execution of a decree, on a compromise, is entitled to plead that he is a *bona fide* purchaser for value without notice, and the judgment debtor is not entitled to the property, on a subsequent reversal of the decree. 10 A. 166 (P. C.) R., 13 M. L. J. 231 followed.

The judgment-debtor has only an equity to set aside the proceedings which were the result of fraud and misrepresentation and that equity cannot be allowed to prevail against *bona fide* purchasers for value without notice.

Where the Court has jurisdiction over the subject matter of a suit, any error, on the part of the Court, as to the effect of a compromise, entered into between the parties would not render the decree void. Even assuming that the decree-holder in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings are only voidable, and a *bona fide* purchaser from him is entitled to rely on his title as such.

It is by no means clear, that it was the duty of a stranger the *bona fide* purchaser for value, when aware that the vendor's title was under a Court-sale, to refer to the decree on which the sale was held. ISMAIL ROWTHER *v.* RAJA ROWTHER. **17 M. L. J. 165 = 2 M. L. T. 186 = 30 M. 295.**

107 *Fraud—Suit to set aside a decree on the ground of fraud—Sole question raised in the suit already decided in proceedings under section 108 of the Code of Civil Procedure.*

In a suit to set aside a decree as having been obtained against the plaintiff by fraud substantially the only ground relied upon was that the suit had been improperly instituted against the plaintiff as of full age when in fact he was a minor. This had been decided against the plaintiff in earlier proceedings between the parties under section 108 of the Code of Civil Procedure.

Held, that the suit was not maintainable. Puran Chand *v.* Sheodat Rai, I L R 29 All 212, followed. Khagendra Nath Mahata *v.* Pran Nath Roy, I L R 29 Calc 395, distinguished. NIADAR MAL *v.* RAUNAK HUSAIN, **4 A L J 665 - A W N 1907 P 191 = 29 A 608.**

108 Fraud—Decree obtained by fraud—Remedy. 5 C W N 559 Col 180 P I.

109 Fraud—Suit to set aside—Right to sue—Next friend ceasing to be a guardian under the Guardian and Wards Act. 5 A L J 35—A W N 1908 P 23—2 M L T 128—30 A 105 Col 1626 P I.

110 *Form of decree—Mutt, head of—Power to bind mutt property—Income of Mutt in the hands of successor liable for debts properly contracted.*

The position of the head of a mutt in reference to the mutt is analogous to that of the manager of an infant heir. Konwur Doorganath Roy *v* Ram Chunder Sen (L R 4 I A 52), referred to. Where debts are contracted by the head of a mutt for purposes binding on the mutt a decree in respect of such debts may be passed against his successors charging the income of the

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mutt property though such debts were not expressly charged on the income of the mutt. NATARAJA DESIKAR *v.* NOOR MAHOMED ROWTHEN. **17 M L J 553=3 M L T 95=31 M 47.**

111 *Form of decree — Sons brought on record in a pending suit as legal erpresentatives.*

Where pending a suit, a Hindu Defendant dies and his sons have been brought on the record in their character of personal representatives of the deceased, the decree should be against them as personal representatives, the amount of the decree to be realised from the estate of the deceased in their hands. 27 M. 243 (248) approved. NARAYANASWAMI NAICK *v.* SESHAMA RAJU, **3 M. L. T. 240 = 18 M. L. J 36.**

112 *Form of decree in redemption suit—Mortgage — Redemption suit— What judgment should contain when redemption is allowed.*

When redemption is allowed the judgment should decree that the plaintiff will be entitled to redemption of the property sued for upon payment into Court of such amount as the Court finds to be due in respect of the mortgage, and should name a date on or before which such sum must be paid into Court. The date should be fixed in the case of cultivated land, so that the party who has sown the crops shall have the benefit of it.

The judgment should then direct that if the plaintiff pays in the money on or before such date, the defendant shall after such date deliver over possession of the land to the plaintiff together with any documents of title relating thereto which the defendant may have in his custody or power, and shall further do all things necessary to place the plaintiff in the same position in regard to the land as he was in previous to the mortgage.

This direction should be followed by an order that if the plaintiff makes default in paying in the money within the time allowed, then the suit will from thenceforth be absolutely debarred and foreclosed from all right of redemption of the property and the suit will stand dismissed with costs. *Maung Myaing* v. *Maung Shwe Yon*, 1 L. B. R., 85, followed.— MAUNG MO GALE *v.* MA SA U **1 L. B. R. 1900 = 1902 P. 186.**

113 Imposing -- Hindu Law -- Father's debts--Perpetual liability created by father—High Court—Decree imposing perpetual liability — Second appeal treated as revision 6 B. L. R. 642 Col. 406 P. I.

114 *Injunction to remove building -- Form of decree.*

In cases of granting injunctions to remove buildings, it is of the utmost importance that the decree should state the precise nature of the relief granted. FAZILATUNNESSA *v.* IJAZ HASSAN. **30 C. 901 at 904.**

115 Instalments-Option of decree-holder —Instalment arrangement put on an end to – New agreement. 2 A L J 828 Col 1793 P. I.

116 Instalments—Execution of decree—Decree payable by instalments--Default in payment of instalments. A W N 1905 P. 268—28 A 249 Col 1792 P I.

117 Instalment—Default in payment of instalment—Subsequent payment and acceptance of over-due instalments—Waiver. 27 B 1 Col 2022 P I.

118 Instalment—Lenders and borrowers —Suit on promissory note—Equitable mortgage of security for loan. 1 L B R 1900 —1902 P 81 Col 1489 P I.

119 Interest awards—Execution of decree—Amendment of decree—Application for refund of amount realized in excess of decree. 27 A 485 Col 1987 P I.

120 *Interest awards.—Mortgage—Redemption--Interest on mortgage-money after date fixed for redemption.*

There is no authority making it compulsory on the Court to allow the contract rate of interest on mortgage-money after the date fixed for redemption by the decree. 23 Mad., 637, followed. M, A. R. A. R. SAMINATHAN CHETTIAR *v.* T. R. SWAMIAPPA NAICKER. **16 M. L. J. 133=29 Mad, 170.**

121 *Interpretation--Whether judgment can be looked into.*

In order to determine what is determined by a decree, the judgment can be looked into. 16 C. 173; 19 C. 159 followed.--MAGNIRAM *v.* MEHDI HOSSEIN KHAN. **31 C. 95 at 101; 8 C. W. N. 20.**

122 Joint possession—Ejectment of one co-owner by another--Joint property--Form of decree. A. W. N. 905 P. 119 Col: 648 P. II.

123 *Joint-possession-decree--Illegal dispossession.*

Where one of the joint owners of immoveable property in execution of a decree obtained by him for exclusive possession ousts another, there is a dispossession: and the latter is entitled to be restored to joint possession as before 26. A. 588 (F. B.), F. 27 A. 88 and 21 A. W. N. 48 distinguished. RAJA RAM MISRA *v.* LALJI MISRA, **2 A. L. J. 481.**

124 Limitation--Execution of decree--Amendment of decree. A. W. N. 1905 P. 63=27 A. 485 Col. 1987 P. I.

125 Limitation--Different period of, for suit to set aside a decree for fraud and a suit for a declaration that a decree is not binding on Tarwad. MUNDAN RAMAN *v.* RAMASUBBA AIYAN KULATHOOR AIYAN. **21. T. L. R. 41.** *See Limitation.*

126 Maintenance--Effect of Civil Court's decree--Consideration--9. O. C. 49 Col : 418 P. II.

127 Mesne profits—Parties--Hindu father and sons--Representative. 11. C. W. N. 163 Col : 1100 P. I.

128 *Minor, against--Exparte--Nazir guardian ad litem* :--The mere circumstance that the Nazir who was appointed a guardian

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ad litem did not defend the suit, because he had no instructions cannot affect the validity of the decree. The mere fact that a decree is obtained *exparte* does not make it illegal or invaild --VISHNU NARAYAN v. DATTA VASUDEO **9. B. L. R. 1099.**

129 Mistake of--Suit for rent by co-sharer landlord 8. C. W. N. 472 Col. 148 P. II.

130 *Mortgage —Redemption suit — Decree should not fix time for payment of mortgage-money* – Res judicata

In a suit for redemption of a mortgage the Divisisonal Judge's decree allowed the mortgagor plaintiff three months for the payment of the amount found due by him on the mortgage, and declared that on failure to do so the right of redemption would be barred.

Held that the provision in the decree barring the right of redemption in case of failure to pay within the time fixed was improper and should be expunged. That the decree should be without any time-limit for payment and the plaintiff left to execute it within the time allowed by law. That if he failed to do so he was competent to bring a fresh suit for redemption. P. R., 86 *of* 1887, 14 *of* 1881, 20 *of* 1887, 93 *of* 1879, *referred to.* 7 *Mad*, 423, 3 *Mad*, 478, 21 *Mad.*, 18, *concurred.* HIMAYAT ALI v. JOWALA SARUP. **100 P. R. 1905=16 P. L. R., 1906.**

131 *Mortgage held by several persons severally—Right of suit--Procedure—Parties.*

When the plaintiff sues for his share of mortgage money claiming to be severally and not jointly entitled to what was due and impleads his co-mortgagee as a defendant in the suit no objection can be made to the frame of the suit. In such a case the decree should direct that in the sale of mortgaged property the amount realized should be paid to the mortgagees in due proportion to the sums due to them. ATCHAMMA v. SUBBARAYUDU. **15 M L J 496.**

132 Moveables for—Alternative—Judgement debtor. 13 M L J 444 Col 1488 P I.

133 Order—Appeal against an order of the District judge, dismissing the suit under S. 158 Civ. Pro-Code – Such order amounts to a decree and is appealable. 10 O C 245 Col 1267 P 1.

134 Order dismissing appeal for default —Mesne profits--Limitation--Date of decree. 30 C 660 Col 909 P I.

135 Order dismissing application to set aside award is not a decree and is non-appealable 14 B L R 129 Col 894 P I.

136 Order dismissing suit for default—Appealable. 8 C W N 813 Col 1271 P I.

137 Order dismissing suit for defalut on adjourned hearing -Application for restoration rejected. 12 M L J 473 Col 1340 P 1.

138 Ordering sale of--Execution of decree --Decree as originally framed incapable of execution--Amendment of decree. 5 A. L. J. 403 Col. 1992 P. I.

139 Order not a decree—Remand — Appeal--A rent suit under the North West Provinces Tenancy Act does not amount to a—As defined in S. 2 Civ. Pro. Code. 3 A. L. J. 20 Col. 1263 P. I.

140 Order not a decree -- Compensation for land acquired by Government--Application for apportionment dismissed and parties referred to Civil Court. 8 C. W. N. 321 Col. 135 P. I.

141 Order refusing to file a private award is a decree and appealable -- Final, when a decree made upon private award by first Court. 2 C. L. J. 80 Col. 1709 P. I.

Note 2 C. L. J. 80 read for C. L. J. T. 80.

142 Order refusing to stay execution of a decree under appeal—Decree 2 S L R 24 Col 425 P II.

143 Order rejecting petition for dissolution of marraige--Appeal filed without copy of decree—"Sufficient cause." 22 P R 1903 --91 P L R 1903 Col 1873 P I.

144 Part adjustment- Certificate necessary. 4 M L T 229 Col 1195 P 1.

145 Partly valid and partly unvalid--Sale of a tenure--Landlords decree--Execution 29 C 219 Col 121 P II.

146 *Partition decree declaring plaintiff's shares, leaving details to be worked afterwards, not a final and executable decree—Step in aid of execution--Limitation.*

If a decree merely states the plaintiff's sharer in the immoveable property and leaves these as well as all other necessary figures to be worked out and settled at some subsequent period, the decree is not a final or executable decree.

Before there can be any final or executable decree, all these matters must be worked out and determined in the suit, and, therefore, an application for the partition of the immoveable property in the above case is merely a further step in the action to which no limitation applies. 22 C 425, 21 C 575, 32 C 483 and 23 M 127, referred to. RAMASWAMY NAICKER v. RAMASWAMI KAMAYAN NAICKER **2 M. L. T. 265.**

147 *Partition--Civil Procedure Code (Act XIV of 1882), Sections 2 and 396- Decree not capable of execution.*

In a suit brought by the plaintiff to have certain property partitioned and to be put in possession of a one fifth share thereof, the decree declared that the plaintiff was entitled to get possession of a one fifth share of the property set forth in the plaint. The plaintiff applied in execution that out of the property in suit a fifth share may be partitioned, and he may be put in exclusive possession thereof. The judgment-debtor objected that the decree was incomplete and not capable of execution.

Held, that the decree being not capable of execution the objection must be allowed. The original suit in such a case must be treated as pending, and the Court should be

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directed to pass a proper decree in it. 20 All. 311, and W. N. A., 1899, p. 124, referred to. GANGA RAM v. MUHAMMAD ALI. **A W N. 1903 P. 187.**

148 Passed by mistake--Death of defendant before decree, A. W. N. 1904 P. 44 Col. 1576 P. I.

149 Personal--Claim to attached property on behalf of idol, may be tried in execution of a personal decree against a shebait. 12 C. W. N. 310 Col. 1122 P. I.

150 Possession of land--Order in execution proceedings--Appeal. 26 M. 438 col. 391 P. I.

151 Pre emption—Resale by vendee to vendor, when could affect right of pre-emptor--Sale to stanger of a co-occupant's share, effect of. GANPATSA MAHADASA v. JOOMABHAI. **2 N. L. R. 150.**

See Pre-emption.

152 Pre emption—Unconscionable covenant for pre emption for a fixed sum irrespective of market price. M. L. J. 1901 P. 132 Col. 265 P. I.

153 Preliminary order disregarded by successor--Suit tried partly by one and partly by another judge. 4 L. B. R. 256 Col. 1477 P. I.

154 Provision for maintenance-Impartible estate—Hindu Law--Devolution of—Restoration of grant with altered conditions. 24 M. 562 Col. 303 P. II.

155 Question as to validity of — Jurisdiction of Court to which a decree has been transferred for execution to entertain suit based on the validity of the decree. VELAYUDHAN NILAKANTAN v. KRISHNAN PADMANABHAN. **21 T. L. R. 138.**

See Jurisdiction of Civil Courts.

156 Recital in later decree produced, if evidence--Decree not produce--Suit to declare entry in the record of rights erroneous. 11 C. W. N. 48 Col. 1829 P. I.

157 Redemption—Extension of time for payment of mortgage amount. 28 M. 211 Col. 2021 P. I.

158 Redemption—Execution of decree—Delivery of land—Standing crops—Appeal from order of execution—3 L B R 1906 P 129 Col 1509 P I.

159 *Religious endowment—Alteration of scheme settled under a decree—Suit relating to endowment.*

The Court has power in a properly constituted proceeding to alter a scheme settled under a decree in a suit under Section 539, Civil Procedure Code. But an application to that end can only be successful, if it be evident that the proposed alteration is necessary in the interests of the foundation, and in harmony with its objects. The Court would be slow to act when all that was proposed was an alteration in a detail of administration on which opinions might reasonably differ. KANDAS DAYA RAM v. THE TALUQDARI SETTLEMENT OFFICER. **3 B L R 258.**

160 Remand partial—Civil Court—Reversing decree as to part of disputed property and remanding the suit as to remainder. GANU ANANTSHET v. GANU MAHADEV. **9 B L R 966.**

See Practice.

161 *Representative capacity in—Against son.*

Where a decree was obtained against the son of a deceased as latter's representative.

Held, that as such representative, he was bound to pay out of the assets of the deceased. V. BAHARATHAN BATTER v. N. NARAYANAN NAIR, **3 M L T 314.**

162 Reversioner's suit for—Widow by-Hindu Law—Necessity for part of the amount raised. 25 A 380 Col 2134 P I.

163 Reversal of—Fraud—Suit to set aside decree obtained by fraud—Jurisdiction of High Court. Original side C. P. C. Act V of 1908 S. 20. VII R. 4, 5—Administration suit 7 C. W. N. 354=30 C. 369 Col. 1757 P. I.

164 Reversal of one appeal by one defendant—See C. P. C. Act V of 1908 OXLI R 4 —S. 544 6 C. W. N. 794, 9 C. W N. 1061, 31 C. 643, 28 M. 122, Col. 1645—1646 P. I, 30 M. 470, 28 M. 229 Col. 1650 P. I

165 Right to recover losses and expenses contingent on an uncertain future event—Decree whether executable—2 S. L. R. 33 *See Declaratory suit No. 34 supra.*

166 Right of inheritance by—Death of donor pending suit—Gift held invalid—Custom—Alienation—By childless proprietor—56 P. L. R. 1904 Col. 2099 P. I.

167 *Sale in execution of decree--Rights of auction-purchaser—Distinction between decree-holding purchaser and other purchasers.*

Where no fraud is alleged, a sale in execution cannot be set aside as regards an auction-purchaser whether the order of Court under which it took place was legal or not. Even if the decree in execution of which the sale took place was a collusive one, the right of the auction purchaser would not be affected if he was no party to the fraud and there would be no ground for setting aside the sale. Mahomed Kuzulbash Khan v. Mahomed Shah and others, 12 W. R., 48, followed.

Distinction drawn between decree-holding purchasers and other purchasers, Jan Ali v. Jan Ali Chowdhry, 10 W. R., page 154, Murari Singh v. Priyag Singh, XI Col. 362, and Zain Ul Abdin Khan v. Muhammed Ashgar Ali Khan, X All., 166, cited. MAUNG AUNG BAN v. MAUNG SHWE PE. **1 L. B. R. 1900=1902 P. 22**

168 Sale of hypothicated property—Execution--Limitation. 25 A. 541 Col. 1139 P. I.

169 Sale of hypothicated property—Right of prior mortgagees—Cross-objections. Cin. 14 C L R 1901 P 46 Col. 1666 P. I.

170 Satisfaction of decree not certified—Application after time to have certificate—Satisfaction of decree not certified through decree-holders. 12 C. W. N. 485 Col. 1497 P. I.

Decree *(Contd.)*

171 *Set aside as fraudulent—Partition decree based on award, declared fraudulent and not binding on one of the judgment debtors—Execution against other judgment debtors.*

A partition decree based on an award was on the suit of one of the judgment-debtors declared to be fraudulent and not binding on him

Held, that the decree did not cease to be susceptible of execution as against the other judgment-debtors. 10 Bom. 338 and 25 Mad. 426 referred to. PASUPATI NATH BOSE v. NANDO LAL BOSE. **30 C. 718.**

172 Set aside as fraudulant—Exparte decree—Application for refund of the amount of decree subsequently set aside. 28 C. 113 Col. 1995 P. I.

173 Set off cross decrees—Assignment de decree—Notice to judgement debtor. 26 M 428 Col 1145 P I.

174 Suit to set aside alienation by Hindu widow—Suit for possession against aliences —A W N 1903 P 68—27 A 494 Col 19055 P I.

175 Suit to rectify mistake in decree—Judgment. 8 C W N 473 Col 1308 P I.

176 Time for registration—Decree not providing for period for registration—Non-presentation of document within thirty days of First Courts decree directing registration. 33 C 1020 Col 493 P I.

177 Time extended fixed for compliance of a condition laid down in the decree. 8 O C 241 Col 699 P II.

178 Transfer of Property Act—Mortgage decree need not reserve rights admitted by all parties—Decree must be construed with reference to pleadings. 29 M 84 Col 662 P I.

179 Transfer of Property Act—Suit for sale—Question of personal liability of mortgagor when made be decided. 28 A 364 Col 696 P I.

180 Transfer of decree for execution—Notice to assignor and judgment debtor. 29 C 235 Col 1501 P I.

181 Trust—Purchaser—Shebait's powers—Decree under S. 539 C P C 2 C L J 448 Col 1218 P I.

181 (a) Variation of—On appeal by some of joint appellants. 25 B 699 Col 1725 P I.

Decree holder

1 Application of decree-holder for execution of decree. 2 M. L. T. 339 Col. 908 P.I.

2 Construction of decree—Consent of decree. 28 C. 557 Col. 337 P. I.

3 Executing mortgage decree. 12 C. W. N. 365 Col. 693 P. I.

4 *Minor—Joint decree holder.*

When one only of several joint decree holders is a minor, S. 7 of the Limitation Act (1877) saves an application for execution by the minor decree holder from being barred by limitation 13 M. 236, 17 M. 189, dissented from 20 B. 383, 22 A. 199 concurred.

Decree holder *(Contd.)*

SURJA KUMAR DUTT v. ARUN CHUNDER ROY. 28 C 465.

5 Minority of one of several decree holders—Limitation 7 C. L. J. 308 Col. 1744 P. I.

6 *Not claiming within time—Joint decree—Execution of decree. N. W. P. Act I of 1903 S. 2 and 12—Advantage of the Act taken by some of joint judgment debtors.*

Where only five out of six joint judgment-debtors took the benefit of the Bundelkhand Encumbered Estates Act, 1903, on a notification being issued under the Act, and the decree-holders did not make any claim within the time prescribed

Held that the decree-holders could not recover from the judgment-debtor who had not taken advantage of the Act anything more than his proportionate share of the judgment debt. MAKUND RAO v. JANKI BAI. **A. W. N. (1908), p. 43=5 A. L. J. 132=30 A. 441.**

7 Purchase by decree holder—Certificate of sale – Amendment of certificate. 23 A. 476 Col. 378 P. II.

8 Purchase by decree holder—Step in aid of execution. 24 M. 185 Col. 2018 P. I.

9 *Right of decree holder, where wrongly entered in the schedule—Insolvency order passed by chartered high, courts effect of—Order of discharge passed by chartered High Court operates throughout the whole of British India.*

Held that, where a judgment-debtor had been declared insolvent by the High Court at Calcutta but the amount due to a particular decree holder had been entered wrongly in the schedule of debts filed by the judgment-debtor the decree-holder was not entitled to proceed in execution against the judgment-debtor for the amount of the decretal money not entered in the schedule. The order of the High Court should be considered as giving the judgment-debtor a personal discharge as to the claim whatever its amount might be, the remedy of the decree-holder in such a case being, if any, to move the High Court to re-consider its decision.

Held further, that orders relating to insolvency passed by the Chartered High Courts under the Insolvent Debtors' Act do not extend only to Presidency towns but operate throughout British India. Brett v. Schooner Stedt (1), Dadadhai Nasarwanji v. Manikji Shapurji Kaka (2), Cowasha v. Homi N. A. Wadian (3) and Miller v. Sheo Prasad (4), referred to. BITHAL DAS AND ANOTHER v. MUNSHI IHTISHAM ALI **10 O. C. 305.**

10 Right of decree holder to execute a decree passed in favour of—Execution of decree by a survivor of two joint decree holders—10 O. C. 378 Col. 793 P. I.

11 Sale—Decree on the original sale—Decree holder—*Locus Standi*—Appeal. 29 C. 548 Col. 1192 P. I.

12 Sale—Putting property to sale without disclosing his lien—Effect of purchaser without notice—Liability for the undisclosed

Decree holder *(Contd.)*

lien. BALDEO *v.* AUSAN SINGH. **11 O C 206**.

See Execution of decree.

Dedication.

See Trust.

1 Second appeal—Ground for—Construction of document of title 9 C W N 154 Col 1251 P I.

2 *Mahomedan Law*-Wakf-Sajjad a nashin —*Muttawali. Appointment of successor by—Durga—Tombs of ordinary individuals.—Creation of valid* wakf.

The office of *Sajjad a-nashin* is a religious office, and the property acquired by a *Sajjad a-nashin* is ordinarily his private property, unless he has done something to dedicate it to charitable or religious purposes.

But a *Sajjad a-nashin* may also be a Muttawali of property dedicated to charitable purposes and to that extent his office is secular as distinguished from his office as *Sajjadea nashin* which is spiritual. Muttawalis appoint their own successors unless the deed under which they themselves hold lays down a contrary provision. Similarly, a *Sajjad-a-nashin* appoints his own successor, generally some member of his family. ZOOLEKA BIBI *v.* SYED ZYNUL ABEDIN **6 B L R 1058**.

Deduction.

Of time spent in obtaining of judgment and decree *See Limitation Act S. 12*

Deed

1 Alteration—Refusal to register on the ground that the document did not contain sufficient descirption of the property. 304 B 304 Col 470 P I.

2 Alteration—Materalatteration in a document—Alteration in acknowledgement. 25 B 616 Col 34 P I.

3 Alteration. Bond. Mortgage suit by puisne mortgagee for redemption of prior mortgage and sale of hypothecated property. 25 A 580 Col 2145 P I.

4 Attestation—Mortgage bond—Execution-document. 29 C 355 Col 189 P I.

5 Attestation—Of mortgage-bond—Meaning of the word attested. 27 B 91 Col 607 P I.

6 Attestation—Mortgage bond—Attesting witness—Presumption. 7 C W N 384 Col 606 P I.

7 Cancellation—Suit to set aside an instrument—Collusive sale deed not intended to be acted upon. 15 M L J 228 Col 1860 P I.

8 Cancellation of deed—Equity—Grand Misrepresentation—Undue influence—15 P R 1908 Col 438 P II.

9 *Construction—Matter of law—Estoppel.* The construction of a decument is a

Deed *(Contd.)*

matter of law and there can be no estoppel by reason of misrepresentation on a point of law. This rule does not apply where the point of law is not clear and free from doubt.—NARASING DYAL SAHU *v.* RAM NARAIN SINGH. **30 C 883 at 894**.

10 Construction of document—Name given by parties to document. 29 B 19 Col 2172 P I.

11 Construction—Mortgage—Construction of deed—Mortgage or lease—Land transferred for ten years—Profits to go in liquidation of debt 26 B 252 Col 537 P II.

12 Construction — Duty of court—Construction of document—Mortgage by conditional sale. 4 B L R 871 Col 582 P II.

13 Construction—Execution of sale deed—Subsequent redemption—Suit on footing that the sale was in fact a mortgage—25 M 7 Col 204 P I.

14 Construction—When a registered deed begins to operate—Priority of—Non payment of consideration in full. 29 B 46 Col 475 P I.

15 Construction—Decision in former suit —Parties in subsequent suit all claiming under one party only in former suit—Deeds, construction of. 30 C 556 Col 558 P I.

16 Composition—Deed—Conveyance—Trustees under the deed. 28 B 364. Col. 480 P I.

17 *Execution—What amounts to.*

'Execution' of a document means the signing of the document of the executant's free will. Where the signature to the document is obtained by duress and intimidation, there is no execution. CHANDRA KISHORE MUNSHI *v.* DINENDRA NATH SANNYAL. **1 C L J 126**.

18 Execution—Attesting witness—Mortgage-deed. 5 C. W. N. 454 Col. 189 P. I.

19 Executent name with by witness—Attesting witnesses—Remand. 7 C. W. N., 160 Col. 606 P. I.

20 Execution of deed-Admission of signature before Registering—Officer—6 C. W. N., 329 Col. 486 P. I.

See also Construction of Deed.

Defamation.

1 Abatement of suit—Appeal—Abatement —Death of appellant after appeal filed, but before hearing of appeal—Defamation. 26 B 597 Col. 1280 P I.

2 Cause of action—Special damage—Unchastity, Imputation of. 34 C., 48 Col. 343 P. II.

3 Communication—Truth of the imputation—Action of libal—Cause of action. 6 B. L. R. 684 Col. 340 P. II.

4 Deposition in—Defamatory statement in deposition when privileged 9 C. W. N. 911 Col. 245 P. I.

5 English and Indian Law—Slander. 1 A. L. J. 102 See Damages No. 71

6 Jurisdiction of Civil Court—Caste Zan-

Defamation *(Contd.)*

zibar to be treated as a district in the presidency of Bombay--Zanzibar order in council, 1884--Defamation--Privilege. 26 B. 174 Col. 335 P. II.

7 Libel—Defamation-Libel slander-Cause of action-Special damage. 4 C. L. J. 390 Col. 343 P. II.

8 *Libel--Special damages--Remedy—Civil action.*

A libellous letter, containing a specific allegation with respect to another's business and causing special damage by reason of the injury inflicted on the business would afford grounds for civil action rather than for a criminal prosecution. CASSEM KURRIM *v.* JONAS HADJEE SEEDICK, **9 C W N 195=3 C L J 47.**

9 Mental Distress--Slander—Defamation—Slander--Right of suit. 28 C. 452 Col. 360 P. II.

10 *Libel—Privileged communication—Defamatory statements in report submitted to superior officer—Malice in fact.*

In the absence of proof of malice in fact a public officer is not responsible for any defamatory statements, however, erroneous, made by him to his superior officer respecting the character of a person if he made the statements honestly believing it was his duty to do so. NARASIMHA SHANKAR *v.* BALVANT LAKSHMAN. **5 B L R 664=27 B 585.**

11 *Privilege—Slander--Defamatory words spoken by witness during examination—Imputation of unchastity to woman—Suit for damages by her brother not maintainable.*

Where certain words were spoken by a witness during his examination, imputing unchastity to the plaintiff's sisters, and the plaintiff brought a suit for damages for slander—

Held, that the suit was not maintainable inasmuch as the words were neither defamatory of him, nor had they caused him any injury.

Harington, J.—What a witness says in the course of his examination is privileged even if irrelevant but no witness is entitled to claim privilege for a slanderous statement wantonly made which is neither an answer to any question addressed to him in examination or cross examination, nor had any connection at all with the case under trial. GIRWAR SINGH *v.* SIRAMAN SINGH **9 C W N 847=32 C 1050.**

12 *Privilege—Right of suit—Words spoken in answer to questions put by an investigating officer.*

No action lies for defamatory words spoken in answer to questions put by a Police Officer conducting an investigation under the Criminal Procedure Code.

16 Mad., 235, 6 Q B. D. 307; L. R. 71, and L. R. 7 H. L. referred to METHURAM DASS *v.* JAGGAN NATH DAS. **5 N. W. C. 804=23 C. 794.**

13 Privilege—Minister of charitable institution communicating to a lady attached to the mission intimating his disapproval of her proposed marriage—83 P R 8 *See Damages No. 26.*

14 Privilege—Libel—Suit for claim for damages—Application for leave—9 C W N 370—32 C 318 Col 1293 P I.

15 Privilege—Defamation in a Government Resolution—6 B L R 131 Col 47 P I. (131 read for 133).

15 a Privilege—Government and Government officers. Suit against—Power of Government as to dismissal reduction etc of public servants. 27 B 189 Col 42 P I.

16 *Privilege—An accused person is privileged in respect of questions put in good faith for the purpose of defending himself—Publication.*

The rule of English Law "that no action of libel or slander lies whether against Judge, cousel, witnesses, or parties for words written or spoken in the ordinary course of any proceeding before any Court, or tribunal, recognised by law" will also apply to an accused person in respect of questions put by him in good faith for the purpose of defening himself. A party receiving a notice entitled to reply to the notice and state his reasons, and such reply is privileged so long as it is confined to the matter in hand and is relevant, provided the reply is not published by the person making it. Where such reply is a mere acknowledgment that the party had made the imputations complained of in the notice, relief can be claimed only in respect of the original imputations. PACHAIPERUMAL CHETTIAR *v.* DASI THANGAM. **8 M L J 353=4 M L T 222=31 M 400.**

Default,

1 Order dismissing on appeal for default—Right of appeal against--special remedy: 1 L. B. R. 1900-1902 P 183 Col. 1657 P. I.

2 The appeal without hearing argument. 17 C. P. L. R. 1904 P. I. Col. 1656 P. I.

3 Dismissal—Decree — Appealable. 28 C. 81 Col. 906 P. I.

4 Suit dismissed for default on adjourned hearing—Application for restoration rejected 12 M. L. J. 473 Col. 1340 P. I.

5 Decree--Order dismissing suits in default--Appeal. 8 C. W. N. 313 Col. 1271 P. I.

6 Dismissal of suit—Councel having no instructions—Limitation for application for re-hearing expiring during vacations. 31 C. 150 Col. 1453 P. I.

7 *Appeal to His Majesty in Council—Application for admission--Restoration to file of an appeal struck off for default-Time limits, extension of, for security and deposit--Civil Procedure Code, Ss. 595, 602.*

While the Court has power to restore to the file an application for admission of an appeal to His Majesty in Council which has been struck off for default and to extend the time-limits specified in section 602 of the Code for the furnishing of security and the

Default (Contd.)

deposit of expenses, those limits are not to be departed from without cogent reason. Burjore v. Bhagana, I. L. R. 10 Cal., 557, followed. MA ME GATE v. MA SA YI. 1. L. B. R. 1900-1902 P. 329

8 Dismissal of suit for default—Witness attending Court on first yearing but absent adjourned hearing. A. W. N. 1905 P. 92. *See discretion No. 16.*

Defeasance Clause.

1 *Defeasance clause.*

Held, that a clause of defeasanse in order to be operative must contain express words or words of necessary implication of a gift over to a definite person or persons.—AMULYA CHARAN SEAL v. KALI DAS SEN. 32 C., 861.

Defective title.

1 Mortgage—Defective title—Jurisdiction of Civil Courts, objection to. 1 L. B. R. 1900 =1902P. 277 Col: 318 P. II.

Defence.

1 Conditions under which court may strike out the defence of defendant—7 C. L. J. 295 Col : 1471 P. 1.

Defendant.

1 Death of defendant—Abatement of suit —Appeal against order of. 25. A. 206. Col : 2741 P. I.

2 Death of defendant. Right of representatives of a deceased defendant. 29. C. 33. Col : 1464 P. I.

3 Death of defendant-appellant against a decree for damages. 26 M. 499 Col: 12 P. I.

Dekhan Agriculturists Relief Act.

1 See Bombay Act XVII of 1879 Cols 208 to 213 P II.

2 *S. 7—Defendant, summoned—Payment of batta unnecessary.*

Where an agriculturist-defendant is summoned to be examined under S. 7 of the Act, it is not necessary to pay *batta* to him. GANGASHANKAR PRABHASHANKAR v. BODHAR MADHBHAI, 10 B L R 1163.

3 *S. 11—Suit on commission agency accounts—Sadar Court's decision.*

A suit is barred against an agriculturist on a commission agency account by S. 11, Bombay Act XVII of 1879, if he resides beyond the Court's jurisdiction.

District Courts judges are bound by decisions of the Judges of the Sadar Court until questioned or overruled by the Judges exercising the District Court jurisdiction of the Judicial Commissioner's Court. But those decisions, being the decisions of single Judges, are not binding on succeeding Judges of the Sadar Court. P J 1897, 200 followed.

Dekhan Agriculturists Relief Act (Contd.)

GULAM HUSEIN YULLEE v. FALIB SIDIK, 2 S L R 28.

Delay.

1 *In appeal—Arbitrator. Liability of—Fraud.*

The plaintiff withdrew the suit against the defendant on the parties agreeing to refer the dispute to arbitration. The arbitrators delivered no written award. The plaintiff brought the present suit against the arbitrators and the defendant in the previous suit, on the allegation that the arbitrators gave only an oral award and by their acting in collusion with the original defendant they omitted to give a written one.

Held, that an oral award, though undesirable, is perfectly valid, and consequently no cause of action arose against the arbitrators. SAVALAPPA v. DEV CHAND VAL CHAND. 3 B L R 691=26 B 132.

2 Effect of delay on a claim to mandatory injunction — 12 C. W. N. 519 = 35 C. 661 Col. 2169 P. I.

3 In security—Taxation costs. 5 C. W. N. 119 Col. 685 P. II.

4 In specific performance—Claims for specific performance—Effect of laches 30 C. 265 Col. 407 P. I.

5 Registered documents — Delay in effecting registration— Notice — 1. L. B. R 1900—1902 P. 293 Col. 488 P. I.

6 Suit — Delay in filing suit — Interest compound. 53 P. L. R. 4 Col. 344 P. I.

7 Suit — Delay by reversioners in suing to protect their reversionary right — 111 P. L R. 1908 Col. 989 P. I.

8 What amount to unreasonable delay — Co owners — 4 N. L. R. 120 Col ; 1920 P. I.

Deligation.

1 By Arbitrators—Deligation of duty—29 C 854 (P C) Col 1695 P I.

2 By arbitrators—Deligation of duty. 24 A 312 Col 1693 P I.

3 *Collector—Board of Revenue—Sanction by—Manager, powers of—Deligatus non potest deligare.*

The maxim "*delegatus non potest delegare*" is to be understood with this necessary qualification that, in any particular case, if no authority to delegate has been given, such authority may be implied from the circumstances of the case. JOGESHWAR NARAIN SINGH v. RAI RADHA RAWAN, 3 C L J 165. *See for other facts Col 459 P I.*

4 By District Judge—Application for appointment of guardian—Reference to Subordinate Judge to record evidence. 26 B 716 Col 805 P I.

5 Reference to arbitration—Award—Finality of —Powers of arbitrators. 25 P R 2 Col 1697 P I.

6 Delegation of power of enquiry. 6 C W N 289 Col 511 P I.

Delegation *(Contd.)*

7 *Hindu Law—Widow. Alienation by, not void but voidable—Reversioner. Assent of —Delegation of Power to validate alienation.*

An alienation by a Hindu widow having a life interest is only voidable. It may be validated by the assent of the reversioner.

The reversioner is not entitled to delegate his power of valislating the alienation to his executor. HAYES *v.* HARENDRA NARAIN. **31 C. 698.**

8 Arbitration—Duty of arbitration—Delegation of duty. 29 C. 854 Col. 1695 P I.

9 Delegation of power of enquiry. 6 C. W. N. 289 Col. 511 P. I.

Delivery of Possession.

1 Delivery of Possession—Effect as against party not affected by the decree. 27 M. 262 Col. 1961 P. I.

Demand by registered notice.

1 *Demand by registered notice—Burden of proof—Evidence—Regulation XVII of 1806—Mortgage—Foreclosure proceedings—Seraice of notice—Substituted service when permissible—*

In order that the mortgagee should obtain foreclosure of the whole mortgage every mortgagor should be served with a notice.

In a suit for foreclosure of a mortgage by way of conditional sale it is for the plaintiff to prove a demand from each mortgagor prior to issue of notice, the failure to prove which would be fatal to his suit. The demand may be made by means of a letter sent through post registered, it would be presumed that the letter reached its destination when it is not returned to the mortgage through the Dead Letter Office, though the presumption is neither obligatory nor conclusive. The contents of the letter being in the nature of a demand should be proved.

It is not essential that service of notice under the Regulation should be personal. The provisions of the Civil Procedure Code as to service of process, so far as they are not contrary to the Regulation, are applicable by force of S. 647 of the Code to the service of notice issued under the Regulation.

The finding of the District Judge in the foreclosure proceedings that notice has been duly given to the mortgagor is not even prima facie evidence of the provisions of the Regulation having been complied with, the service of the petition for foreclosure and the notice in theform prescribed by the Regulation must be strictly proved.

Though substituted service is not confined to cases in which it is established that the mortgagor is keeping out of the way yet the stringent requirements of the Regulation would not, in the absence of strict proof of evasion of service, be complied with by substituted service of notice.

Substituted service on one of the mortgagors who was a female not being considered sufficient and the allegation not having been established that she made an admission of having been duly served with notice the foreclosure proceedings were held as infructuous. SHEIKH FAZAL ILAHI *v* HAZARI SINGH. **63 P. R. 1902=48 P. L. R. B. 1902.**

Demand and refusal.

1 Pledge — Limitation—Construction. 26 430 Col. 1761 P. I.

2 *Hindu Law — Maintenance — Arrears—Impartible estate—Effect of partition of divisible property.*

Held, that the plaintiff's claim for maintenance was not barred on account of a decree obtained by him for partition of divisible property of the family.

Held, that nonpayment of maintenance to a person entitled thereto does not necessarily give him a right of action for arrears but it constitutes *prima facie* proof of wrongful withholding. It is only upon a full consideration of all the circumstances of each particular case that it is possible to decide whether such *prima facie* proof has been rebutted.

Arrears of maintenance for the period not excluded by the law of limitation allowed. RAJA YARLAGADDA MALIKARJUNA PRASADA NAYADU *v.* RAJA YARLAGADDA DURGA PRASAD NAYADU. **5 C. W. N. 74—24 M. 147 P. C.**

Demaracation.

1 *Demarcation of village boundaries being accepted by Settlement authorities and by defendants, suit by Government to impugn their correctness.*

Between Government and the defendants' predecessors it was decided in 1866, that the whole of the town of Tanda should be regarded as Nazul property with the exception of the hamlet of Nawagunj. This decision was upheld in appeal in 1871, and the Deputy Commissioner ordered that the boundary should be demarcated. An *amin* being appointed to demarcate submitted a report, and a map in which the boundary was shown. This demarcation was accepted as correct by the Settlement authorities and the defendants' predecessor in title under a *razinama* in 1872 and the settlement papers were made accordingly. The defendants had been in possession of the land, which was demarcated as their property, ever since 1872, and this area of land was included in the *had bast* village M. which was settled with the defendants and their co-sharers In 1904, the Government brought a suit for possession of certain lands, alleged to have been wrongly included in the hamlet of Nawagunj and impugned the correctness of the proceedings and demarcation which had taken place in 1872.

Held, that having regard to the circumstances of the case and the conduct of the parties through a long period of more than

Demaracation *(Contd.)*

30 years, the plaintiff was bound to abide by the demarcation proceedings of 1872 and could not be allowed to impugn their correctness. 19 C 312 followed, 9 O C. 301 referred to. LACHMAN PARSHAD *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL—11 O. C. 30.

Demolition.

1 *Building suit for removal of equity.*

In a suit for removal of building erected by the defendant on the plaintiff's land the Courts should follow the principles laid down in Naunihal Bhagat *v.* Rameshar, Bhagat 16 All., 328 and Chhotu *v.* Inayat-ul lah, W. N All. 1899, p. 191.

The suit could not be dismissed on the ground that the plaintiff had sat still and allowed the constructions to come into existence. MAULA BAKHSH *v.* NUR-UL-HAK. A. W. N. 6 P. 174.

2 Suit against co-sharers for possession of *shamilat* land and demolition of construction thereon blocking a road. 7 O. C. 362 Col. 666 P. I.

3 Suit by co-sharer for demolition of well constructed by a third person with the consent of other co-sharers. 7 C. 336 Col. 667 P. I.

Denial of Tenancy.

1 Res judicata—suit for arrears of rent—Denial of tenancy —Jurisdiction — Revenue Court. 3. O. C. 65. Col. 969. P. I.

Denial of title.

1 *Landlord and Tenant—Denial of landlord's title in written statement.*

A tenant forfeits his tenancy by denying his landlord's title but the denial should be before the institution of the suit for ejectment.

13 *Cal.*, 96, *followed.* NIZAM UD-DIN *v.* MUMTAZ-UD-DIM. 28 C. 135.

2 Landlord and Tenant—Limitation Act —Denial of tenancy by tenant. 24 M. 246 Col. 1949 P. I.

3 *To quit—Denial of title—Setting up of permanent tenancy* :—

Per *Starling,* J.— A tenant does not deny the landlord's title by merely setting up a permanent tenancy: and, consequently, does not disentitle himself to a notice to quite.—THAKORE FATEHSINGJI *v.* BAMANJI DALAL. 5 B. L. R. 274 27 B. 515 at 550.

4 *Mortgage—Kanom—Malabar Law—Anomalous mortgage—Forfeiture — Disclaimer by kanomdar of title of jenmi.*

The plaintiff brought the present suit to redeem a kanom granted for a term of 59 years. The kanomdar was to enjoy a portion of the produce for interest on the kanom and annually pay the balance of produce to the mortgagor, the jenmi. A question arose whether the suit was maintainable owing to

Denial of title *(Contd.)*

the disclaimer by the kanomdar of the title of the jenmi before the expiry of the term of mortgage.

Held, that the suit was permature, the transaction being an anomalous mortgage and not a lease. RAMAN NAIR *v.* VASUDEVAN NAMBOODRIPAD. 27 M. 26.

Deorha.

1 Separate appeal with respect to separate orders passed on separate appeals — Deorha, payment of interest not penal provision. 10 O. C. 412 Col. 1663 P. I.

Depoint.

1 Arrears of rent against the Mokararidar --Person whose immoveable property has been sold. Execution of decree. 32 C. 107 Col: 1541 P. I. (for 110 read 107)

2 *Attachment in execution of decree — Mortgage — Redemption suit — Redemption money deposited in Court but part of it attached in execution of decree for costs.*

Where in a redemption suit the plaintiff in accordance with directions contained in the decree paid the full amount of redemption money in Court within the fixed time and then attached a portion of it to realize costs awarded to him by the decree--

Held, that the plaintiff was entitled to possession of the mortgaged property for the directions in the decree were duly complied with by him. PARMANAND *v.* LOKMAN DAS, 2 A L J 10=W N A 1904 P 283 =27 A 392.

3 *By co-sharer.*

A person claiming under the Muhammadan Law a share in some immovable property, which has been sold in execution of a decree against his co-sharers, is not entitled to make a deposit under section 310A of the Civil Procedure Code—23 Bom., 450 ; 29 Cal., 1¦; 21 Mad , 416, referred. ABDUL RAHMAN *v.* MATIYAR RAHMAN, 30 C 425.

4 Compulsory deposit — Contributions by a Railway servant. 29 B. 259 Col: 868 P. I.

5 *Criminal breach of trust—Loan—Deposit.*

Upon a charge for criminal breach of trust the accused pleaded that the amount claimed by the complainants was due by them as a debt but having sustained losses in business they were unable to pay it.

Held, that in such cases the crucial test is, was the sum due to complainants owed by the accused as a debt, or was it held by them as trust money for complainants over which they had no right of disposition of any kind.

Held, upon evidence that the accused must be held to have acted as the complainants' bankers, and the relation between banker and customer is in law that of debtor and creditor. Punjab Record 95 of 1885 referred to. RAUSHAN RAI *v.* THE EMPEROR. 135 P. L. R. 1901.

6 Dowry -Palla—Loan, deposit—5 B L R 511 Col 1845 P I.

Deposit *(Contd.)*

7 Extension of time for—Appeal to His Majesty in Council—Application for admission—1 L B R 1900 1902 P 329 Col 1302 P I. and Default No. 7.

8 Instalments—Deposit of mortgage debt in two instalments—Interest 8 C W N 216 Col 648 P I.

9 Limitation—Suit for recovery of deposit—1 A L J 442 Col 1755 P I.

10 Loan or Government securities—Suit for return of—Suit by new administrator against the estate of deceased executor—7 C W N 476 Col 1917 P I.

11 Loan—Debtor—Executor—Assets—Government securities—31 C 519 Col 1824 P I.

12 Money deposited into Court—Decree holder—30 C 262 Col 1189 P I.

13 Mortgage debt—When interest ceases to run—Deposit by mortgagor—27 B 23 Col 649 P I.

14 Mortgage money deposited by mortgagor in court—Redemption—4 O C 355 *See Mortgage—Redemption.*

15 Mortgaged property—Execution of decree—Insufficient deposit—Wrong information given by an officer of the Court. 1 O C 193 Col 1544 P I.

16 *Mortgagee's right to put up for sale any portion of mortgaged property—Execution of decree.*

If more properties than one are subject to a mortgage, and the mortgagee obtains a decree, then he can cause any one of the properties to be sold by auction in order to realize his mortgage debt. MT. CHANDO BIBI *v.* MT. BISMILLAH KHANUM. **6 O. C. 197.**

17 *Question of fact—Deposit as used in the Limitation Act Art 60—Loan.*

The term 'deposit' as used in Article 60 of the Limitation Schedule is to be construed in its ordinary or popular, and not in any technical, sense.

Whether a particular transaction is a loan or a deposit is a question of fact to be decided upon the evidence.

13 *L. J. Ch.* 162. 16 *L. J. Ex.* 210, 15 *B.* 338, *16 C.* 25, 13 *B.* 338, 16 *C.* 35, 28 *C* 393, 18 *M.* 390, 19 *B* 352 *followed and referred to.* BHAGWATI PRASAD *v.* NARBADA PRASAD. **15 C. P. L. R. 1902 P 147.**

18 Refund of—Deposit as security for due discharge of duties, 6 C. L. J. 535 Col. 581 P. II.

19 Rent—Notice of deposit on one of several joint landlords, effect of 29 C. 283 Col. 115 P. II.

20 *Deposit by stranger in judgment-debtor's name to set aside sale—Order setting aside sale reversed on appeal—Decree-holders right to attach the deposit money.*

Defendant No. 2's property having been sold in execution of a decree, he entered into an agreement with Defendant No. 1 by which the latter deposited the decretal amount under S. 310-A of the Code in the name of Defendant No. 2 in the sale being set aside, defendant No 2 had to sell the property to Defendant No. 1. The sale was set aside and the sale by Defendant No. 2 to Defendant No. 1 was also effected as agreed.

Held, that, on the Appellate Court setting aside the order under S. 310 A and confirming the sale, it was not open to the decree-holder to attach the money deposited as Defendant No. 2's money and Defendant No. 1 was entitled to withdraw the same from Court. SOBHA RAM DASS *v.* MOHESHWAR SARMA. **13 C. W. N. 100.**

21 Transfer of Property Act S. 83—Deposit in Court by the Mortgagor of the sum alleged by him to be due on the mortgage—25 A 179 Col 646 P I.

22 *Withdrawal by one of them without the consent of the other—Dowry—Palla—Deposit in the name of two persons.*

The second plaintiff, *D*, the daughter of *M.*, was betrothed to *J.*, the son of the 1st plaintiff. The plaint alleged that it was agreed between the 1st plaintiff and *M.*, that the 1st plaintiff should provide Rs. 4,000 as the 2nd plaintiff's *palla* and that ornaments of the value of Rs. 2,000 should be made thereout at once, and the balance deposited with the defendant firm for ornaments to be made at the marriage on the condition that the same should be withdrawn only with the consent of *M.*, and one *C.*, maternal uncle of the first plaintiff. The deposit was made by *M.* alone but it was admitted by one of the defendants that he was told the money belonged to *M*'s daughter. The terms of the deposit were reduced to writing in a *samadaskat* book signed in the name of the defendant firm. *M.* alone withdrew the money deposited. On the suit of the plaintiffs, claiming for refund of money it was contended that the deposits having been made by *M.*, who withdrew interest on the money from time to time with the knowledge and consent of the 1st plaintiff and the *samadaskat* book having been allowed to remain with *M.*, the defendants were discharged from liability by making the payment to *M.*

Held, that the contention was not valid. The defendants were under an obligation not to pay the money to *M.* alone and the withdrawal of interest and keeping of *samadaskat* book by *M.* was no sufficient authority for the defendants to make the payments to *M.* JAMNADAS KANJI *v.* PRAGJEE SOORJEE. **5 B L R 778.**

Deposition.

1 *Heading, description of the witness—Evidence—Witness. Credibility of — Marriage — Legitimacy.*

When statements made by witnesses are not improbable and the witnesses have not been shaken on cross-examination and the

Deposition *(Contd.)*

Court before whom they are made has accepted them, the Appellate Court should not reject them on mere suspicion that the witnesses are not independent.

The heading of a statement giving the description of the witness by whom the statement is made is no part of the deposition made by him, on Solemn affirmation. *Mussammat* MAQBOOLAN *v.* AHMAD HUSAIN. **6 B. L. R., 233=31 I. A. 38=8 C. W. N. 241 (P. C.)**

2 Inadmissible except under special circumstances 2 A. L. J. 91 Col: 171 P. I.

3 Statement under O. X. R. I. S. 118 C. P. C. is not a deposition. 2 A. L. J. 777 Col 1470 P. I.

Depository

1 Ornaments, money &c., deposited for safe custody—Suit for return—Limitation—26 B. 430, Col : 1761, P I.

Descent of Jagirs Act (Punjab Act IV. of 1900.)

See Punjab Act IV. of 1900.

Desertion--

By husband of his wife--Lapse of time--Custody of wife not claimable.

Where a Hindu husband grossly failed to fulfil the obligations of giving his wife a home and of supporting her and her child for several years during which time she depended on her parental relations for support *held*, in face of such desertion and abandonment, that the husband is not entitled to come forward and assert his rights as her husband and that a Court is not bound to decree a claim by such husband for custody of his wife and can exercise its discretion against him.—78 P R 1893 95 P R 1898, 28 C 37, 751 49 A 222, 11 M. I. A. 551 relied on; 25 B. 644; 28 M. 436; 34 C. 79, R; 60 P. R. 1879 (F. B.) distinguishhed. DHANI *v.* NARAIN SINGH. **147 P W R 1908=82 P R 1908.**

Design.

See Invention and Designs Act V of 1888 Col 792 to 794 P I.

Destruction of articles unfit for human food.

See Different Municipal Acts.

Determination of rent.

See Oudh Rent Act XVII of 1886 S. 108 Cl. 16, Rent Act XVII of 1876 S. 40, and other local Acts.

Devastanam Committee.

See Temple Committee.

Devise.

1 *Mohammadan Law--Shias--Will-Power of devise amongst Shias.*

Amongst Muhammadans of the Shia sect a testator can leave a legacy to one of his heirs so long as that legacy does not exceed one third of his estate, and such a legacy will be valid without the consent of the other heirs. Where, however, the legacy exceeds one third of the estate it will not be valid to any extent unless the consent of the heirs, giving after and not before the death of the testator has been obtained. Cherachom Vittil Ayisha Kutti Umah v. Valia Pudiakel Biathu Umah, 2 Mad. H C Rep, 350, Keramatulnissah Bibee, 2 Morley's Digest, 120, and Rance Khujooroonissa *v.* Roushun Jehan, L R, 3 I. A. 291, referred to. FAHMIDA KHANUM *v.* JAFRI KHANUM **5 A. L. J. 169=A W. N. 1908 P. 55=30 A 153.**

Dhar-dhura.

1 Custom of—Suit by taluqdar for possession of land by reason of. 9 O. C. 129 Col. 727 P. II.

Dharm --

1 Charitable bequest – Lapsing of—Will—Bequest to Hindu wife — Females' estate—4 B. L. R. 555 Col. 401 P. II.

Dharam-Karta.

1 Suit to have procession of idol carried along a public street—Customary rout. 11 M. L. J. 1901 P. 215 Col : 920 P. I.

Dicta.

1 Obiter dicta--Authority of--Charge on property. Unsolicited payment on behalf of another. 26 B. 437 Col : 1259 P. I.

Digwari Tenure.

1 Digwari Jagir of Maubhum, nature of--Constructive possession--Minerals, right to. 12 C. W. N. 193=34 C. 753 Col : 597 P. II.

2 *Digwars of Ramgurh—Resumption and re-settlement with them as Sikmi talookdars--Default--Act VIII, of 1878.*

The *Digwari* service resembles ghatwali tenure. The use of the term *Digwar* does not raise any presumption that the holders of land by a service so named hold as personal servants of the Raja. Rather the presumption would seem to be the other way.

The power of Government, although generally exercised through the Rajah was always recognised as supreme with respect to the supervision over the *Digwars* in regard to the discharge by them of their police duties. The Rajah of Ramgurh never possessed or exercised a right to dismiss the *Digwars* and to resume the *Digwari* grants, save in cases of default; and by the terms under which per-

Digwari Tenure *(Contd.)*

sons held *Digwari* grants, no such power was given or reserved to the Rajah.

The dismissal by Government of the *Digwars* and the substitution for them of a new system of rural police supposed to be of superior quality did not entitle the Rajah to resume the lands as for default.

The subsequent settlement of the lands by Government, purporting to act under Act VIII B. C. of 1878, with the dismissed *Digwars* treating them as *Sikmi* talookdars, and imposing on them assessments for road and police purposes of an amount far beyond the burden, which previously rested on the holdings in the shape of supplying patrols, amounted to a continuance, in the form imposed by statute, of their public duties. There was no default. NAM NARAIN SINGH *v.* TEKAIT GANJHU. **12 C. W. N 178.**

Diligence.

1. Effect of—in suing—Limitation for suits against rival pre-emptors, 20 P. R. 1908 Col: 1915 P. I.

Diluvion,

1 Alluvial land, suit for—Land diluviated and afterwards reformed. Effect of acquiescence in title of Government—Discontinuance of possession by submission of land by river. 29 C 518 Col : 2057 P. I.

2 *See Alluvion and Diluvion Cols: 2133 to 2144 P. I.*

Directions.

1 Rules and directions under the Lower Burma Land and Revenue Act distinguished. 2 L. B. R. 1904 P. 272 Col : 383 P. I.

Directors.

1 Agreement between Company and Director, how far binding on Company. 10 P. R. 1905 Col. 317 P. I.

2 Liability of— See Act VI of 1882 (Companies Act). S. 214 Col. 749, 750 P. I.

3 Powers of directors— Rights of powneo Acts in excess of powers — Ratification. 57 P. R. 1902 Col. 300 P. I.

4 Power of directors and other officers —Presumption — Public Company 81 P. R. 1903 = 47 P. L. R. 1904 Col. 473 P. II.

Disability and inability to sue.

See Act. IX. of 1908 (Limitation Act.) S. 6 = S. 7 Nos: 106, 112. Col. 1747, 1750. P. I.

Disciples' claim.—

1 *Hindu Law—Trust for religious purposes—Succession to property of Hindu religious mendicant who is not a hermit or 'ascetic'—Property left by 'Guru'—Claims by his disciples —Inheritance.—*

G. D., Mahant of an order of "bairagis," had built a temple of which he was a trustee To the idol of *Sri Raghunathji* in the temple he dedicated by a deed an estate of his with a view to maintain the temple and declared himself the trustee for life of the endowment. The plaintiff, one of his "*chelas*" or disciples he appointed his successor. He refers to himself as having passed his life in the worship of *Sri Raghunathji*, and intending to pass it in that manner ; and as having always applied, and intending to apply, his property to good works ; and refers to himself as desiring that after his death his property may be applied to defraying the expenses of the worship of *Sri Raghunathji* and to other good works. When G. D. died the plaintiff became the trustee of the temple.

Held, that the terms of the deed were not sufficient to create a trust with regard to all the property which was in possession of G. D. when he died. Where a pious man is of opinion that all his property is that of God, that he is only a trustee, that the property should be applied to religious and charitable purposes and applies the same accordingly, he does not thereby create a trust. A trust must be created in order to make a dedication of property to an idol, and unless a trust is created, there is no dedication of the property, which remains the property of the owner; unless a *Hindu* is a "hermit" or an "ascetic," the property, which he leaves undisposed of, which was his own absolutely, will devolve upon his secular heirs, notwithstanding that he may have severed his connection with his kindred and entered a religious order, and has become a "*Guru*" or spiritual guide, and has "*chelas*" or disciples.

Held, therefore, that although the plaintiff was G. D's. "*chela*" he was not entitled to succeed to the property of G. D., who was not a "hermit" or "ascetic," as G. D.'s successor to the office of "*Mahant*," the plaintiff can only succeed to the property which G. D. held as "*Mahant*."— DRIGBIJAI SINGH *v.* MAHANT BISHAMBHAR DAS, **3 O C 281.**

Discharge of debt.

I Contract—Ratification of—Discharge of debt by mistake—Relief—14 M L J 443 Col 317 and 1876 P I.

2 *Contract—Payment of mortgage money to one of several joint heirs of mortgagee does not discharge the mortgage. Contract Act IX of 1878 S. 2.*

Where property is mortgaged to one person and that person subsequently dies, leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs without the concurrence of the rest, does not amount to a valid discharge to the mortgagor. *20, Mad 161 dissented from.* SITA RAM APPASHET *v.* SRIDHAR ANANT PRABHU. **5 B L R**

Discharge of debt *(Contd.)*

91=27 B 282.

3 Of mortgage on payment of mortgage money—Rights of depositor—1 A L J 579—27 A 178 Col 614 P I.

Discharge final—Insolvent debtor's Act.

1 *Final discharge—Postponement of hearing—Maintenance—Practice—Indian Insolvency Act, 1848, S. 36, 37, 47, 59, 60.*

The benefits of the "Act for the relief of insolvent debtors in India" are intended for persons who place such property as they have in the hands of the Court with the object of such property being collected and distributed amongst the insolvent's creditors. The whole object of the Act implies that the insolvent must render every assistance in his power to enable the Court and its officer, the Official Assignee, to realize the property.

Where, therefore, the applicant merely informs the Court in his schedule that he has certain debts owing to him but does nothing more—

Held,—that the Court is justified in adjourning the hearing of the petition until the applicant has taken the steps which it is his duty to take before the benefits of the Act can be extended to him

The Act contemplates, and as a fact the vesting order vests in the Official Assignee, not only all the property which the insolvent possess or is entitled to at the time the order is made, but also all property which he may thereafter become entitled to until he obtains a certificate of final discharge either under section 59 or 60 of the Act. Consequently as an effect of the vesting order, the Official Assignee is entitled to receive the whole of the salary which the insolvent was at the time earning or might thereafter earn, until he obtains the certificate of final discharge. The Court is, however, empowered by section 47 of the Act to direct that the Official Assignee shall make a reasonable allowance for maintenance of the insolvent until final order.

Where, therefore, the Court ordered the applicant to pay a certain sum per mensem out of his salary towards payment of his debts to the Official Assignee—

Held,—that such an order, while not strictly covered by any section of the Act, was in conformity with the practice of the late Court of the Recorder of Rangoon and of the High Court, Calcutta, and in effect carried out the provisions of section 47 of the Act MAUNG CHIT U. *v.* OFFICIAL ASSIGNEE. 1 L B R 1900=1902 P 249.

Discharge of surety.

1 Discharge of principal—Discharge of surety 6 C W N 7 and 1 L B R 1900—1902 P 150. *See Act IX of 1872 (Contract Act) Ss 130 to 134 Col 354, 356 P.I.*

Discharge of surety *(Contd.)*

See also C P C Act V of 1908 S 55.

Discovery—

1 *See C P C Act V of 1908 S 114 and Order XI R 14.*

Discretion of Court.

1 Order refusing to rehear an appeal decided exparte—Appeal against such order. 7 C L J 426 Col 30 P II.

2 Discretion vested in the discretion. 10 B L R 821 Col 219 P I.

3 Co-sharer, building on joint land—Right of—Why of necessity—Judgment. 30 C. 901 Col. 916 P. I.

4 Appeal—Discretion—Second appeal. 7 C. W. N. 647 Col. 673 P. II.

5 Discretion Judicial — Position of co-owner who has separated his share but not by metes and bounds. 11 C. W. N. 1143 Col. 131 P. II.

6 Procedure—License of conveyance. 4 B. L. R. 768 Col. 188 P. II.

7 Appeal against order refusing to stay execution—Discretion of Court. 29 B. 71 Col. 905 P. I.

8 Injunction — Temporary injunction—Branch of negative covenant. 26 M. 168 Col. 406 P. I.

9 Judicial discretion of Court — Where the act of the defendant amounts to an ouster of the plaintiff from the possession of the Joint Property. 29 C. 500 Col. 450 P. I.

10 Application for review—Time—Occupied in discretion of Court when liable to review or appeal. 1 L. B. R. 1900-1902, 313 Col. 1726 P. I.

11 Mandamus for not using—Discretion—Suit dismissed for default on adjourned hearing. 12 M. L. J. 473 Col. 1340 P. I.

12 *Tender of documentary evidence after closing case—Judicial discretion, exercise of—Practice—Evidence.*

The plaintiff tendered in evidence a Persian judgment of 1836, which was filed with the plaint, after he had closed his case, but before the defendant commenced his, and prayed that the document might be translated and admitted in evidence. The Court of first instance refused this application as "too late."

Held, that the Court did not exercise a sound judicial discretion in refusing to receive this document in evidence. BARODA PRASAD CHATTERJEE *v.* MADHAB CHANDRA GHOSE. 33 C. 1345.

13 Terms of the order admitting review—Discretion of Court—Irregular procedure in hearing case in review. 7 O. C. 345 Col. 1314 P. I.

14 Trustees—Discretionery power—Exercise of discretion—Interference by Court. 4 B. L. R. 199 Col. 546 P. I.

15 *Wrongly exercised — Remedy—Trial of case to determine—Practice.*

Where the discretion vested in a Court

Discretion of Court *(Contd.)*

is wrongly exercised through oversight, the proper course is to apply for review and not to appeal. MITHALAL *v.* CHUNILAL. **4 B L R 816.**

See for other facts Col. 685 P. II.

16 *Wrong exercise of—Dismissal of suit for default—Witness attending Court on first hearing, but absent on adjourned hearing—Discretion.*

The plaintiff in a rent suit appeared before a Revenue Court with his only witness *patwari* to establish his case, but the defendant did not appear. The Court then adjourned the hearing until a date fixed. On that occasion the plaintiff presented himself, but the *patwari* was absent, and the defendant also made no appearance. The Court thereupon summarily dismissed the suit for want of prosecution. The lower Appellate Court upheld the decision upon the ground that what was done by the Assistant Collector was done in the exercise of discretion.

Held, that it was not a proper exercise of the discretion and that the case must be remanded for re trial on the merits. COLLECTOR OF JAUNPUR *v.* TAHULI RAI. **2 A. L. J. 345=A. W. N. 1905 P. 92.**

Dishonor.

See Act XXVI of 1881 (Negotiable Instruments Act) S. 30 No. 22 and 23 Col. 538 P. I.

Dismissal.

1 Of appeal. *See C. P. C. O. X. L. I. R. 17 --S. 556 Col: 1656--1658 P. I.*

2 In default—14 C. P. L. R. 1901 P 135, 37 P. R. 1901. *See C. P. C.* (1908) *O. IX. R. 3 Col: 1448 P. I.*

3 In default—*See C. P. C. (1908) O. IX R. 8, Col: 1450 to 1453 P. I.*

4 In default—*See C. P. C. (1908) OIX. R, 9 Col: 1454 to 1458 P. I.*

5 In default—*See C. P. C. (1908) O. XVII R. 2, 3 Col: 1474 to 1476 P. I.*

5a *Lambardar—Dismissal for indebtedness—Acquisition of property before vacancy is filled up—Ground for re appointment.*

When a *lambardar* is dismissed for indebtedness and before the vacancy caused by his dimissal is filled up he acquires sufficient property by gift or otherwise, he should be re-appointed.

It is inexpedient to change *lambardars* if a change can be avoided.

If from whatever cause, there is sufficient security for the recovery of the revenue for which the Lambardar is responsible he should not be dismissed for indebtedness. FAKERIA *v.* MUNGA. **3 P. R. 1903 Rev:=39 P. L. R. 1908.**

Dispossession.

1 Co-sharer—Claim for contribution against his co-sharer inequitable when the plaintiff was in wrongful possession of his co-sharer's

Dispossession *(Contd.)*

share. 6 C. W. N. 903 Col: 322 P. I.

2 By co-sharer—Suit for recovery of advances made by shebait—Amendment of plaint by appellate Court. 5 C. W. N., 273 Col. 1279 P. I.

3 By co-owners--Decree for joint possession—Illegal dispossession. 2 A. L. J. 481 Col. 686 P. II.

4 In execution of decree—*See O. XXI 98, 99=S. 330, 331 Col. 1562 to 1566 P. I.*

5 Of judgment debtor—Suit by tenant of judgment-debtor against auction purchaser—Delivery of possession—12 C. W. N. 694 Col. 398 P. I.

6 Of joint wrong-doers—Joint-tort feasors --Contribution. 6 C. W. N., 88 Col. 638 P. II.

7 In Law—Adverse possession—Execution of decree—Delivery of possession—Effect as against party not effected by the decree. 27 M 262 Col. 1961 P. I.

8 Tenant holding over dispossessed--His suit for possession—Due course of law. 7 B. L. R. 12=29 B. 213 Col, 391 P. I.

Disqualified heir.--

1 *See Hindu Law -- Inheritance.*

2 Ghatwali—Tenure—Heritability. Determination or resumption of 9 C. W. N. 663 Col. 1927 P. I.

Disqualified proprietor.—

1 Jurisdiction—Commissioner--Consideration—Bengal Courts of Wards Act. 29 C. 638. Col 69 P. I.

2 Ratification of contract caused by undue influence — Borrowing money without sanction of Court of Wards 5 O. C. 256 Col. 267 P. I.

3 Capacity of disqualified proprietor to contract 25 A. 195 Col. 253 P. I.

4 *Suit against, in his own name— Collector, entry in record of the name of, after limitation —Revenue Act (XIX of 1873)--Heritable Wasiqa to be taken into account in ascertaining husband's property for fixing dower — Oudh Laws Act (XVIII of 1876), s. 5, — Disposal by will of dower fixed by Court — Mahomedan Law.*

The defendant. A. H., at his marriage agreed to pay his wife Rs. 1,25,000 as dower. Of this sum the wife, by her will, bequeathed Rs. 15,000 to the plaintiff and a like sum to W. A. She died on November 24th, 1896. The plaintiff sued for a sum reduced under s. 5 of the Oudh Laws Act, in respect of his share. The Lower Court held that the plaintiff's claim was barred by time because the defendant, A. H. was, at the date of the suit a disqualified proprietor whose estate was in charge of the Court of Wards and the suit (which was filed on the last day of limitation) was brought against A. H. in his own name instead of in the name of the Collector of the district where the suit was filed and the name of the Collector

Disqualified Proprietor *(Contd.)*

was not entered on the record till after the period of limitation had expired.

Held, that the real defendant was the disqualified proprietor and that there was no real distinction in principal between the case of a disqualified proprietor suing or being sued in the name of his guardian or the Collector of the district and the case of a minor represented by his next friend or guardian or the case of a lunatic represented by his committee; therefore no new party was added when the name of the Collector was entered on the record and the plaintiff's suit was within time.

Held, further, that a heritable *Wasiqa* should be taken into account in ascertaining the means of the husband under S. 5 of the Oudh Laws Act.

Held, also, that under the Mohomedan Law the wife could not dispose, by will, of more than one-third of her dower as fixed by the Court.—SYED AHMAD RAZA KHAN *v.* MIRZA ALI HUSAIN. **7 O C 176**.

5 Execution of decree—Disqualified proprietor, debt contracted by—Court of Wards, property under management of—4 O C 28 Col 713 P II.

Dissolution.

1 Of marriage—Petition for divorce—Right of alleged adulteress to intervene. 7 C W N 504—30 C 289 Col 97 P I.

2 *Of marriage Divorce Act IV of 1869 Ss. 14 and 50—Practice—Petition, service of—Substituted service—Unreasonable delay.*—

It is essential, in suits for dissolution of marriage, that the petition of the plaintiff should be personally served under S 50 of the Indian Divorce Act on the respondent or that sufficient notice of its contents should be given to him. This practice follows that of the matrimonial Courts in England.

Unless satisfactory explanation is given for the long delay in presenting and prosecuting a petition, a Court is obliged to refuse a decree for dissolution of marriage, under S 14 of the Indian Divorce Act. ARABELLA CLARRESSA ELIZA MITTER *v.* JOHN CHARLES MITTER, **12 C W N 1009**.

3 Of partnership—Abandonment—Expenses—Partnership and private accounts confused. 28 C. 53 Col. 23 P. I.

Distraint.

1 For damages—Application for distraint permissible for arrears of rent and interest, but not for damages. 28 C, 264 Col. 123 P. II.

2 *For damages—Rent Recovery Act (Madras) VIII of 1865, Section 15, 17 and 18—Statement of place in which distrained property is kept.*

Held, that in the present case, in which the property distrained consisted of some small jewels, the statement that they were 'with the distrainer' was a sufficient statement of the place where they were kept, within the meaning of section 15 of the Rent Recovery Act, Madras VIRARAGHAVA AYYZANGAR *v.* KANAGAVALLI AMMAL. **25 M. 503**.

3 *For damages, N. W. P. Rent Act, 1881, S. 56—Distraint.*

When the rent of a tenant is in arrear, the landlord is entitled to distrain any crop growing on the tenant's holding no matter by whom that crop was sown. 4 N. W. P. H. C. R., 76; and 9 All. 244, referred to. MEGH SINGH *v.* TIKA RAM. **W. N. A., 1901 p. 182=24 A. 127**.

4 *Illegal—Limitation Act (XV of 1877), Schedule II, Act. 29, 36—Standing crops. Suit for damages for illegal distraint of.*

Standing crops are immoveable property within the meaning of the Limitation Act. therefore Art. 36 of the second schedule of the Act is applicable to a suit to recover damages for illegal distraint of standing crops. MOHESH CHANDRA DAS *v.* HARI KAR. **9 C W N 376**.

5 *Right of—Shikmi tenant, liability of—Rent due from the tenant-in-chief—Rent Act (Oudh), S. 72.*

Held, that a landlord is entitled to distrain the crop of a *Shikmi* (sub-tenant) in respect of rent due by the tenant-in-chief. A W N 1901 P 182 GIRDHARI LAL (LALA) *v.* DARSHAN. **10 O C 41**.

Distress.

1 Suit for wrongful distress—Bill and notice of demand not served—Effect on plaintiffs claim. 31 C 452 Col 107 P II.

6 Fictitious distress—Standing crops—Seizure of—Immoveable property—32 C 459 Col 1811 P I.

Distribution.

1 Rateable—*See C P C (V of 1908) S. 73—295 Col 1180—1193 P I.*

2 Of assets—*See Insolvency proceedings.*

District Court.

1 Appeal—Subordinate—Application 27 B 604 Col 1277 P I.

2 Contempt of—Power of Subordinate courts—26 M. 494 Col . 1638 P. I.

3 Judges of—U. P. Tenancy Act II of 1901, *Ss. 196, 197—District Judges powers of remand*:

So long as the decision of the court in which a suit has been instituted, whether made rightly or wrongly, is a decision from which an appeal lies to the District Judge, the appellate court not having materials before it for the final disposal of the appeal is empowered under S. 197, Sub-S. 2, U. P. Tenancy Act, to remand the case to any court which it considers competent to try it. BADAM SINGH *v.* MUSAMAT SUBTA

District Court *(Contd.)*

KUAR. **2 A. L. J. 119**

4 Judges of—" District courts," includes High Court in its original jurisdiction. 12 C. W. N. 416 Col. 792 P. I.

5 Jurisdiction of—Religious institution—Trust—Power of Court, 28 M 319 Col. 1212 P. I.

6 Jurisdiction of court to refer to arbitration. 11 M. L. J. 1901 P. 337 Col. 1703 P. I.

7 Jurisdiction of—Power of District Judge to transfer to Subordinate Court a suit transferred by him to his own file. A. W. N. 1902 P. 66=24 A. 304 Col. 1064 P. I.

8 Jurisdiction of—Power of District Judge to re transfer a case to Subordinate Court after its withdrawal to his own file 24 A 356 Col 1065 P I.

9 *Jurisdiction of—Civil Court Act—Bengal, N W P and Assam Civil Courts Act (XII of 1887), S. 11 and 17—Civil Procedure Code, (Act XIV of 1882), S. 26—Transfer—Jurisdiction—Construction of Statutes.*

Held that the words "in the event of the death, resignation or removal of a Subordinate Judge, or of his being incapacitated by illness or otherwise for the performance of his duties or of his absence from the place at which his Court is held," occurring in section 11, clause (1) of Act XII of 1887, include the abolition, by order of Government, of a special Court temporarily constituted by Government to exercise jurisdiction in a particular district, and that therefore where such Court, being the Court of a Subordinate Judge, had ceased to exist, and the District Judge had taken up on his own file a suit which had been pending before the said Court, it was competent to the District Judge, under section 11, clause (3), of the Act abovementioned to retransfer such suit to the Court of the permanent Subordinate Judge in his district, from which Court the suit had already been transferred by him to the Court of the temporary Subordinate Judge. Amir Begam v. Prahlad Das, (I L R 24 All 304) and Sakhram v. Gangaram (I L R 13 Bom 654), distinguished.—GAPPU LAL v. MATHURA DAS. **A W N 1903 P 4=25 A 183**

10 Power of—Interference by High Court in the absence of application for revision—Civil Court—Power to manage the judgment debtor's estate. 28 C 680 Col 1320 P I.

11 Power of transfer—Transfer of part heard case. 10 C W N 12. *See Col 1065 P I.*

12 Power of transfer—Transfer of part-heard case from District Court — Jurisdiction of District Court to hear appeal. 26 M. 595 Col. 1062 P. I.

13 *Appeal to Divisional Court as District Court—Punjab Courts Act (XVIII of 1884), Sections 23 (b) and 43 (1) (b)—Limitation—Civil Procedure Code (Act XIV of 1882), Ss. 588 (7) and 589 (a).*

The period of limitation prescribed for appeals to the Divisional Court under S. 43 of (1) (b) of the Punjab Courts Act is applicable to appeals preferred to that Court in the Punjab as District Court under Local Government notifications issued under S. 23 (b) of the Punjab Courts Act. MUKANDA MAL v. TARA SINGH. **83 P. R. 1904=89 P. L. R. 1904.**

District Municipalities Act.

See Several Provinces' District Municipal Acts.

Divesting of property,

See Hindu Law.

Division Court.

1 Order of Division Bench whether open to appeal to Privy Council—Meaning of. 9 C. W. N. 566 Col. 1291 P. I.

2 Division and separation of—Shares amongst co-heirs—Pre-emption—Relations of remote degree. 1 L B R 1900—1902 P 144 Col 2162 P I.

Divisional Bench.

1 Representative—Suit to obtain possession by assignee by auction purchaser-Full Bench reference—Powers and duties of a Divisional Bench. 5 A L J 285 Col 1098 P I.

Divorce.

1 *Adultery of petitioner—Act XV of 1865 Parsi marriage and Divorce—S. 32—Divorce—Adultery of petitioner.*

Under S 32 of the Act, adultery of the petitioner is a legal ground on which the Court can refuse the petition for divorce. MEHERBAI v. HORMASJI N. MOTIVALA, **10 B L R 1019.**

2 Burden of proof—Marriage-Continuance of—Presumption—Legitimacy. 7 B L R 95 Col 232 P 1.

2 *(a)—Intervenor-Parties-Alleged adulteress, application by.*

In a wife's petition for dissolution of marriage by reason of the husband's adultery with one Mrs: Ollenbach, the latter applied and obtained this rule calling upon the petitioner to show cause why she should not be allowed to intervene. BAILEY v. BAILEY, **3 O C 490 N.**

3 Misconduct—Condonation of adultery—Costs—Adultery after condonation 28 C. 221 Col. 677 P II

4 *Misconduct—Divorce Act (IV of 1869)—Liability of husband to pay costs of his wife's suit in the absence of security or deposit by husband pending the suit—Married Woman's Property Act (45 & 46 Vic., c. 75 1882)—Succession Act (X of 1865), S. 4.*

In a case where it is shown that the wife has no money of her own, the mere

Divorce (*Contd.*)

fact that pending the suit no deposit has been made or security given by the husband for the estimated costs of his wife, is no obstacle to the making of an order against her husband to pay her costs on the dismissal of her petition for divorce against him. ELLEN THOMAS BOYLE *v.* WILLIAM-MCCORMACK BOYLE. **7 C. W. N. 565=30 C. 631.**

5 Misconduct--Cruelty--Adultery. 1 A. L. J. 318 Col. 724 P. II.

6 Right of Burmese—Budhist--Costs—Condition--Joint property. U. B. R. 1905 P 3 (Budhist Law-Divorce) *See Col. 240 P. II.*

7 Suit by wife for dissolution of her marriage with husband under--Husband not appearing at the hearing. 14 Bur. L R 174. *See Divorce Act IV. of 1869 Section 10.*

8 Suit for—Claim to partition of property—Budhist Law--Causes of action distinct. 1 L. B. R. 1900-1902 P. 7 Col. 241 P. II.

Divorce Act (IV. of 1869).

1 *See Act IV of 1869 (Divorce Act) Col. 95 to 98 P I.*

2 Section 1—Personal service--Advertisement in newspapers insufficient--4 L B R 195 Col. 1431 P. I.

3 Section 7--Marriage--Converts--Nature of the measure contemplated by the Act. 8 B. L. R. 856 Col. 645 P. II.

4 S 7, 51 and 52—Suit for dissolution of marriage on the ground of adultery. 11 P. R. 1902 Col. 244 P. I.

5 *S. 10--Wife's suit for dissolution of marriage—Husband absent at the hearing—His adultery after last condonation thereof.*

A wife sued, under S. 10 of the Indian Divorce Act (IV of 1869), for dissolution of her marriage with her husband, for cruelty and adultery of her husband and deposed that he suffered from a contagious and loathsome disease, which he communicated to her, the husband filed a written statement but did not appear at the hearing *held.* on medical evidence, that it must be presumed that the husband recklessly or wilfully communicated it to his wife; for, when a husband, being a competent witness, does not come forward to assert his ignorance, the Court will hold the wilful intention proved L R 1 P 146; 35 L J P & M 13 L R 1 P 233 followed. Where the husband committed adultery after last condonation of former adultery cruelty, *held,* that the subsequent adultery revived the former cruelty, which had been condoned. 1 S & T 61, 29 L J P. & M 126 followed. MA ON *v.* MAUNG AUNG BWA. **14 B. L. R. 173**

6 S. 14, 50—Practice--Petition, service of—Substituted service—Unreason. 12 C W N 1009 *See Dissolution No. 2.*

7 S. 35—Misconduct—Conditions of adultery--Costs, 28 C 221 Col. 677 P. II.

8 S. 36--Alimony pendente lite--Security for wife's costs--Absence of means of wife. 6 C W N 414 Col. 2138 P. I.

Divorce Act (IV of 1869) (*Contd.*)

9 S. 45--Appeal filed without copy of decree--Sufficient cause--Judgment dismissing appeal--Application for dissolution of marriage. 22 P R. 1903-91 P L R 1903 Col. 1873 P I.

10 S. 50. *See 12 C. W. N. 1009 No. 6 supra.*

11 S. 51, 52. *See 11 P. R. 1902 No. 4 supra.*

12 S. 55--Appeal—Decrees and orders under Divorce Act. 18 P. R. 1903 Col. 2174 P. I.

Dobas.

1 Lakes or dobas formed by a river shifting its course right of fishery therein. BHABA PRASAD *v.* JAGADINDRA NATH RAI. **33 C. 15.** *See Jalkar rights.*

Document.

1 Alteration of date of acknowledgement—Oral evidence as to date. 3 B. L. R. 574—26 B. 128 Col. 1776 P. I.

2 Alteration of--Material alteration in a written acknowledgement of a debt does not render it inoperative and ineffective. 25 B. 616 Col. 34 P. I.

3 Construction of--Alienation of acquired property--Suit for possession of property. 74 P. R. 1904--2 P. L. R. 1905 Col. 1861 P. I.

4 Construction of—Oral agreement. 26 A 387 Col 203 P I.

5 Construction of—Gift to daughter—Gift to a female—Restricted right to alienate. 23 A 309 Col 534 P II.

6 *Executed by Indian Ladies—Construction of--Appointment of heir to Taluqdari estate by Hindu Widow—Oudh Estates Act (I of 1869).—*

A *sanad* was granted to a widow in respect of her deceased husband's *taluqa* which was entered in Lists I and II, prepared under S. 8 of the Oudh Estates Act. On inquiries from the Collector, the widow had, on 20th April, 1862, declared "She appoints Sheopal Singh to be her heir. She shall be ~~the pro~~prietor during her lifetime, shall herself manage the estate affairs and after her death, Sheopal Singh shall become the proprietor of the estate. Therefore during her lifetime she declares Sheopal Singh to be heir and this application is submitted by way of a deed of inheritance." Again in a letter of 21st April, 1862 to the father of Sheopal Singh she had written—"During my lifetime I shall be proprietor I make Sheopal Singh my heir and proprietor of the estate, &c., after me. I make Sheopal Singh, proprietor and landlord of this *Raj* after me.'

Held, that when it was said "I make Sheopal Singh the owner (or the owner and heir) of my estate after my death." the only interpretation to be put on the words is that the writer was appointing Sheopal Singh to be heir in succession to herself and not that she was declaring herself a mere trustee for her lifetime of

Documents *(Contd).*

the estate on behalf of Sheopal Singh. The most obvious meanings should be put upon documents executed by Indian ladies.—BAL BHADHRA *v.* SHEO NARAIN SINGH, **2 O C 372.**

7 Execution of — Signature— Sufficiency of— Suit to recover possession of immoveable property. 30 C. 433 Col. 1871 P. I.

8 Inspection of-Judgment-Discovery and inspection of document. 4 B. R. 312 Col. 1273 P. I.

9 *Non-delivery of after registration-Validity of such document—Transaction whether completed.*

A sued B on a mortgage deed executed by B, in A's favor. B presented it for registration, but it was not delivered to A. B. contended that the deed was invalid for want of delivery; *held*, there is no provision of law in this country requiring that a registered deed shall not operate until it is delivered to the person claiming under it. Further, the presentation of such document by the party executing it to the Registration Officer and its subsequent registration must be regarded as equivalent to the formality of delivery prescribed for writings under seal by the law of England. KANSHI RAM *v.* TOTA RAM. **40 P R 1906.**

10 Not mentioned in list annexed to plaint—Discretion of Court—Certified copies of public documents or record should not be excluded. 12 C. W. N. 312 Col. 1471 P. I.

11 Old document—*See Evidence Act S. 90 Col. 192--194 P. I.*

12 *Parda-nashin lady. Deed executed by* --Onus.

In the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who executed them. MUSSAMMAT SHAMBATI KOERI *v.* MUSSAMMAT JAGO BIBI. **4 B. L. R. 444=9 C. W. N. 682=29 C. 749 (P. C).**

13 Pardanashin — Proof -- Execution of mortgage-deed by a pardanashin. 28 C. 516 Col. 302 P. II.

14 *Practice--Admitting in evidence--Deciding the genuinenes or otherwise of document.*

Per Heaton, J. Admitting in evidence is mechanical and former proceeding. When all the evidence is recorded, and when it is all considered, it is in the judgment that the Judge decides, whether a document is or is not genuine. AMBALAL GANPATRAM *v.* PASCOL BASTAV SEEL. **8 B L R 973.**

15 Production, order for--Legal advisor--Discretion. 7 B. L. R. 709, Col. 245 P. I.

See deed.

Documentary evidence.

1 See Act 1 of 1872. Evidence Act S. 92.

Domicile.

1 Burden of proof--Private international law-French citizens in British India-Marriage—9 C W N 394—32 C 631 Col 286 P II.

2 Divorce—Wife's costs--Suit for judicial separation by wife. 29 C 619 Col 97 P I.

3 Disqualified proprietor to contract—25 A 195 Col 253 P I.

Domicile *(Contd.)*

4 Hindu Law--Widow's estate--French Law—Effect of change of domicile. 24 M 650 Col 39 P I.

Donee.

1 The word "donee" was not applicable to the public. 13 M L J 361 Col 515 P I.

Donor.

1 Deed of gift of immoveable property registered after the donor's death--10 B L R 536 Col 730 P I.

Dower.

1 Cause of action--First suit for a share in inheritance—Subsequent claim for dower 11 O C 69 Col 1007 P I.

2 *Muhammadan Law--Dower--Lien of widow.*

A widow's claim for dower under Muhammadan Law is not a lien on her husband's property, such as is obtained by a mortgage; the claim for dower is ranked on a *par* with ordinary debts.

A widow in possession has no right to hold the property of her husband as against a purchaser in execution of a decree for sale passed on a mortgage executed by her husband. AMEER AMMAL *v.* SANKARA NARAYANAN CHETTY **25 M 658**

3 *Muhammadan Law Dower—Widow's right to recover dower from heirs.*

A Muhammadan widow in possession of property of her late husband, in lieu of dower, is not debarred from filing a suit against the heirs of the deceased husband for recovery of the dower due to her. 7 All 353, referred to. GHULAM ALI *v.* SAGIR UL-NISSA BIBI. **W N A 1901 p 124=23 A 432.**

4 *Succession to unpaid dower--Rajputs of Ludhiana District.*

Held that the Mahomedan Rajputs of the Ludhiana District, who are governed by the general rules of agricultural custom of the province in matters of succession generally, are governed by Mahomedan Law regarding succession to unpaid dower of a deceased female. FAQIR MUHAMMAD *v.* MIRAN BAKHSH, **90 P W R 1908=188 P L R 1908=43 P R 1908.**

Drainage Act (Bengal) Act VI of 1880.

1 See Bengal Act VI of 1880 Col. 71 to 73 P II.

Drains

1 Municipalities power--Conditional injunction. 71 P R 1901 Col. 455 P I.

Drawer.

1 Cause of action - Promissory Note - Suit on - Drawer "Legal representatives of." 60 P R 1903 Col 510 P I.

Due diligence.

See Limitation Act IX of 1808 S 14.

Dues.

1 Liability of co-sharers to Lambardar for "village dues and other expenses"--Meaning of. 5 O C 298 Col. 660 P. II.

2 Suit by Lambardar for share of weighing dues—Lease (unregistered) modified by subsequent arrangement—U K and M K being joint lumberdarsgave a joint lease of weighing dues to the defendant. U K sued the defendant

Dues (*Contd*)

for her half share of the sum due by him under the lease which was not registered. It was found that there was an arrangement by which each Lambardar collected half the amount due from the defendant.

Held, that these dues did not come under the definition of rent and that the Civil Court had jurisdiction.

Held, also, that there was nothing to prevent the parties modifying the lease by a subsequent arrangement. DULARE *v.* MUSAMMAT UMRAO KUAR. **1 O C 103.**

Durbanga Raj.

1 Babuaba grant—Durbanga Raj—Mortgage by grantee—Legal necessity—Alienability—Ancestral property. 12 C W N 966 Col. 2164 P I.

Duress.—

1 *Impending prosecution — Belief by one party that he might escape prosecution, effect of.*

Any expectation of a party to a transaction of escaping from prosecution if he entered into it, will not amount to duress so as to vitiate the transaction. (1843) 6 M. and Gr. 785 referred to. DE SILVA *v.* DE SILVA. **5 B. L. R. 783; 27 B. 103 at 111.**

Durga.—

1 Tomb of ordinary individuals—Creation of valid—Wakf — Muttawali — 6 B. L. R. 1058. *See Dedication No. 2*

2 Trustee—Misconduct of—Dismissal by Committee Resumption of inam jagir by Government. 15 M. L. J. 26 Col. 70 P. I.

Durmokararidar.

1 Person whose immoveable property has been sold. Mokarari tenure. 32 C. 107 Col. 1541 P. I. (for 32 C. 110 read 32 C. 107).

Duty of Revenue Court.

1 Duty of Revenue Court to give notice of date and place to parties. 12 P. L. R. 1903 Col 1452 P. I.

Duties.—

1 Liability of Government to pay. 25 M. 457 See Madras City Municipal Act I of 1884 S. 341.

2 *See Punjab Municipal Act.*

Dwelling house.

1 Sale by Registrar of High Court—Misrepresentations—Recision of sale—5 C. W. N. 1901, P. 593, Col. 618 P. II.

E

Easement.

1 *Acquisition of—Customary easement—Watercourse—Continuous use.*

The plaintiffs sued to establish a right of easement over the defendant's lands, namely, that they were entitled, by constructing an embankment across the river *S.* and diverting the water of the river over the lands of village *D.*, to convey the water over the defendant's land on to their own land in order to irrigate it.

Held, that the easement claimed was not a customary right and was not unreasonable, such an easement may exist and may be established. It was immaterial whether the exercise of the right was continuous, if it had been exercised over a period of 20 years, during the periods of draught, when it could be taken advantage of. BUDHU MANDAL *v.* MALIAT MANDAL. **30 C. 1077.**

2 Acquisition of by tenant—Profit aprende — Right of common—Custom — Evidence. SITAL RAI *v.* DABAL NEGESIA, **6 C. L. J. 218.** *See Landlord and Tenant.*

3 *Acquisition of, by tenant—Easement—Right of occupancy tenant to acquire easement in lands of the lessor outside his tenure.*

A tenant of land, even one having permanent rights of tenancy, cannot acquire an easement by prescription in other land of his lessor. MANI CHANDER CHAKERBATTY *v.* BAIKANTA NATH BISWAS. **29 C. 363.**

4 *Bunds—Easement—Prescriptive rights—Riparian owners—Power to erect* bunds—*Injunction.*

The parties' villages were irrigated by a common tank. The surplus water of the tank from time immemorial was charged through a weir and the water discharged passed over some of the lands of both the parties and eventually escaped through a channel separating the two villages. The plaintiff wanted to put up a *bund* in order to save from inundation the portion of the property affected by the flow of the surplus-water and sued to restrain the defendant from interfering with the erection of the proposed *bund*. The *bund* if constructed would have thrown back upon the defendant's land more water than had customarily flowed on to his property and increased the damage to which he had been subject before suit. The Court declined to grant the injunction.

Held, that the injunction was properly refused.

Per Sir Subrahmania Aiyar, O. C. J.—Having regard to the fact that the surplus-waters of common tank had from time immemorial been discharged so as to overflow certain lands of both parties, an agreement must be implied as between the owners to the effect that neither could interfere with the accustomed flow of the surplus-water so as to increase the burden of the other. The plaintiff had, moreover, no right to construct the *bund* under the law.

Though every land-owner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose, and if he acts *bona fide*, he is not liable for any damage occasioned to his neighbours who must protect themselves but the law does not except in the case of extraordinary floods, give such large powers for protection to riparian owners, for such owners have a right to protect their lands with reference to ordinary floods, only if they do so without injury to others.

The plaintiff was not entitled to the

Easement *(Contd.)*

injunction also on the ground that there had been nothing more than mere assertion on the one hand and the denial on the other as to the right of the plaintiff to raise the *bund*.

Per Russel, J.—A prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream, and cannot apply to surface water not flowing in such a stream, though it might ultimately, if not arrested, flow into a tank VENKATACHALAM CHETTIAR *v.* ZAMINDAR OF SIVAGANGA. **M L J 1904 P 162, 27 M 409.**

5 *Claims inconsistent -- Ownership--Suit claiming rights of ownership and easement, whether maintainable.*

Held, by the Full Bench, that a suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of ground rights, (1) of ownership and (2) of easement. Bijoy Keshup Roy *v.* Obhoy Churn Ghose. 16 W R 198 overruled. NARENDRA NATH BARARI *v.* ABHOY CHARAN CHATTOPADHYA, **4 C L J 437=1 M L T 364=11 C W N 20=34 C 51 (F. B).**

6 Burden of proof—Easement—Claim for possession of property—Plaintiff denying defendant's alleged right to easement. 26 P. L. R., 1906 Col. 276 P. II.

7 *Cornice as ornamentation--Prescription—Cornice of wall.*

There can be no prescriptive right to a projection which has been erected for the mere purpose of ornamentation. 3 B. L. R. O. C. 18, 47, *referred to.* NRITTA KUMARI DASSI *v.* PUDOOMONI BEWAH. **7 W. N. C. 649=30 C. 503.**

8 Light—Alteration of easement—New windows higher than the old ones—Easements. 26 B. 374 Col. 738, 2146 P. I.

9 Light, ancient lights. Obstruction of—Infringement—Nuisance—Acquiescence—Decree for damages. 35, C. 661 Col. 2169 P. I.

10 *Light—Release—Non-user—Extinguishment--Transfer—Dominant and servient owner—Alienation—Civil Procedure Code (Act XIV of 1882), s. 276.*

An easement can be extinguished by the dominant owner releasing it expressly or impliedly to the servient owner, and, if expressly released it would amount to an alienation. The transfer of an easement is an alienation within the meaning of section 276 of the Code. Mere non-user is not an implied release of an easement. KRISTODHONE MITTAR *v.* NANDARANI DASSEE. 12 C W N 969 35 C 839

11 Light and air—Damages—Injunction 5 B. L. R. 446 Col 2090 P. I.

12 Light—Disturbance of easements—Meaning of disturbance—Injunction to prevent disturbance. 30 C. 319 Col. 739 P. I

13 *Light and air--Injuction--'Quia timet' action :--*

There are two necessary ingredients for a *quia timet* action. There must, if an actual damage is proved, be proof of imminent danger and there must also be proof that the apprehended damage will be very substantial or irreparable--GANGABAI *v.* PURSHOTAM ATMARAM. (MACLEOD J.) **9 B. L. R. 912.**

14 *Light and air—Injunction.*

To constitute an actionable obstruction of ancient lights and unrestricted flow of air, it is not enough that the light is less than before and the plaintiffs enjoy less free flow of air. The test is whether the obstruction complained of is a nuisance.

Where the Court found that the erection of a wall by the defendant would cause substantial privation of light and impede the flow of air to such an extent as should prevent the plaintiffs from carryiug their jute business as beneficially as before—

Held, that the erection of the wall amounted to a nuisance and that an injunction ought to be granted to the plaintiffs. *(1904) A. C. 879 followed.* JOHN ALEXANDER ANDERSON *v.* HARDUT ROY CHAMARIA. **9 C. W. N. 543.**

15 *Light and air--Alteration--In the plan of building--Injuction--45 rules.*

No alteration in the plan of the building either by advanting or setting the building will destroy the right the light and air so long as the owner of the dominent tenement can show that he is using through the new appertures in the wall of the new building the same or a substantial part of the same light, which passed through the old aperture into the old building. 31 Ch. D. 554 followed.

To constitute an actionable obstruction of ancient light it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before. A. C. 179 followed,

In India a man who has enjoyed a right to air more or less pure and free, ought to be reasonably protected against any interference.

In Bombay a Court ought to protect a man's right to air with some regard to the recent experiences of this city and the sanitary necessities in this country where ventilation is even more necessary than light.

The 45 degrees rule is a safe one to adopt in a growing and populous city like Bombay and people living in such cities should not expect as a matter of right direct or horizontal light. The 45 degrees rule is not peremptory, it is only a circumstance to be considered with other circumstances. FRAMJI SHAPURJI *v.* FRAMJI EDULJI, **7 B. L. R. 53.**

16 *Light and Air.*

In cases of obstruction of light and air the rule of 45 does not afford in all cases a correct measure of relief. The question to be determined in such cases is whether the obstruction causes such a privation of light and air to the house as renders the occupation of the same uncomfortable. CHOTALAL MOHANLAL *v.* LALLUBHAI SURCHAND. **6 B. L. R. 633 =29 B. 157.**

17 *Light and air-Interruption of--Nuisance--Cause of action--Substantial diminution—Easement.*

Easement *(Contd).*

The plaintiff brought the present suit for a perpetual injunction against the defendant to prevent him from erecting a new building which she alleged would interfere with access of light and air to her house.

Held, that unless there was a substantial interference with light and air such as would reasonably interfere with the convenience and comfortable habitation of the house and would amount to a nuisance, the plaintiff had no right to complain and no cause of action to maintain the present suit accrued to her. *Calls* v. *Home and Colonial Stores* (1) followed MISS GRACE PROSSER *v.* MENDI LAL. **8 O. C. 356.**

18 Light and air—Disturbance of easement, meaning of—Injunction—Substantial damage—Physical comfort. 7 B. L. R. 825 Col. 740 P. I.

19 *Light and air—Ancient Lights—Injunction to restrain defendant from interfering with ancient lights-Quia timet action, necessary ingredients for.*

There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger and there must also be proof that the apprehended damage will, if it comes, be very substantial. Fletcher *v.* Bealey (1885) 28 Ch. D. 688, followed. GANGABAI *v.* PURSHOTAM. **32 B. 146.**

20 Light and air—Injunction—Substantial loss—Sic utere suout abeui non lad as 138 P. L. R. 2 Col. 1635 P. I.

21 Light and air—Easement—Air 6 B. L, 633 Col. 2090 P. I.

22 Light and air—Change in the position of windows. 26 B. 374 Col. 738, 2146 P. I.

23 Necessity of Mitta—Sale for arrears of revenue—Purchase by Government—Restoration to previous Zemindar's son—Grantee's rights and easements of necessity—Water supply through Government source—Grantee not paying for it—Burden of proof.

A Mitta was sold for arrears of revenue in 1836 and was purchased by Government but was "restored" again in 1859 under a permanent sannad to the son of the previous Zemindar.

Held, that in the absence of a special contract to the contrary the law will imply that this restoration or grant carried with it all the rights of water and other easements of necessity which existed at the time of restoration or grant. 2 Mad, 46 ; 37 R. R. 655 followed.

The grantee was entitled to the customary supply to his tanks and when the water arrived in his tanks he could do what he liked with it. 24, Mad. 279, referred to.

This right is not at all inconsistent with the common law rights claimed by Government to the water flowing in all natural channels.

Where the source of water belonged to Government and the Government carried out improvements to the source of the supply—

Held, that the grantee, by virtue of his engagements with the Government, was entitled to a certain supply of water without paying for it, but the burden of proving the extent to

Easement *(Contd.)*

which he was entitled lay on him, and if he failed to sustain this burden, his suit for restraining the Government from levying water cess for second crop cultivation and for refund of the water cess collected must be dismissed. MARIA SUSAI MUDALIAR *v.* THE SECY. OF STATE FOR INDIA IN COUNCIL. **14 M L J 350.**

24 Necessity of—Claim to take plough and water through anothers land—No allegation of severance. 4 L. B. R. 216 Col. 1806 P. I.

25 Obstruction—Interruption. Meaning of. 73 P. R. 5 Col. 1806 P. I.

26 *Obstruction of view to shop—Easement—Right to obstructed view of shop.*

Held, that no action will lie for the removal of erections in front of a shop merely on the ground that such erections obstruct the view which passers-by formerly had of the shop. Smith *v* Owen, 35 L. J. Ch. 317 and Butt *v.* Imperial Gas Company, L. R. 2 Ch. 158 followed. GOPI NATH *v.* MUNNO. **3 A L J 637=A W N 1906 p 257—29 A. 22.**

27 Obstruction of view to shop-Arguments by pleaders-Judgment without hearing pleaders of parties. 203 P L R 5 Col. 1287 P. I.

27 Pasture—Easement—Pasturage rights —Landlord and Tenant—Legal Origin—Presumption from enjoyment from time immemorial—English Law. 31 C. 502 Col. 926 P. I.

29 *Pleadings—First suit for title—Withdrawal with leave—Second suit for easement.*

If the plaintiff had enjoyed the right of user of a land for such a long period as is sufficient to confer on him a right by prescription, the circumstance that in a previous suit he had erroneously stated that he was the owner would not deprive him of the right of easement which he had acquired. 1883 A. W. N. 66 not foll.—CHEDAMI LAL *v.* SHIB CHARAN. **2 A. L. J. 59.**

30 *Pleadings—Suit for possession as owner of certain land withdrawn with liberty to bring fresh suit—Subsequent suit for easement not barred—Pleadings.*

Held, that if a plaintiff has enjoyed any easement for such a long period as was sufficient to confer on him a right by prescription, the circumstance that in a previous suit he had erroniously stated that he was the owner would not deprive him of the right of suit for easement which he had already acquired. W. N. All. 1883 P. 66 distinguished. CHADAMMI LAL *v.* SHIB CHARAN **A W N 5 P. 18.**

31 *Prescription—Landlord and Tenant.*

A tenant of land cannot acquire an easement by prescription in other land of his lessor. *14 All 185 1 C W N 151 referred to.*

A tenant even with permanent rights is always a tenant and never an owner of the land. He always derives his rights from the lessor; and as the latter cannot have the right of enjoyment of an easement as of right against himself, so neither can his tenant against him. MONI CHANDRA CHUKRABUTTY *v* LALKANT NATH BISWAS. **9 C W N 656.**

Easement *(Contd.)*

32 *Privacy—Right of privacy—Defendant not allowed to give himself increased facilities for overlooking plaintiff's zenana.*

Held, that the fact that the plaintiffs' zenana house might be to some extent overlooked by persons standing on the roof of the defendants' house was no justification for the defendants opening fresh doors or windows in the wall of their upper storey looking towards the plaintiffs' house, whereby the plaintiffs' house might be overlooked without the person inspecting it being visible to the occupants of that house. Gokul Prasad *v.* Radho, I L R 10 All 858 referred to. ABDUL RAHMAN *v.* BHAGAWAN DAS. **4 A L J 455 = 29 A 582.**

33 *Privacy, right of.*

The fact that the occupant of a house can from its roof look into his neighbour's house or yard is no ground for holding that the occupant of the higher house is at liberty to open such windows as he chooses. Looking out of a window does not attract the attention of neighbours to the fact that they are overlooked to the extent that being on a roof attracts such attention, and invasion of privacy in one direction and to a limited extent does not justify the extension of such invasion. NIHAL CHAND *v.* MAULU. **108 P L R 1903.**

34 Privacy—Burden of Proof. 174 P. L. R. 1901, Col 761 P. II.

34 (*a*)—Privacy—Custom—Easements—Prescription. 5 C. W. N. 147 Col. 736 P. II.

35 *Projection of—Beam.*

The plaintiff's beam overhang the defendant's soil and the defendant erected a building overhanging the beam. The question was whether the beam gave the plaintiff a right to the column of air above it so as to prevent the erection of any building by the defendant overhanging the beam.

Held, that the defendant being the owner of the soil the diminution in his rights by reason of the beam did not extend beyond the protusion of the beam itself. RANCHOD SHAMJI *v.* ABDUL BHAI MITHABHAI. **6 B L R 356 = 28 B 428.**

36 Reasonableness of—30 C. 1077—*See Easement No. 1. Supra.*

37 *Surplus rain water to pass—Right to pass water—Defined channel. Proof of water passing through necessary.*

The right of an owner of a dominant tenement to pass water through the servient tenement is restricted to a defined channel and in order to enable the owner of a dominant tenement to prove a right according to law he must prove that the water passed, for the period indicated in section 26 of the Limitation Act, through a defined channel. It is not sufficient to prove that the water passed in various directions through the servient tenement. BIDHOO BHUSAM PALIT *v.* BENY MADHAB MAZUMDAR **8 C. W. N. 244.**

38 *Water, user of—Limitation Act (XV of 1877) S. 26-Easement-Way, right of—As of right.*

Section 26 of the Limitation Act requires that the user should be as of right in order that it may lead to the aquisition of a right to an easement. The plaintiff to succeed must prove *such* user even if the defendant simply denies the existence of the right in question. It is not enough to prove mere user.

According to English Law whenever user is proved the presumption is that it is as of right until the contrary is shown, but having regard to the habits of the people of this country it is not right to draw the same inference from mere user that is proper and legitimate in a case arising in England. The question is always a question of fact and the propriety of the rule that the presumption from user should be that it is as of right, must depend upon the circumstances not only of each particular case but also of each particular country, regard being had to the habits of the people of the country. SHAIKH KHUDA BAKHSH *v.* SHAIKH TAJ-UD-DIN **8 C W N 359.**

39 *Water—User—Different modes of drawing water—Evidence—Decree in previous suit.*

On appeal against a decree in a suit for a declaration of plaintiffs' right to irrigate the land with the water of a certain tank and for an injunction restraining the defendants from obstructing them in the exercise of that right it was contended, first, that the finding as to the user which was to the effect that the water of the tank was lifted by baling baskets in three of the last twenty years was insufficient to warrant a decree declaring the plaintiffs' right to take the water by that method, secondly, that the Court was wrong in giving the plaintiffs a decree when no right to easement could be acquired over flowing water, thirdly, that the plaintiffs had no right to sue when the land to be irrigated was in the possession of tenants, and fourthly, that the decree in a former suit was wrongly admitted in evidence.

Held, that, the contentions were not valid, that (1) the user for 20 years by the plaintiffs was proved and the mode of drawing the water from the tank by different methods did not affect the case, (2) that the water could not be said to be a flowing water, (3) that the plaintiffs' right was not affected by the land being in the possession of tenants and (4) that the decree in the former suit was admissible under S. 13 of the Evidence Act as showing that the predecessors of the defendants did not object to the plaintiffs' exercise for the easement in question. KRISTA DAS CHOWDHURY *v.* JOY NARAIN PANJA. **8 C W N 158.**

40 *Water, user of—Presumption—Right to the use of water—Presumption.*

It was found by Court that the plaintiff irrigated his fields from water flowing out of the tank of the defendant through two channels from time immemorial. The plaintiff sued for a declaration of his right to do so in future and for injunction, restraining the defendant from closing the opening of the tank through which water flowed into the tank, and the openings which it flowed out of the tank.

Held, that upon the above finding a presumption arose that this enjoyment had an

Easement *(Contd.)*

origin which conferred a right, and that the plaintiff was entitled to the relief prayed for by him. 4 Cal., 633; 5 M & W 203; L. R. 38 Ch D, 295; 3 Exch 748; 2 Ch, 502; 8 Exch. 291; 11 W. R. 236; 8 W R., 211. MADHUB DASS BAIRAGI *v.* JOGESH CHUNDER SARKAR. **30 C 281.**

41 *Water channel — Riparian proprietors —User of water.*

Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, irrigating their land, and for purposes of manufacture, subject to the conditions (1) that the sue is reasonable, (*ii*) that it is required for their purposes as owners of the land and (*iii*) that it does not destroy or render useless or materially diminish or effect the application of the water by riparian owners below the stream in the exercise either of their natural right or their right of easement if any. Perumal *v.* Ramasami Chetty, (1887), I. L. R. 11 Mad. 16; followed. Debi Pershad Singh *v.* Joynath Singh (1897), I. L. R. 24 C., 865; distd. THB E *v.* LON MA GALE. **3 B R 23.**

42 Water channel — Relations between upper and lower riparian owners regarding right to use river water Custom. 35 C. 851 Col. 1807 P. I.

43 *Water, discharge of — Easement—Discharge of water — Land — Servient tenement—Right of easement.*

Where an easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire a right to have it discharged on to his land unless the existence of some grant or arrangement is either proved or from the circumstances of the case, may reasonably be presumed, 39 R. R. 354, 8 L J Ex. 201, 18 L J Ex 305, 40 L J Q B 293, 25 L J Q B 115, 32 L J Q B 136. 4 C. 633, 7 M 530, 2 C L R 141 referred to. CHAKRADHAR SINGH *v.* TIKARAM SAO. **14 C P L R 1901 P 145.**

44 Water flow— Right to use and consume water without material injury to other like owner. 7 B L R 265 Col. 733 P. I.

45 Water flow—Right of owner of land on a higher level to pass on to land on lower level collecting into his land in undefined channels. JAIRAM MALI *v.* BABAJI VIDUR. **1 N. L. R. 182** *See Injunction.*

46 *Water. Flow of—Construction of channel —Material alteration—Injunction.*

The defendant excavated a channel on his land. Prior to its excavation, all the water that flowed from the defendant's lands on to plaintiff's found its way there by natural flow or percolation, and was not carried down by any definite watercourse. The effect of the channel was to collect water which formerly flowed from a large tract of land at different points into a definite channel and to throw it all into a particular part of plaintiff's channel. The plaintiff sued for an injunction directing the defendant to fill up the channel.

Held that the suit must be decreed. RAJA OF VENKATAGIRI *v.* RAJA MUDDUKRISHNA. **28 M. 15.**

47 Way—Easement— Obstruction — Interruption. Meaning of—73 P R 5 Col. 1806.

48 Way—*See 8 C W N 359 No. 38 supra.*

49 *Way, grant—Alternative defences.*

A defendant's user of a land for eight years without any objection on the part of the plaintiff implies no grant of easement.

Per Mookerjee, J. There is no implied reservation of an easement in case one transfers a part of his land over which he has previously exercised a privilege, in favour of the land he retains, unless the burden is apparent, continuous and strictly necessary for the enjoyment of the land retained (4 De. Gex. J. & S. 185—4 E. R. 888; 12 Ch. D. 31; 25 Ch. D. 559; 26 C. 811 referred to.

Implication of a grant of easment, upon the severance of a tenement, extends to a way which is a formed or metalled road.

It is open to a defendant to set up alternative defences, *e. g.,* to set up as a defence, that he was the owner of the property in dispute and if he was not the owner, he had a right of easement over it 4 C. L. J. 437—34 C. 51, *Appl.*

A plaintiff will not be allowed to raise any objection as to the defendant's setting up alternative defences, in appeal when no such objection was raised in the Court of first instance, and it was not shown that he was in any way prejudiced. 4 C. L. J. 367 referred to. PURNENDU NARAIN ROY *v.* DWIJENDRA NARAIN ROY. **8 C. L. J. 289.**

50 Way—Easement of necessity—No easement on the ground of convenience when there is other means of access. 28 M. 495 Col. 205 P. I.

51 Windows—Change of position. 26 B. 374 Col. 2146 P. I.

Easements Act (V of 1882).

1 *See Act V of 1882 (Easement Act) Col. 733 -741 P. I.*

2 *S. 1—Right to water sold by the Government to servient holder.*

The plaintiff was found to have the right to take water to his own land through a channel on the defendant's land whenever the water was sold to him by Government.

Held, that the right amounted to an easement within definition of S. 1 of the Act. TIRUVENKATACHAR *v.* N. Y. DESIKACHAR. **4 M. L. T. 414.**

3 *S. 60—Land holder and Tenant—Suit in abadi occupied by non-agricultural tenant—Adverse possession—License—Act No V of 1882 (Indian Easements Act), S. 60.*

A person who was neither an agricultural tenant nor a village handicraftsman was found in possession of a house in the abadi which he and his predecessors in title had held for a period of considerably more than twelve years, without paying rent or acknowledging in any way the title of the zemindar to the site

Easements Act (V of 1882) *(Contd.)*

upon which it was built.

Held, that such person had acquired the absolute ownership of the site. BHADDA *v.* KHAIR UD-DIN HUSSAIN. **3 A L J 760**= **A W N 1906 P 305—29 A 133**.

East India Company.

See Secretary of State.

1 S. 11, 12—Construction—License—Commissioner of Police—Discretion to refuse license. 4 B. L. R. 1—26 B. 396 Col. 447 P.I.

Ejectment.

1 *Acquisition of occupancy right over a partition of a holding--Liability to ejectment from the ghat.*

A sued B to recover *khas* possession of a ghat which together with certain jote lands had been leased out for five years to B's predecessors in title at a certain annual *jama* both for the jote land and for the ghat. These were held over by the defendants for a long time beyond the said five years.

Held, though A could not get rid of the B so far as the jote lands were concerned, by reasons of the fact that the latter had acquired the position of an occupancy rayat, as regards those lands, yet the B's position as regards the ghat was entirely different, no occupancy right having been acquired in the same and A. was therefore, entitled to a decree against B for *khas* possession of the ghat. G. S. HAYES *v.* GHINA BARHI. **33 C. 450.**

2 *Alienation of non-transferable holding for --Landlord and Tenant--Ejectment--Transfer of non-transferable holding--Tenant in possession—Landlord not entitled to eject tenant on transfer being held as illegal.*

Certain lands were originally held under the plaintiffs by the defendants Nos. 2 and 3 as their tenants. They subsequently transferred the lands to defendant No. 1. In a suit for ejectment against all the three defendants it was found that the tenancy was not transferable and that the defendants Nos. 2 and 3 were still in occupation of the lands although they had repudiated their tenancy under the plaintiffs.

Held, that the plaintiffs were entitled to a decree for possession as against the defendants No. 1: but their claim for *khas* possession as against defendants Nos. 2 and 3 must be dismissed, for the tenancy which they originally held under the plaintiffs still subsisted. 9 Col. 648 followed 24 Col, 212 distinguished. DINA NATH ROY *v.* KRISHNA BEJOY SAHA. **9 C. W. N. 379.**

3 Alienation of non-transferable, holding for—Occupancy raiyat—Mortgage, girby, usufructuary. 3 C. L. J. 222—10 C. W. N. 499 Col. 52 P. II.

4 Alienation of non-transferable, holding for—Original tenant remaining in possession as subject of the transferee. 33 C 631 Col. 128 P. II.

5 Alienation of non-transferable holding for—Abandonment--Sale. 10 C. W. N. 1033 --33 C. 1219 Col. 11 P. I.

6 Alienation of non-transferable holding for—Onus--Tenure holder. 7 C. L. J. 553

Easements Act (V of 1882) *(Contd.)*

Col. 93 P. II.

7 Alienation of non-transferable holding for--Suit for--Sub lease, grant of, by tenant 8 C. L. J. 156 Col. 372 P. II.

8 Alienation of non-transferable holding for--Order returning plaint for presentation to proper court. 16 P L R 1903 Col 939 P I.

9 Contract by permanent tenure, holder for—On non-payment of rent illegal—4 C L J 521 Col 121 P II.

10 Co-owners of--Ejectment of co-owners by another—Co-sharers—Exclusion of co-owner--Form of decree. A W N 1905 P 119 Col 648 P II.

11 *Co-owners of—Plaintiff entitled to a share only of joint property—Suit for ejectment--Whether suit can be treated as for partition.*

The plaintiff sued on the allegation that the suit property, a house, was the sale property of his vendors, the defendant 1 and 2. But it was found that it was not their sale property.

Held, that the suit, as framed and as tried, being one for ejectment against the third defendant as a trespasser, it should not be treated as a suit for partition between co-owners, that being a suit of a different character and for a different relief. 10 B 451 followed. SAMINADHA PADAYACHI *v.* RANGASAMY NAICKEN. **4 M L T 215.**

12 Court fees on a suit for—Of a tenant—Budhist Law—Claim of eldest son to one fourth share of the general joint estate on the death of the mother, when the father marries again. 1 L B R 1900—1902 P 23 Col 246 P II.

13 Houses occupied by tenants for more than 12 years—Adverse possession—Landlord and tenant, 3 A L J 619 Col 2061 P I.

14 Landlords-Purchase of occupancy right—His right to ejectment—An under raiyat—Notice to quit. 3 C L J 155 Col 101 P II.

15 Landlord and tenant—Ejectment of tenant—Decree for arrears of rent—Satisfaction of decree. 16 C P L R 1903 P 88 Col 373 P II.

16 Landlord and tenant—Ejectment. Suit for, cultivating raiyat—Leases, Construction of, 7 C L J 475 Col. 99 P II.

17 Landlord and tenant—Ejectment, Suit for—Denial of relation and setting up third party as landlord in a previous rent suit by some of the landlords. BHIKHARES RAM MOHOORI *v.* DHAGESWAR NARAIN SINGH. **7 C L J 483=35 C 807.** *See Landlord and tenant.*

18 *Landlord and tenant—Suit for ejectment by some of the landlords—Procedure.*

For the purpose of ejectment joint landlords must either act together and unanimously, or if they cannot agree, must obtain partition and then proceed, as they severally think fit, with reference to their separated shares. But a doctrine of this kind must not be so blindly applied as to occasion a miscarriage of justice. An exception to the general rule may be made when the Court is satisfied that the co-sharers who do not sue are, for

Easements Act (V of 1882) *(Contd.)*

some reasonable cause, not in a position to do so, that the co-sharers who do sue are acting *bona fide* in the interest of the absentees, as well as in their own interests, and that the tenants will not be prejudiced on the merits of the case by the decision of the suit in the absence of some of the landlords. CHUHAR SINGH *v.* JHANDA SINGH. **72 P L R 1903=1 P R 1903 (Rev.)**

19 *Of mortgagee from occupancy holding--Usufructuary mortgage of—Position of mortgagor and mortgagee--Ejectment of mortgagee.*

Held, that the contract of usufructuary mortgage of an occupancy holding, is between the parties to it, a perfectly valid contract, and the relation between the parties is not that of landlord and tenant. Accordingly the mortgagor, if he desires to resume possession, must proceed by civil suit; he cannot treat his mortgagee as a sub-tenant-at-will and oust him by notice under S. 36 of the Rent Act—CHOTTEY LAL *v.* AJUDHIA PERSHAD, **Bd.'s S D No. 5 of 1901.**

20 *Notice of—Not given to under tenants before a suit for Chaukidar to hold in lieu of service—Subletting by Chaukidar—Ejectment of tenant on Chaukidar's death.*

The mere fact that the tenants holding under a Chaukidar on the Chaukidari Chakran lands, paid rents for more than 12 years, would not necessarily show that at the time when the grant was made by the landlord to the Chaukidar, it was the intention of the parties that the Chaukidar's tenancy should be that of a middleman. If at the inception of the tenancy, it was a middleman's interest and if the Chaukidar let out the lands to cultivating raiyats, the latter might acquire rights of occupancy therein; but if at the time of the grant it was intended that the grantee was to hold it himself and enjoy the proceeds thereof, in lieu of the services to be rendered by him, it could not be said simply from the fact that he sub-let the land to somebody else, that person would acquire a right of occupancy against the landlord. If the tenancy of the Chaukidar came to an end upon his death, and the landlord was entitled to re-enter into possession, he would be perfectly justified in treating the tenants who hold under the Chaukidar as trespassers and no notice would be necessary before they could be ejected from the lands. 2 C. L. J. 403 ref. to. MIRITTUNJOY ROY CHOWDHURY *v.* KERATTULLAH NARYA. **11 C W N 46=5 C L J 53.**

21 *Notice to quit—Tenant-at-will—Tenant from year to year-Revenue sale-Record of rights, correctness of.*

In a suit by an auction purchaser for ejectment of the defendant in possession of land sold for arrears of revenue, if the defendant be a trespasser, the question of giving him notice to quit does not arise. But if he be a yearly tenant, he would be entitled to a reasonable notice. If he, however, be a tenant of inferior status, a verbal demand for possession of the land might be sufficient. Sulatu Dass *v.* Jadu Nath Dass, 8 C W N 774 referred to. Ram Narain Sahu *v.* Mangru Urao, 4 C. W. N 792, distinguished. A mere request by the plaintiff to the defendant to give up possession of the land in question and to pay the produce of the land or price thereof, during his occupation, cannot be regarded as a demand for rent, and is not sufficient to create the relationship of landlord and tenant which is a matter of contract. In the absence of any statutory provision or of any agreement, a verbal notice to quit, whether given by the landlord or the tenant, is sufficient especially where the lease is verbal. DEONANDAM PERSHAD *v.* MEGHU MAHTON. **11 C. W. N. 225=5 C. L. J. 181=34 C. 57.**

22 Notice of, given to tenants claiming under proprietary rights–Effect–Suit for proprietary—Declaratory suit. RAJA MUNTAZ ALI KHAN *v.* SARJU SING. **9 O. C. 292.**
See possession.

23 *Notice of, given to tenants claiming under proprietary right, effect of--Agricultural holding--Transfer of Property Act (IV of 1882), Section 108, cl. (7)--Trespasser, notice addressed to tenant as if legal.*

In the absence of a custom to the contrary the incident of non-transferability was common to tenancies from year to year of homestead lands and agricultural lands created before the passing of the Transfer of Property Act, 4 C W N 574 and 32 C. 1023 followed.

A notice addressed to a tenant, not as a tenant but as a trespasser, giving him six months' time to quit, even if the tenancy was created after the passing of the Transfer of Property Act is a good notice, and the defendant is bound to quit the land in accordance with such notice. RAM CHARAN NASKAR *v.* HARI CHARAN GUHA. **7 C. L. J. 107.**

24 Permanent tenure-holders contract for --For non-payment of rent illegal. 4. C. L. J. 521 Col. 121 P. II.

25 *Permanent tenure-holders, contract for—For non-payment of rent illegal—Ejectment suit—Onus—Presumption.*

In a suit to eject the defendants from the land on the ground that they are merely tenants-at-will, the onus lies on the defendants to substantiate that they have a permanent interest in the land.

The absence of words importing the hereditary character of the tenure may be supplied by the evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son where that hereditary character may be legally presumed 10 M. I. A. 183 (191)—3 W. R. I. (P. C.); 2 B. L. R. (P. C), 23—12 M. I. A, 263—11 W. R. 10, 11 (P. C.), followed.

Where the following facts were found, *viz*, the possession at a uniform rent for some hundred years, the property descending from father to son, various transfers, many of them recognised by the landlord, the erection of *pucca* buildings, the improvements at much cost, and all this with the knowledge of the landlord's agents, and no

Ejectment *(Contd.)*

attempt to eject or to enhance the rent for all those years, the presumption of the permanency of the holding may legally be made.

A permanent tenancy is not destroyed by the acceptance by a purchaser of the holding of a mutation *potta* containing no express words importing the permanency of the holding.

The words "mutation is being made in substitution of the heirs of Bhagwan" in the mutation *potta* mean that the *potta* was executed not for the purpose of destroying the old permanent tenure and creating a tenancy-at-will, but simply with the object of effecting a mutation of names in the proprietor's *sherista*.

Where a *potta* refers to an old *potta* creating a permanent holding, and treats the lessee as the then existing tenant and not as a new tenant by virtue of that *potta*, that *potta* is a confirmatory one. ISMAIL KHAN MAHOMED *v.* NANI GOPAL MUKERJI. **8 C L J 513**.

26 Proof of plaintiff's title necessary for—Suit for possession of land, by the Secretary of State against co sharer in a village. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* THAKUR MOHAR SINGH. **9 O C 301**. *See possession.*

27 *Proof of plaintiff's title necessary for —Permissive occupation—Defendants adverse possession—No finding by Appellate Court on permissive possession—Remand.*

A sued B for ejectment from a piece of land, on the ground that the B was in permissive occupation of it. B denied A's title and pleaded that the land was abandoned village land, which he occupied some 20 years before suit. A's claim was decreed in the Township Court.

The important question to be decided in this case was, whether the defendant's possession was permissive or not. If the plaintiff has proved that it was, the burden of proof lies on defendants to prove that they have had 12 years adverse possession; if on the other hand, the plaintiff has not done so, the burden of proof lies on him to prove possession within the 12 years preceding the suit. The District Judge had come to no finding on the point. He did not state that the Township Judge's decision was wrong, but merely that it was questionable. The Chief Court reversed the decree of the Lower Appellate Court and remanded the appeal for rehearing and a fresh decision on the grounds of appeal and points at issue and for a judgment in accordance with law 11 B L R 59 followed observing that, where the District Judge had not definitely found adversely to the Township Judge on a question of fact and had given no reasons for his decision on the point at issue, it was not within the province of that Court to come to a finding on the question.

Ejectment *(Contd.)*

Held, that, in the present case, therefore, it was for the plaintiff to show that the land in dispute belonged to his father, and the defendants were permitted by his father to live on it. In such a case, the defendants would not be in adverse possession, until they refused to quit, when asked to do so, and the burden of proof would lie on the defendants to show that they have had 12 years adverse possession. If, on the other hand, the plaintiff has not proved that the land was his father's and that the defendants were allowed to live on the land by his father, he must lose his case.

There is the third contingency, and, that is if the plaintiff has proved that the land belonged to his father, but has not proved, that the defendants were permitted by his father, to live on the land. In this case, circumstances remained unexplained as to how the defendant came into possession, and if the possession of defendants under such unexplained circumstances exceeds 12 years, the plaintiff must lose. In this third contingency, the burden of proof lies on the plaintiff to show that the defendants have not been in possession for 12 years, but on the other hand, that he or his predecessor, has been in possession within the 12 years next preceding the suit. 16 C 473 followed. MAUNG KYAW ZAN HLA *v.* MAUNG SAN NYUN. **14 B L R 156**.

See for other fact of the case Col 1685, 1965 P I.

28 *Proof of plaintiff's title necessary for —Onus—Evidence—Title—Presumption—Constructive possession—Survey map.*

In respect of jungle and hilly land, possession must be presumed to be with the rightful owner 9 C 744 and 19 C 660 (P C). *relied on.*

Plaintiff, in an action for ejectment, must not only prove his title, but also his possession, actual or constructive within twelve years of suit 12 M I A 337, 8 M I A 199, 9 C 744, 16 C 473 (P C) and 17 C 137 (P C) *relied on*; 2 M 10, referred to.

When plaintiff has established his title, it is not necessary for the defendant to prove a better title, or establish that he has acquired a good title by adverse possession, which has extinguished the title of the plaintiff, but plaintiff must prove his possession also within 12 years.

Nature of evidence required in such cases discussed.

Revenue survey maps are evidence of title and possession 30 C 291 and 22 C 252 (257), referred to.

They are not conclusive and may be shown to be wrong, but, in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct when made.

The doctrine of constructive possession applies only in favour of the rightful owner,

Ejectment *(Contd.)*

and must not, as a rule, be extended to the wrong doer, whose possession must be confined to land of which he is actually in possession. 24 C 256, 6 App. Cas. 164, 13 App. Cas 793, 29 C 518, 5 Peters 319, 102 U S 333, 134 U S 255, 144 U S 526 R 20 W R 25, referred to. MIRZA SHAMSHER BAHADUR *v.* MUNSHI KUNJBEHARI LAL, **8 M L T 212=7 C L J 114=12 C W N 273.**

29 *Service tenure from—Bengal Tenancy Act (VIII of 1885), Section 155, 181—Service tenure. Forfeiture of, by repudiation of tenancy—Ejectment, suit for—Notice, if necessary—Act shewing intention to determine the lease—Transfer of Property Act (IV of 1882), Sections 106, 111 cl. (g).*

Where the holder of a service tenure renounced the title of his landlord and executed a *kabuliat* in favour of a third party in respect of the whole of the land comprised in the tenure, and the landlord brought a suit for ejectment.

Held, that the case falls within the Transfer of Property Act and not within the Bengal Tenancy Act that no notice to quit was necessary, as the defendant forfeited his tenancy by denying the landlord's title; but that the landlord before he can eject the tenant must do some act or other showing his intention to determine the lease, and this intention must be shown at sometime antecedent to the institution of the suit. *2 C L J 403 17 All 45 referred to.* ANANDAMOYE *v.* LAKHI CHANDRA MITRA. **8 C L J 274=33 C 339.**

30 *Sir land from suit for Defendant's possession, nature of, immaterial.*

A suit for ejectment from sir land cannot fail, merely because the defendant is found to be in possession as tenant, and not as trespasser as alleged by the plaintiff, the status of the defendant being no part of the plaintiff's cause of action. 2 C. L. R. 292 9 Bom. H. C. I. 15 A. 186 Refd. to., 25 A. 498 Followed. DULI CHAND CHOUDRI *v.* LALLAH KURMI, **1 N. L. R. 4.**

31 *Sir land from— Suit for—Nij jote land, suit for possession of — Makarraridar Occupancy raiyat, plea of — Burden of proof.*

In a suit for ejectment from *nij-jote* lands where the defence set up a right of occupancy when the plaintiff was admitted to be a *makarraridar* of the landlord, it lies upon the defendants to make out that they are occupancy raiyats and are entitled to remain there. 9 C. W. N. 144 and 7 C. L. J. 553 referred to. 3 C. W. N. 763 explained. BARAIK KAMAL SAHAI *v.* LILHU CHRISTIAN. **8 C. L. J. 170.**

32 Of Thekadar— Notice of ejectment—Sale deed Lease—hold rights of mortgagor, effect of sale of equity of redemption upon 2 O. C. 336 Col. 556 P. II.

33 Transfer of non-transferable holding *See Ejectment Alienation No. 2—8 Supra.*

34 Unregistered Amalnama admissibility if in evidence in a suit for—33 C. 502 Col. 458 P. I.

35 Vendor and vendee — Enforceable contract of sale followed by delivery of possession to defendant, but not followed by registered sale deed. 29 M. 336 Col. 539 P. I.

Ejectment, suit

1 *Adimayavana tenure — Malabar Law—Landlord and tenant.*

An adimayavana tenure is a permanent tenure granted as a reward for past services or both for past and future services.

A landlord has no right to eject the tenant from an adimayavana holding when land was granted to the tenant for services rendered prior to the grant. THEYYAN NAIR *v.* ZAMORIN OF CALICUT. **27 M. 202.**

2 *Cause of action—Disclaimer of landlords title — Landlord and tenant — Agricultural tenancy—Putting landlord to proof of his title —Denying landlord's right to receive entire rent—Estoppel—Cause of action for suit for ejectment—Disclaimer in written statement.*

It does not amount to disclaimer of the relationship of landlord and tenant where the tenant merely puts the landlord to the proof of his alleged title by purchaser; nor where the tenant merely questions the extent of the landlord's interest and his title to receive the entire rent.

The cause of action must be based on something which accrued antecedent to the suit, and the denial by a defendant of his landlord's title in the written statement does not entitle the plaintiff to a decree for ejectment on the ground of forfeiture in that suit. 13 Cal., 96, 28 Cal 135, 223 Bom., 407, 15 Mad., 123 referred to. SRIMATIMALLIKA DASSI *v.* MAKHAM LAL CHOWDHRY. **9 C. W. N. 928.**

3 Defendants title—Cause of action—Subsequent lessee in possession—First lesse's suit to eject him—Compensation for improvement. 29 C. 871 Col. 569 P. I.

4 Defendants title—Cause of action—Custom—Free occupation of menaikats belonging to mirasidars by artizans conditionally on rendering services. 27 M. 517 Col. 277 P. II.

5 Plea of permanent tenure—Onus—Landlord and Tenant—Charitable endowment—Permanent lease granted by manager of temple. 27 M 591 (P C) Col 402 P II.

6 Plea of permanent Tenure—Onus—Landlord and Tenant—Recognition by landlord—Presumption. 32 C 41 (P C) Col 553 P II.

7 *Pleadings—Inconsistent—Landlord and Tenant—Plaintiff denying tenancy—Defendant claiming zamindari rights—Defence—Notice to quit—Second appeal—Pleadings—Findings inconsistent with pleadings.*

The plaintiffs brought a suit for ejectment against the defendant alleging that he was a trespasser; the defendant alleged that he was the *putnidar* of the land in

Ejectment suit *(Contd)*

suit and did not plead that he was tenant of the plaintiffs. The lower appellate Court held that the defendant had not proved his *patni* title, but refused to make a decree for ejectment holding that the defendant ought to be treated as a yearly tenant holding over and so entitled to a proper notice before ejectment, inasmuch as he had been in possession for ten years after the expiry of an *ijara* term and had paid rent.

Held, that the plaintiffs were entitled to a decree, for the defendant had not pleaded that he was tenant of the plaintiffs, and that it was not proper for the lower appellate Court to make a case for the defendant which he never set up in defence. *13 Cal 248, 17 Mad 218, 15 Bom 407 distinguished.* SUJJAD AHAMED CHOWDHURY *v.* GANGA CHARAN GHOSE. **1 C L J 416=9 C W N 460.**

8 Sir land from—Burden of proof—Tenancy Act. 1 N L R 32 Col 277 P II.

9 Subsequent purchasers right of—Who has notice of defendants agreement to renew Kanom. 13 M L J 217 Col 457 P I.

10 *Titles of both plaintiff and defendant defective. Suit—Plaintiff's title—Flaw in the titles of both plaintiff and defendant—Rival purchasers of same property under different decrees.*

In a suit for possession, the plaintiff must establish his title to the property in question. Hence, when the plaintiff's suit to obtain possession of a property which their predecessors in title had purchased in execution of a decree for sale passed on a prior mortgage, and the defendants resisted the plaintiffs' claim on the ground that they were the representatives of another purchaser of the same property sold in execution of a subsequent decree passed upon a subsequent mortgage, the prior mortgagee not being a party to the suit upon the subsequent mortgage and the subsequent mortgagees not having been impleaded in the first mortgagee's suit:

Held, that the plaintiff's title was not of such a character as to justify a court in ousting the defendants.—DARBARI MAL *v.* SHIAM DEI. **1 A L J 90**

11 Zemindar's suit for ejectment of defendant—Burden of proof—A W N 1904 P 71 Col 277 P II.

Ekjaddi.

1 Meaning of Presumption in favour of entry in Wajib ul-arz—Daughter and daughters sons, exclusion of, from inheritance. 4 O C 71 *See Col 558 P II.*

Eldest daughters right.

1 Eldest daughter, claim of to a share of the general joint estate on the death of the mother—Right of eldest child—Claim of eldest son to one fourth share of the general joint estate on the death of the mother, when the (father marries again). 1 L B R 1900—1902 P 23 Col 216 P I.

Eldest son right.

1. Title of eldest son who has obtained his one fourth share to share thereafter in the remainder of the estate. 1 L. B. R. 1900, 1902, P. 50 Col. 252 P. II.

Election.

1 Grant by Nawab—Muhammadan Law—Succession—Tank estate. 30 C. 843 (P. C.) Col. 410 P. II.

2 By legatee under will, construction of—Bequest to widow—Adoption a condition precedent—Estoppel. 9 C. W. N. 309 Col. 566 P. II.

3 Paying voters for travelling expenses when a disqualification—Election of member—Bribery. 15 M. L. J. 419-29 M. 166 Col. 71 P. I.

Election, municipal.

1 Candidates name omitted from candidates list—Declaration and injunction. 3[illegible] B. 409 Col. 446 P. I.

2 *Defendant refusing to receive nomination papers—Election of Councillor—Bye-election—Officer appointed to receive nomination papers—Return by the officer of plaintiffs nomination papers—Suit for injunction and declaration—Malice.*

The plaintiff, who was a councillor of Surat Municipality, disabled himself from continuing to be a councillor by virtue of clause (*b*) (*ii*) of sub-section (2) of section 15 of the District Municipal Act (Bom. Act III of 1901) for having acted as a councillor in a matter in which he had been professionally interested as a pleader on behalf of a client. On the plaintiff being thus unseated, a vacancy was created and a bye-election was ordered to be held. The defendant wa[illegible] appointed by the Collector to receive nomination papers for the bye election. The plaintiff, who was duly qualif[illegible] of the District Municip[illegible] of 1901) to be a candida[illegible] a candidate by duly q[illegible] electors. The officer appointed to r[illegible] papers received the papers o[illegible] nomination, and having heard [illegible] returned his nomination papers on the ground that he, having been disabled [illegible] stand as a candidate at [illegible] fill up a vacancy created [illegible]

The plaintiff thereupon brought [illegible] against the officer for [illegible] defendant should enter [illegible] in the list of candidates [illegible] the defendant and for a d[illegible] was duly qualified to appe[illegible] The plaintiff subsequently c[illegible] in lieu of injunction.

The first Court found tha[illegible]

Election, municipal *(Contd.)*

was not entitled to an injunction, but it awarded to him damages to the extent of Rs. 150 owing to the defendant's wrongful act. On appeal by the defendant the judge reversed the decree and dismissed the suit on the ground that malice on the part of the defendant was necessary to such a suit and that no such malice was proved.

Held, confirming the decree on second appeal by the plaintiff, that in the absence of malice no such suit could lie against the defendant CHUNI LAL *v.* KIRPASHANKAR 8 B. L. R. 838 = 31 B. 37.

Elephant.

1 Wild animals—Animal fere nature—Right of property—Animusre vertendi Recapture. 35 C. 413 Col. 2169 P. I.

Encroachment.

1 Penal assessment levied on poromboke land—Illegality of—Land Revenue. PAMULAPATI ANKINUDU *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. 28 M 312.

See Madras Revenue Recovery Act (II of 1864).

2 Public land—Power of Collector to enhance rent on land sold—Sale of encroached land. 25 B. 752 Col. 198 P. II.

Endorsement.

1 Authority and time for making—Eating house—Discretion to refuse license. 4 B L R 1902 P. 1—26 B. 396 Col. 447 P. I.

Endowed Property

1 Minority—Presence of guardian—Idol—Juridical person—Right of suit—Title. 32 C. 129 Col. 1744 P. 1.

Endowment.

1 Complete and incomplete — Presence of guardian—Idol—Juridical person—Shebait 32 C. 129 Col. 1744 P. 1.

2 *Construction of Religious Endowment—Trust — Uncertainty — Income of villages to be applied to "charitable purposes" at a dharamshala which the settler had founded.*

By a deed of trust or *bhentnama*, the owner of seven villages settled the income thereof to the extent of Rs. 500 a month to be applied to "charitable purposes" at a dharamsala which he had founded. In course of time one of the villages mentioned in the deed of trust was alienated by a person who was at the time acting as trustee.

Held, on suit by the trustees to have the sale cancelled and to recover possession of the village, (1) that the trust was not void for uncertainty, and (2) that it was not competent to the court in the suit as framed to declare that the village in suit was charged with a proportionate part of

Endowment *(Contd.)*

the total income of the seven endowed villages. Ranchordas Vandravandas *v.* Parvatibai, I. L R. 23 Bom., 725 referred to. GORDHAN DAS *v.* CHUNNI LAL, 30 A. 111.

3 Management of—Power of — Court to grant reliefs other than those included in the terms of sanction — Liability of Mahant to render account—Management of endowment. 89 P. R. 1901 Col. 1214 P. I.

4 Religious and pious purpose — Grants for charitable purposes — Suit to set aside order imposing full assessment. 17 M. L. J. 549 Col. 140 P. 1.

5 *Religious Endowment profits of — Money lent by* mohunt—*Successor of* Mohunt—*Right of suit.*

One *G.* dedicated certain property for the worship of a *thakur* and constituted himself as trustee for life and the present plaintiff *B.* his disciple, as trustee after his death. In January 1890 *G.* advanced to the defendant, by way of loan, moneys out of the profits of the dedicated property. On the suit of the plaintiff after the death of *G.* for recovery of the amount due.—

Held, that the plaintiff was entitled to sue for the benefit of the endowment. MAHANT BISHAMBHAR DAS *v.* THAKUR DRIGBIGAI SINGH. 9 C W N 914.

6 *Religious Hindu Law - Mutt — Succession of mohant—Power of mohant to alter succession.*

The right of succession to the property left by the deceased held of a religious institution depends upon custom and practice which must be proved by evidence in each case. *11 M I A 405 9 All 1; 16 Mad 490 followed.*

A *chela* is primarily entitled to succeed a *mohant* of the *sanyasi* sect who has to follow a life of celibacy. Where there are more *chelas* than one custom and practice intervenes.

9 All 1 S D A, 291, 6 S D A 262, 5 W R misc 57, 9 Cal 766 referred to.

An ascetic, being a mere life tenant, cannot alter the succession to the trust by an act of his own in connection with the status under which he originally acquired the trust—*1 W R 160, 3 C L R 112 referred to.*

Found that the mode of appointment by a *mohant* of the religious institution known as the Barhampur Paita, *Asthal* belonging to a sect of *vaishnavas* of the *Ramanandi* class of a successor was by custom by the nomination of one of his *chelas.* RAMJI DASS *v.* LACHHU DASS. 7 C W N 145.

7 Power of a shia to make a valid wakf —Endowment—Power of Shia to create valid waqf by will—Admissibility of evidence - statements as to heirs made in accordance with practice of public office. 25 A. 236 Col. 719 P. II.

8 Specific property of idol not extent —Religious and charitable trust for 13 years

Endowment *(Contd.)*

—Ultimate gift to sons—Administration Scheme for. 9 C W N 528 Col. 2031 P I.

9 *See Religious Endowment Act Col. 68 to 76 P. I. and Trust.*

Enfranchised-Inam Act IV of 1866.

See Madras Act IV of 1866

Enfrenchisement.

1 Principles of—Executor de son tort—Termination of his functions—Lispendens—Principles of Engligh Law applicable to Hindus. 10 C. W. N. 566 Col. 2038 P. I.

2 *Property of—Personal inam — Enfrenchisement in favor of widow—Effect of.*

Service inam, taken by inheritance by the widow of the previous holder, is not her absolute property.

The enfrenchisement of a personal inam or grant of title deed in respect of personal inam to the widow does not in any way affect the rights of reversioners. VANGALA DIKSHATULU *v.* VANGALA GAVARAMMA. **M. L. J. 1904 P 308 = 28 M. 13.**

3 Rule of double portions—Will—Principle of double portions. Applicability of English law as to. 7 B L R 299 Col 556 P. II.

4 *Transfer of Inam Law—Village service—Inam land—Transfer of land, effect of—Validity of transfer—Reg VI of 1831—Subsequent enfrenchisement, effect of—Vendee and vendor.*

Whether an Inam is regarded as a grant of the land, or as a remission of the assessment payable on the land, if the land is transferred, the Inam is transferred, unless in the transfer the Inam is reserved.

A certain land, classed as village service inam, was sold in 1889 and the inam was enfrenchised or resumed in 1891.

Held that any transfer of Inam forming the emoluments of Village Offic rs and Servants is, by Reg. VI of 1831, which was in force in 1899 null and void; for the alienation as a whole must be null and void; it is not possible to alienate the land and reserve the benefit of the right to withhold the payment of the assessment payable thereon; but, when the land was enfrenchised in 1891, it became alienable and the purchaser became entitled to require that the transfer should operate on the alienable interest acquired by the seller. 30 M 255 distinguished. ANGANNAYYA *v.* DAROOR NARASANNA. **3 M L T 243.**

English High Court.

1 Jurisdiction over non-resident—Foreigner—Residing in country subject to the same soveriegn English Court—Jurisdiction of. 28 C. Col. 506 P. II.

English Bankruptcy.

1 *Insolvency Act (Stat. 11 and 12, Vic., c. 21), S. 40 English Bankruptcy Act—Rules under; Applicability of.*

English Bankruptcy *(Contd.)*

As to the question whether the limit to the time within which a creditor can seek to substantiate before the Commissioner in insolvency a debt rejected by the Official Assignee is that prescribed by the English Bankruptcy rules.

Held, that the reference to "conditions and provision" in section 40 of the Indian Insolvent Act does not import mere rules of procedure, but only general rules of bankruptcy law applicable for the time being to the proof of debts in England. *In re* KALIDAS KESHOWJI *Sub nom In re* KALIDAS *v.* PESTONJI JEHANGIR HORMUSJI. **4 B L R 315 = 26 B 623.**

English Judges in Zanzibar.

1 Acquierer building before acquisition—Whether the value of buildings to be awarded to the owner. 26 B. 1 Col. 856 P. I.

English Law.

1 Application—Presumption from enjoyment from time immemorial. 31 C. 503 Col. 927 P. I.

2 Trustees and cestuiqui trustent all Hindus—Applicability of English Law. 9 C W N 79 Col. 95 P. I.

3 *Mesne Profits—Suit for—Proof of title in plaintiff—Trespass—Oudh Laws Act (XVIII of 1876), s. 3. cl. (g)-Justice, Equity and Good Conscience—Application of English Law.*

In a suit for mesne profits, one of the points for decision was whether the plaintiffs were entitled to recover such profits without proof of title, the defendand having denied their title and set up title in himself.

Held, that such a suit was maintainable without proof of title, if the plaintiffs were in possession of the property and were dispossessed by the defendant and subsequently again put in possession. Otherwise, the claim for mesne profits could be maintained only on proof of title. In the former case the defendant could not justify his trespass by merely showing that the plaintiff's title was defective but by setting up and substantiating title in himself, a title, that is, giving immediate right to possession.

Held, also, that as the case was not provided for by any part of section 3, of the Oudh Laws Act preceding clause (*g*) of that section or by any other law in force, the Court was right in acting, under clause (*g*) according to Justice, Equity and Good Conscience by applying to the case the doctrine of English Law. RAGHURAJ SINGH *v.* BHAGWANT SINGH. **2 O. C. 236.**

Enhanced House rent.

1 Liability of Tenant to pay enhanced rent of house 6 O C 190 Col 776 P I.

Enhanced rate of interest.

1 *See Contract Act IX of 1872 S. 74 Col*

Enhanced rate of interest *(Contd.)*

338 to 347 P I.

Enhancement of Rent.

1 Conversion of Money rent into rent in produce. 33 C 200 Col 103 P I.

INAMDAR BY

2 *Land Revenue—Land Revenue Code, (Bom Act V of 1879), S. 83—Inamdar—Grantee of Royal share of Revenue or of soil—Mirasi tenant—Enhancement of rent—Sheri lands—Contractual relation—Usage of the locality—Enhancement to be just and reasonable.*

A grant to an Inamadar may be either of the Royal share of revenue or of the soil; but ordinarily it is of the former description and the burden rests on the Inamdar to show that he is an alienee of the soil. Where an Inamdar is alienee only of the land revenue, then his relations towards those who hold land within the area of the Inam grant vary according to certain well recognized principles. If the holding was created prior to the grant of the Inam, then the Inamdar as such can only claim land revenue or assessment; for he has no interest in the soil, in respect of which rent would be paid. If the holding is later in its origin then the Inam grant, the Inamdar, even if only a grantee of revenue, would be entitled to place tenants in possession of sheri lands not by virtue of any interest in the soil, but as being entitled to make the most he can out of them by way of revenue. The difference between the two classes of holdings is obvious; in the last direct contractual relation would be established between the Inamdar and the holder. If these contractual relations are defined by an express contract, of which there is evidence, then the rights of the parties must be determined by that contract. If no such contract can be proved, then the Court must have re-source to the criteria prescribed by law for determining their rights.

The test whether the enhancement of rent is sanctioned by usage, is whether there has been any and what, enhancement according to usage of the locality in respect of land of the same description held on the same tenure. RAJYA *v.* BALKRISHNA GANGADHAR. **7 B L R 439.**

3 *Rent Recovery Act-Madras (VIII of 1865), Section 11, Clause (4)--Regulation II of 1803, Section 9--Regulation VII of 1828, Section 3--Rent. Enhancement of by Deputy Collector--Powers of Collector--Enhancement--Retrospective effect.*

The general power of supervision given to a Collector by section 9, Regulation II of 1803, and section 3, Regulation VII of 1828, authorise that officer to set aside the order of a Deputy Collector passed under section 11, clause (4), Act VIII of 1865, sanctioning

Enhancement of rent *(Contd.)*

the raising of the consolidated rent payable by the tenants on the petition of the landlord without notice to the tenants.

An order passed by a Deputy Collector under section 11 is not a judgment of a Collector or an order passed by him after decree and relating to execution, and the provisions of section 76 of Act VIII of 1865, do not apply to such orders.

Pattas must be tendered by the landlord to the tenants within the *fasli* to which they relate.

Retrospective effect cannot be given to an order sanctioning increased rate of rent passed under section 11. ZEMANDARNI OF NIDADAVOLE *v.* SAGIRAZU KRISHNAM RAZU **26 M 456.**

Suit for Bastuland -- Bastuland, subject of tenancy situate within a Municipality--Notice to quit. 9. C. W. N. 303 Col. 14 P. II.

5 Suit for—Bastuland—Average rate of rent—Registered kabuliat. 32 C. 395 Col. 103 P. II.

6 *Suit for—Bastuland—Punjab Tenancy Act (XVI of 1887), Sections 22, 68, 72 (e)—Enhancement of rent—Tenant's right to compensation for improvements made by him—Measure of compensation.*

Section 22 of the Punjab Tenancy Act does not give landlords the right to claim certain enhancements irrespective of the circumstances of the tenancy; it merely defines certain circumstances under which the Court has discretion to allow enhancement, but is not bound to allow them.

Section 22 must be read with the other section of the Act, and amongst them with Sections 68 and 72 (*e*).

Held, following unpublished judgment No. 90 of 1889-90 that Section 68 is imperative, and lays down without qualifications the rule that when a tenant has made an improvement in his tenancy in accordance with the Act, his rent shall not be enhanced until he has received compensation for the improvement. The only exceptions are (1) when the landlord has tendered a twenty years lease under Section 67, or (2) where, with reference to Section 72 (*e*), the tenant has the benefit of the improvement for so long a time that the estimate of compensation is reduced to nothing at all.

When the tenant has enjoyed the benefit of the improvement for twenty years, there is no need to compensate him in a case for enhancement of rent. Cases of ejectment obviously differ because the improvement in that case would pass into the landlord's hands.

When in a case of enhancement of rent the tenant has enjoyed the benefit for less than twenty years, the full compensation should be reduced by the rule of proportion. NATHA SINGH *v.* BURA. **15 P L R 1903 =7 P R 1903 R.**

7 *Right--Of son of the Landlords—Landlord and tenant--Buildings--Rent. Enhance-*

Enhancement of rent *(Contd.)*

nent of—Right of some of the landlords.

Some of several joint landlords of a hop, can without the consent of others, enhance the rent paid by the tenant. *7 Cal 633 (F B) 9 Cal 861 followed. 17 Cal 538 and 19 Cal 593 referred to.* MEHRU MAL *v.* ISHAR DAS. **59 P L R 1903.**

Entire estate.

1 *Regulation XXVI of 1802 Madras, Section 3— Act II. of 1864, Madras, Section 5— Liability of land to be sold for arrears of revenue.*

Per Moore, J.—Section 5 of Act II. of 1864, Madras, provides that all the moveable and immoveable property of a defaulter, wherever it is to be found, can be proceeded against in order to recover arrears of land-revenue due by him.

But the lands of the defaulter, which have been sold in execution of a decree against him and purchased by a stranger, cannot afterwards be again sold to recover the arrears of revenue falling on other lands, although the purchaser has not applied on the strength of sale certificate granted to him by the Collector for the transfer of the land to his name.

As against Government and for the purpose of exemption from liability to revenue, a transfer without change of entry is not valid, and the land continues to remain liable for the revenue accruing on it after the transfer until the change of registry takes place.

Per Davies, J.—Reading sections 3, 4, 5 and 25 of Act II, 1864, Madras, together, it seems clear that the land which is liable to be sold for arrears of revenue, must either be the land upon which the revenue is due, or that it must be land which is the property of the defaulter.

The word 'estates' in section 3 of Regulation XXVI of 1802, Madras, has reference to the plural 'persons,' and when used with reference to one person, must be read in the singular 'estate.'

A patta represents a whole or entire estate. Land held under another patta must be deemed to form another estate. A holding does not mean all holdings from Government under different pattas in defferent places. NARAYANA RAJA *v* RAMCHANDRA RAJA, **M L J 1903 P 130 26 M 521.**

Entry.

1 In death register—*See Evidence Act 1 of 1872 section 35 Col. 172 to 176 P. I.*

2 *Entry false considedation in Law fraudulently becoming party to a deed of transfer containing false statement of consideration—Purchase of land subject to right of preemption.*

A person in whose fivour a sale deed of property subject to the right of preemption, vested in persons living at the date of the sale-deed, is executed, stating the consideration paid for the property sold as more than the real consideration, is guilty of the offence under section 423, Indian Penal Code, for he fraudulently becomes a party to the deed which contains a false statement relating to the consideration for the transfer. EMPEROR *v.* MAHABIR SINGH. **25 A. 31.**

3 Entry by Tehsildar till entered in Jamabandi—Entry of mutation by Tehsildar not presumed to be correct till it is incorporated in the Jamabandi—Relevancy of such entry—Evidence Act 1 of 1872 section 35—Sale—Non-payment of consideration does not vitiate sale. 91 P R 2 Col 262 P II.

Epidemce Diseases Act III of 1897.

1 Words done or intended to be done, meaning of—Compensation—Demolition—Plague Regulation. 31 C 829 Col 477 P II.

Equitable claim

1 *Lien declared—Effect on purchaser—Estoppel—Waiver—Mortgage denied in defence without bringing a suit under S. 283. C. P. C. S. 282, 283—Fraud.*

A purchaser of property in execution of his own decree, apparently subject to a mortgage lien, as declared by the Court under S. 282 of the Code of Civil Procedure, not acquiescing in the order made under S. 282 in favour of the mortgagee, can question the validity and *bona fides* of the mortgage, within a year of the order in the claim case by way of defence in the suit brought against him by the mortgagee to enforce his mortgage lien, although he may not have instituted any suit, under S. 283, C. P. Code, to establish his right, in the property.

On the part of the purchaser there is no waiver or estoppel so far as the mortgagee is concerned, to raise the plea that the mortgage is invalid.

One who has perpetrated fraud, cannot take advantage of it. A fraudulent and collusive mortgage cannot be enforced even as against a purchaser with a declaration as above under S. 282 C. P. C. if impeached within the period allowed by the Law.

A fictitious mortgagee can not set up and enforce any equitable claim for re-imbursement which the mortgagor may have as against the purchaser. 27 A 97 distinguished SHAHZIA UDDIN ABDUL HOSSEIN *v.* KAILASH CHANDRA SHAHA **2 C. L. J. 539.**

2 Vendee of Mortgage decree sold free from incombrance entitled to retain money to pay off claims against decree. 9 C. W. N. 178 Col 617 P. I.

Equitable estoppel.

1 Suit for demolition—Necessary Finding—Principle applicable. A. W. N. 1906 P. 174. *See Demolition No. 1.*

Equitable.

1 Deposit of title deeds—Charge—Mortgage. 28 M. 54 Col. 590 P. I.
2 As security for loan—Decree for payment of claim by instalments—Mortgage. 1 L. B. R. 1900-1902 P. 81 Col. 1489 P. I.

Equitable plea.

1 Vendor and vendee—Delivery of possession to vendee—No defence to suit for possession. 29 M. 336 Col. 589 P. I.

Equitable Relief.

1 *Unconscionable bargain — Professional money-lender and illiterate agriculturist.*

A professional money-lender sued a borrower, an illiterate agriculturist, on an unregistered bond. The bond provided for repayment of the principal Rs. 35 and interest at 2 per cent per mensem in a few months; that in case of default, interest should be paid at 3 per cent per mensem until liquidation, and in case of default the mortgagee should be entitled to enter into possession and remain in possession for forty years. After the due date the borrower paid, and the lender acccepted, a small sum of money on interest. This sum was at the rate of interest between 2 and 3 per cent per mensem, now the suit was for possession of the mortgaged property for forty years under the terms of the bond. The profits of the land for three years would have been quite ample for him to pay himself the principle and interest. No other relief was claimed in the alternative. The defence was, (1) that the plaintiff had, by accepting interest, after the bond fell due, at a rate lower than that provided for payment therein, in case of default waived not only his right to the higher rate of interest but also to claim possession of the land and that the plaintiff could only sue for the money due under the bond and interest thereon at the original rate, and (2) that the borrower, being an illiterate agriculturist, was over-reached by the plaintiff, a professional money-lender, that the transaction was a hard and unconscionable one, and that the defendants were entitled to be relieved from liability on equitable principles.

Held, the plaintiff being a professional money-lender and the borrower being an illiterate agriculturist, and seeing that three years possession being quite ample to pay up the whole of the principal and interest, the transaction was a hard and unconscionable one from the effects of which the borrower was entitled to be relieved 2 App. Cas. 815; 9 A. 74, 26 C. 315, Refd. to. and that the case fell within the Ruling of the Privy Council in 12 C. 225.

Held, further, there was no waiver, in this case, either of the plaintiff's right to claim interest at a higher rate or to claim possession, because the obligation to pay did not cease on the date fixed for payment, but on the other hand, the deed itself provided

Equitable relief *(Contd.)*

for payment of interest after default and up to date of realisation: and as regards possession, the borrower did not plead that, from the fact of acceptance of interest after the due date, he believed that the lender had forgone his right to enter into possession 14 C. P. L. R. 49; 6 C. P. L. R. 9 referred to.

Held, lastly, that the suit ought not to have been dismissed *in toto*.

The plaintiff could not get a decree for sale, because S. 46 (2) of Central Provinces Tenancy Act precluded such a decree, the deed being unregistered. Seeing that borrower had the benefit of the money, and looking to Ss. 19 A and 64 of the Contract Act and S. 38 of the Specific Relief Act, it was possible to give plaintiff possession for such a length of time as would satisfy the principal and interest. NANDLAL KALAR *v.* MT. RADHA, **1 N. L. R. 76.**

Equitable set off.

See Act V of 1908 C. P. C. OVIII R. 6=S. 111 Col. 1444 to 1447 P. I.

Equity.

1 *Alienation of Land Act (Punjab) 1900, Section 9 (3)—Provisions not applicable to pending appeals—-Mortgage—-Foreclosure—-Debt not incurred wholly for necessary purposes—Equity—Relief to which mortgagee is entitled—*

Section 9 (3) of the Alienation of Land Act, Punjab, does not contemplate that in the case of an appeal pending before the Chief Court when the Act was passed, the matter in dispute should be referred to the Deputy Commissioner for disposal by him.

In a suit for foreclosure of mortgage after the death of the original mortgagor his legal representatives are entitled to claim the benefit of any technical defect in the foreclosure proceedings carried on under Regulation XVII of 1806 and as reversioners they can advance a plea impugning the legal necessity of any portion of the sum admitted by the mortgagor to have been incurred as a debt before the deeds of mortgage were drawn up.

In such a case although the mortgagee might be held fixed with the duty of ascertaining exactly how much of the amount shown in his books was incurred for actual necessity and consequently bound to issue notice of foreclosure in accordance with such knowledge, yet it would be too much to expect him to issue the notice in any other way than in conformity with the terms of his deeds. According to equity the plaintiff is entitled to be put in possession as mortgagee to hold the land mortgaged pending payment of so much of the debt and interest thereon as the Court might find the defendants liable. BADHAWA MAL *v.* MEHRAM **150. P. L. R. 1901.**

2 *Charged paid off.*

Where there is a subsisting charge on certain property paid off by the person in possession, it is equitable that when the plaintiff re-claims the estate, credit should be

Equity *(Contd.)*

given to that person for the payment of the mortgage which the plaintiff would have had to meet. L. R. 2. I. A. 7 (1893) P. J. 30 and 1894 P. J. 39 followed. ASHIDABAI *v.* ABDULLA HAJI MAHOMED. **8. B. L. R. 652**=**31 B 271**.

3 Grant of unborn person--Compromise --Hindu Law. 28 C. 720 Col. 2165 P. I.

4 Hard and unconscionable bargain-- Money lent under pressing necessity--Compound interest. 8 O. C. 193 Col. 607 P. I.

5 Minor--Discretion of Court--Notice-- Knowledge of attorney. 30 C. 539 Col 255 P. I.

6 *Notice—Registration of document.*

Where the mortgagor hypothecated certain land out of his undivided share in joint property and agreed with the mortgagee, that if at partition the mortgaged land or any part of it fell to the share of some other co-sharer the mortgagor would in place thereof give the mortgagee possession of certain other land belonging to the mortgagor in his own right—

Held, that on the mortgaged land falling at partition to the share of other co-sharers, the mortgagee was not entitled to recover possession of the land which was agreed to be made over to him in the mortgage-deed, from a transferee in good faith of it from the mortgagor, who had paid money to the mortgagor without notice of the previous mortgage. Mere registration of the previous mortgage-deed was not notice in law to the subsequent transferee. KANSHI RAM *v.* PIR BAKHSH. **134 P L R 1904**.

7 *Payment—Benefit enjoyed by another—Liability of person benefited Equity.*

It is consistent with general principles of equity, that those whose funds are used to meet the legitimate demands of others, when the latter have the benefit of such payments, are entitled to ask the latter to pay to the extent of the benefit; they cannot retain the benefit and plead non-liability. Where the codified law does not cover the case, the Court should apply the general law, legal and equitable. CHANDRA SEKHAR KAR *v.* NAFAR CHANDRA KUNDU. **4 C L J 555**.

8 Purchase without notice—Power of administrator-Burden of proof-Benami transaction. 5 B L R 784 Col 89 P I.

9 Registration—Notice. 134 P L R 1904. *See No 6 supra.*

10 *On reversioner setting aside alienation by widow--Right of suit—Breach of duty by a third person—Equity with respect to property received as belonging to another.—*

Where the plaintiff (reversioner) was ordered by the lower Court to repay Rs. 400, the amount of the purchase money, received from the widow as a condition precedent to recovering possession from the defendant (purchaser from the widow) the sale being invalid for want of necessity beyond the lifetime of the widow.

Held:—There was no equity in favour of the defendant and as against plaintiff entitling the defendant to the amount of the purchase money. An action will not lie at the suit of *A* for the breach by *B* of a duty which *B* owed to *C* because in order to support an action there must be either a contract with the person sued or some relation establishing a duty on his part towards the plaintiff. 18 C B 59 foll. Where a party receives from another goods or their value in money as belonging to a third party with notice of that party's ownership, that third party can sue the receiver therefor. 8 A C 874 followed.—JANKI DAGDEE *v.* MAHODEE DEVJI. **9 B L R 710**.

11 *Treats as done what ought to have been done—Mortgage--Property mortgaged not at date of execution belonging to the mortgagor --Effect of subsequent acquisition of such property by the mortgagor.*

The plaintiff in a pre-emption suit, in order to procure funds for the prosecution of his suit, executed a mortgage comprising certain property of which he was the owner and also the property the subject-matter of the suit for pre-emption. The suit for pre-emption was successful.

Held that the mortgage took effect as regards the property the subject of the pre-emption suit from the time when the plaintiff mortgagor obtained possession by virtue of his decree in the suit. Holroyd *v.* Marshall, 10 H L at p 210, Collyer *v.* Isaacs, 19 Ch D 342, and Bansidhar *v* Sant Lal, I L R 10 All 133, referred to. GAYA DIN *v.* KASHI GIR, **4 A L J 57**=**A W N 1907 P 7**=**29 A 163**.

Equity, Justice and good conscience.

1 *See Punjab Courts Act XVIII of 1884 S. 5.*

2 Suit for—Proof of title in plaintiff—Trespass—Oudh Laws Act (XVIII of 1876) S. 3 cl. (g)—Justice, Equity and good conscience—Application of English Law. 2 O C 239 *See English Law No. 3.*

3 *Marriage among Christians—Affinity--Consanguinity—Marriage with deceased wife's sister—Member of Greek Church converted to Roman Catholic Church at the time of marriage--Subsequent apostacy. Effect of—Bengal, N-W P and Assam Civil Courts Act (XII of 1887), Section 39—Rule of equity, justice and good conscience—Incestuous marriage.*

The presumption in favour of every thing necessary to give validity to a marriage is one of very exceptional strength and the evidence to rebut the presumption must be strong, distinct, satisfactory and conclusive. *12 Cal 706 followed.*

In India there is no legislative prohibition against persons who are not British subjects and of English domicile marrying, though they be within prohibited degrees as understood in England. The Courts in

Equity, Justice and good conscience *(Contd.)*

India will not disallow a Roman Catholic of Indian domicile, who has obtained the necessary dispensations, from marrying his deceased wife's sister though by the law of her own Church, she may be incapable of contracting the marriage. The husband's capacity renders the marriage valid in law. *L R 5 P D 94 relied on.*

L, who belonged to the Greek Church, married his deceased wife's sister who was an Armenian. Before this marriage he had embraced the Roman Catholic Church which he left soon after the marriage. They were both domiciled in British India.

Held, that his subsequent apostacy did not affect the validity of the marriage.

It is not the province of the Courts to examine the sincerity of a man's religious convictions.

Per Mitra, J.—The rule applicable in this case is that of equity, justice and good conscience as stated in section 37 of Act XII of 1887. There being no Municipal Law or well-established usage prohibiting the marriage of a domiciled British Indian of the Christian religion with reference to consenguinity or affinity, and there being a presumption as to its validity and not being incestuous by the general consent of Christendom, the marriage is valid. H. A. LUCAS *v.* THEODORAS LUCAS. **9 W. N. C. 322=32 C. 187.**

Eqity of redemption.

1 Not extended to bear--Transfer of intengible—Immoveable property--- Registration. Estoppel. 3 N. L. R. 72 Col. 474 P. I.

2 Adverse possession of person holding under Mortgagee. 27 B. 43 Col. 1964 P. I.

Note: 27 B. 43 read for 27 B. 73.

3 Adverse possession of-Equity of redemption. Extinguishment of the right of—Adverse possession. 6 C. W. N. 601 Col. 2063 P I.

4 Adverse possession of—Mortgagor and mortgagee--Against mortgagee and necessarily adverse to mortgagor. 1 A. L. J. 725 Col. 2065 P. I.

5 Clogon—See Mortgage redemption.

6 Omission to issue—Fraud—Equity of redemption—Physical possession. 1 O. C. 262 Col. 1771 P. I.

7 Purchaser of part--Right to redeem whole —Mortgage—Right of a purchaser of a part of equity of redemption to redeem the whole. 5 C. W. N. 83 Col 610 P. I.

8 *Purchaser by mortgagee at auction sale--Mortgagors suit--Mortgage—Mortgagee, purchase by, of half share of mortgaged property subject to entire mortgage-debt—Equity of redemption, purchase of, by mortgagee at sale in execution of money decree—Mortgagor, suit for possession by.*

A usufructuary mortgage of an entire village was made in the year 1866, by H. to A. and B. to secure the sum of ~~Rs~~ 3,000. H. borrowed ~~Rs~~ 4,500 from the mortgagee in

Equity of redemption *(Contd.)*

1874, the payment of which was secured by further charge on the mortgaged property. In August, 1881, A. obtained a money decree against H. and caused an undivided half share of the village to be attached and put up for sale in execution of this decree. The share was sold subject to the entire mortgage debt of Rs. 7,500 and A purchased the equity of redemption. After sometime A. paid to B. what was due to him on the mortgages and obtained possession of the entire village.

H. sued A. for possession of the remaining 8 annas share on the allegation that the mortgage-money was satisfied by the sale of half the village only.

Held, that the purchase by A. of a half share of the mortgaged property subject to the entire mortgage debt satisfied the entire mortgage debt. A. having been paid the entire mortgage debt had got all he had a right to and H. was entitled to recover possession of the other half share without being called upon to pay any thing. AMIR HASAN KHAN *v.* CHOUDHRI HADI HASAN. **4 O. C. 341.**

9 Mortgage—Equity of redemption purchased by a mortgagee from one of the mortgagors. 12 C. W. N. 745 Col 639 P. I.

10 Sale of—Legality under a decree of redemption—Rights of purchaser the decree having become final. A. W. N. 1902 P. 162 Col. 620 P. I.

Error on a point of Law.

1 *Decision containing an—Jurisdiction—Exercise of, illegally or with material irregularity.*

Error in law does amount to acting in the exercise of jurisdiction illegally or with material irregularity. Ameer Hossein *v.* Shebo Buksh, I. L. R. 11 Cal., 6, and Enat Mowdal *v.* Balaram Dey, 3 Cal., Weekly Notes, 581, followed. MAUNG KYWET *v.* MAUNG KIN. **1 L. B. R. 1900=1902 P 142.**

Escheat.

1 Application to file—Objections—Jurisdiction to investigate revision. 28 B. 276 Col. 1698 P. I.

2 *Escheat—Landlord and Tenant— Zemindar's right of.*

In a suit for possession of a house against the *zemindar*, the Court of first appeal found that the house had fallen down prior to suit but that a portion of the roof and a door remained. In second appeal, *held*, that woodwork and timber have a recognised value and as long as these remain in a house notwithstanding that the house may be in a very dilapidated condition, it cannot be said the site has been abandoned. Until a house becomes a complete ruin the *zemindar* cannot claim the right of escheat. RAMZANALI *v.* CHOUNDHAIE, **2 O. C. 195.**

3 *Escheat—Landlord and Tenant*—Zemindar's *right of, to groves belonging to absconding*

Escheat (Contd.)

Tenants—Wajib ul arz— "Bona vacantia," *meaning of.*

H., a tenant, owned a grove, which he mortgaged with possession. H. having died, his heirs, R. and S., residents of a different village, redeemed the mortgage and sold the grove to plaintiff. The *zemindar* resisted the plaintiff's claim on the ground that the equity of redemption had escheated to the *zemindar*. The *Wajib ul arz* gave the tenant an absolute right of sale and mortgage of the trees; if the tenant absconded from the village the grove would come into possession of the *zemindar*.

Held, that there had been no escheat, the stipulation being intended to cover a case of *bona vacantia*, in which property is left without any one to exercise any dominion over it. RAM SAHAI *v.* BANS GOPAL, 1 O. C. 42.

4 Escheat—Privy Council. Appeal to—Findings of fact—Substantial question of law. 59 P. R. 1905 Col. 1233 P. I.

Estate of divided deceased sister.

1 Buddhist Law—Succession—Brothers and sisters already divided—Estate of divided deceased sister—Equal rights of elder brothers or sisters on failure of younger brother or sister—Exclusion of children of brother predeceasing his divided deceased sister. 1 L. B. R. 1900—1902 P. 104 Col. 230 P. II.

Estate of grand parents.

1 Attetpa property—Letteipwa out of tim. Grandchild, share of—Estate of grand parents 1 L. B. R. 1900—1902 P. 93 Col. 246 P. II.

Estate for life

See Oudh Estates Act.

Estate of Inheritance

1 *Heritable and transferable right—Presumption to retain in perpetuity* birt *tenure—Estate of inheritance, presumption of, without express words of inheritance in* birt-patr-Estoppel—*Decree of Settlement Court when binding upon person against whom it was passed during his minority—Leases for a term not inconsistent with right in perpetuity—Description of defendant in plaint—Impleading of minor—Sub settlement, right to, how to establish—Sub settlement Act, (XXVI of 1866)—Rent Act (XXII of 1886), S. 63 cl (2).*

The plaintiff sued the defendants, on 28th September, 1889, for possession of a village stating that whilst his estate was under the management of the Court of Wards during his minority which lasted until the beginning of October, 1886, one Rajab Chaudhari sued him and one Subhan whose representatives were the defendants in this suit for *birt* right in respect of the village and that in that suit he was improperly represented, inasmuch as no guardian was appointed and his *Mukhtar* wrongly and without authority admitted Subhan's *birt* rights and that he is not bound by the decision of the Settlement Court; that the defendant's ancestor held possession of the village as a lessee and not by virtue of any *birt* right, and that he is within limitation in bringing the present suit as after attaining majority he came to know of the facts. The defence was that a separate suit was brought by the defendant's ancestor and a decree obtained in the Settlement Court, that the *birt* right existed from before the decree, that the decree was obtained after a hard contest, that the grandfather of the plaintiff had admitted the defendants' ancesters' right in 1861, that the plaintiff was properly represented and that the *Mukhtar* acted under the sanction of the Court of Wards and that there was no fraud or collusion in the settlement proceedings and that the plaintiff on attaining majority accepted the payment of rent.

Held, that the plaintiff on becoming fully acquainted with the facts, by accepting rent, elected to treat the decree of the Settlement Court as valid, there being no evidence rebutting this presumption and explaining his conduct. An election made with knowledge of the facts is binding, and it cannot be withdrawn though it has not been acted on by another by any change of position, and it was not open to the plaintiff to avoid that decree and his suit failed on that ground.

Held, that the description in that suit "Rani Dan Bibi, mother and guardian of Mumtaz Ali Khan, minor taluqdar of *Bilaspur* Estate under the Court pargana and tahsil Utraula" sufficiently showed that the Court of Wards was impleaded on behalf of the Wards.

Held, that the plaintiff in the present case could only set aside the decree of the Settlement Court, on proof of fraud, collusion or gross negligence and that he had failed to establish any such facts.

Held, that a person holding a *birt* or *birt zemindari* tenure under which he receives one-fourth or one tenth of the profits of the village has a heritable and transferable right in that share whether excluded from the village management or not, and there is a general presumption that he is also entitled to retain in perpetuity possession and management of the village though this presumption may be rebutted by the terms of the grant.

Held, that a gift of lands made by a *birt-patr*, even if not containing express words of inheritance, is presumed to carry an estate of inheritance.

Held, that acceptance of the leases by a *Birtia* for a short time was not inconsistent with a permanent grant and these leases were not inconsistent with a right in perpetuity vested in the *Birtia*.

Held, *also*, that provisions of Act XXVI of 1866 are not exhaustive and that a right to a Sub settlement can be established otherwise than under that Act.—MURAD BAKHSH *v.* RAJA MUMTAZ ALI KHAN, 4 O. C. 31.

Estate partition Act VIII of 1876 and Act V of 1897.

See Act VIII of 1877 and V of 1896 (Bengal Estate Partition) Col 64, 658, 167 P II.

Estoppel.

1. Acquiescence.
2. Act by.
3. Admission by party.
4. Admission by pleader.
5. Agreement.
6. Alternation claims.
7. Appeal.
8. Application of.
9. Approbation.
10. Attestation of deeds.
11. Award.
12. Benami transaction.
13. Circumstances by.
14. Companies cases.
15. Compromise decree.
16. Conduct.
17. Consent.
18. Consent order.
19. Contract.
20. Definition of.
21. Election by.
22. Elements.
23. Evidence.
24. Execution cases.
25. Executor.
26. Facts and Law, question of.
27. Heirs.
28. Instalment decree.
29. Joint tort feasors.
30. Judgment by.
31. Landlord and tenant.
32. Minors.
33. Mistake.
34. Mortgage cases.
35. Negotiable Instruments.
36. Oaths.
37. Objection to jurisdiction.
38. Objections to right of suit or execution &c.,
39. Parda Nashin Ladies.
40. Parties.
41. Partnership.
42. Pleadings by.
43. Pre-emption cases.
44. Public way right of.
45. Record by.
46. Representation by.
47. Silence by.
48. Vendor and Vendee title.
49. Waiver.

(1) Acquiescence.

1 Buildings - Presumption as to permanent tenancy—Estoppel. 5 C. W. N. 846 Col 233 P. II

2 Suit by mortgage to be declared owner by extinguishment of redemption right—Fresh contract of mortgage—Acknowledgment of mortgage by adult mortgagee when binding upon minor co mortgagee—Power of Muhammadan guardian over the property of his word—Agent Muhammadan and Indian law. 43 P. L. R. 1907—23 P. W. R. 1907 Col. 1783 P. I.

Estoppel *(Contd).*

3 Abuse of process—Purchase benami for decree-holder—Estoppel. 1 A. L. J. 486 Col. 690 P. I.

4 Estoppel—Acquiescence, second appeal—Question of law. 6 B. L R. 440-28 B. 400 Col 1242 P I

5 Government—Suit against—Adverse possession—Estoppel—Pardakimidi zamindari—Maliahs forfeiture. 9 C. W. N. 533 P. C. Col. 238 P. I.

6 *Mortgage by manager of a joint estate—Appointment of the manager subsequently declared illegal, effect of Validity of actions of such manager, when for the benefit of the estate—Acquiescence of major co-sharer—Estoppel—Non-liability of the minor's estate.*

When a person agrees to the appointment of a manager of his estate and that of a minor co-sharer of his, of whom he himself was the duly appointed guardian, and when such manager borrows money on the security of the joint estate for the purpose of paying off the liabilities of such person.

Held that although the appointment of the manager was not lawfully made, and his actions cannot affect the estate of the minor co-sharer, the major co-sharer cannot be heard to repudiate the actions of a manager, to whose appointment he fully agreed, in some of which he himself joined, and by which he only was benefited. The estate of the major co-sharer must be held liable for the debt incurred by such manager for its benefit. GANDAN SINGH *v.* INDER NARAIN SINGH. **3 C. L. J. 537.**

6 *(a)—Estoppel—Acquiescence.*

That the plaintiff had not acquiesced in the transaction by his receipt of rent from the defendant.

That there is a clear distinction between acquiescence in an act which is still in progress and mere submission to it when it has been completed. In the first case it may operate as an estoppel, if it have induced action infringing a right. In the second case submission could not change the past, and the right of action once vested cannot, at all events, as a general rule, be divested without accord and satisfaction. Estoppel by acquiescence has no application to an *ex post facto* submission not amounting to ratification and inducing no action or omission, and is consequently insufficient to constitute what in such cases would be necessary accord and satisfaction with full knowledge.

That acquiescence after a *fait accompli*, if not prolonged beyond the verge of limitation, is no bar to a right of suit already accrued.

That the defendant's possession was adverse to the plaintiff, and the claim not having been brought by the plaintiff within three years of the cessation of his disability was time-barred.

That there can be adverse possession of a limited interest in property as well as of the full title as owner. THAKORE FATE-

Estoppel *(Contd.)*

SINGJI DIPSANGJI *v.* BAMANJI ARDESHIR DALAL. **5 B L. R. 274=27 B 515.** *See for other facts Col. 37 and Evidence No. 10.*

7 *Sita Ram Appashet* v. *Sridhar Anant Prabhu—Arbitration—Joint Hindu family—Minor members—Manager's power to refer disputes to arbitration.*

A manager in a joint Hindu family represents the family, and, in the absence of fraud or collusion, his acts are binding on the other members of the family; it is competent for him to refer any matter in which the family is interested to arbitration. Any minor in the family would be bound by the reference and consequently by the award made upon it. BALAJI NARAYAN *v.* NANA BABAJI. **5 B L R 95.**

(2) ACT BY.

8 Gardazi Sayads of Multan District—Limitation—Effect of entry in wajib-ul-arz 119 P L. R. 1901 Col. 790 P. II.

(3) ADMISSION BY PARTY.

9 Right to specific performance—Failure of consideration. 2 A. L. J., 31 Col. 512 P. II.

10 Of a law point—Transfer of Property Act (IV of 1882) section 41—Consent—Estoppel. A W N 1906 P. 182—3 A L J 534 Col. 240 P. I.

11 Has no connection at all with the question whether a document is liable to registration or not. 3 N L R 72 Col. 880 P. I.

12 Mistaken or untrue—Suit by plaintiff for possession as heir of his father—Defendant alleged the plaintiff to have been adopted by another—Admission by plaintiff of his having been so adopted—Nature of such admission. 4 A L J 102 Col. 26: P. II.

13 Now of one lease then of another or whether stopped from relying on the first lease in High Court.—BAIDYA NATH DUTT *v.* KAMNIKANT GUPTA. **6 C L J 572.**

See Lease

(4) ADMISSION BY PLEADER

14 *On point of law—Hindu Law—Grandfather's debts—Grandson's liability—Pleader—Admission on a pure question of law.*

According to the Mitakshara a grandson is not liable to pay a debt which his grandfather contracted as a surety unless the latter in accepting the liability of a surety received some consideration for it.

Joint family property is liable in the hands of sons and grandsons only for debts which they are bound by Hindu Law to pay.

A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable. NARAYAN *v.* VENKATACHARYA. **6 B L R 434=28 B 408**

15 Of pleader—Hindu Law—Grand father's debts and grandson's liability—Pleader's admission on a pure question of law. 6 B L R 434 Col 2043 P. I.

16 Hindu widow—Legal necessity—Document, cancellation of. 9 C. W. N. 636 Col. 1869 P. I.

(5) AGREEMENT.

17 *Land-revenue—Assessment—Increase of assessment — Grant of land in perpetuity — Grant by Gavnkars of a village — Grant concurred in by Government and its predecessor—Right of enhancement.*

The Gavukars of a village granted in 1801 the lands in suit to the plaintiffs grandfather, who undertook to keep the embankment in repair and to keep water from rushing in, and the Gavukars passed a document to the effect that plaintiff's grandfather should hold the lands in suit permanently, that no increase on any account would be made, either by Government or village, and if any increase be made, they would pay it out of the village revenues. In 1804 the Chief of Sawantwadi, and, in 1807, the Killedar of Bharatgad passed orders in terms of the above document. In 1812, the share of the Chief of Sawantwadi, in the village and in 1845 46 that of Bharatgad passed to British Government, who till 1889 treated plaintiff's lands as katuban and assessed them as such. In 1889 the British Government, through its Special Survey Officer, informed the plaintiff that his lands could not be continued as katuban, and claimed Rs 1,035 as arrears of assessment for 1889 97, which the plaintiff paid under protest. The plaintiff filed a suit for recovering this sum :

Held, that plaintiff's claim should be awarded, as his case fell within the equitable principle which protects one who expends money on the improvement of land under an expectation of an interest therein created or encouraged by its owner. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v* DATTATRAYA RAYAJI PAI. **3 B L. R , 923=26 B. 271.**

15 To abide by commissioners finding—Appeal against decree based on — Commissioner's report where parties had agreed to abide by his report. 29 C 306 Col 1472 P I.

16 Appointing minor agents—Minor—Contract of agency on behalf of minors entered into by their guardian—Novation—Presumption. 4 B L R 627 Col 2077 P I.

(6)—ALTERNATIVE CLAIMS—

17 Possession of—Widow entitled to maintenance and not to life estate—Hindu Law—Mitakshara—Widow's right. 29 C 664 Col 2072 P I.

(7) —APPEAL.

18 Locus standi to appeal. Mortgagee's suit for foreclosure. 24 A 179 Col 634 P I.

19 *Hindu Law—Maintenance—Widow's right to maintenance—Charge on family property.*

The maintenance of a Hindu widow is not charge upon the estate of her deceased husband until it is fixed and charged upon

Estoppel *(Contd.)*

the estate by a decree or by agreement, and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value, even with the knowledge of the widow's claim for maintenance, unless the transfer has further been made with the intention of defeating the widow's claim.—*S D A N W P 1864 Vol I p 328, 2 Bom 494, 22 All 326 referred to.* THE BHARTPUR STATE *v.* GOPAL DEI. **W N A 1901 p 207.**

20 Small cause—Trial by a judge having powers of a small cause court. 25 B. 417 Col. 1341 P. I.

(8) APPLICATION ON

21 Ejectment, suit for—Dispute between rival vendees. 10 C. W. N. 747 Col. 242 P. I.

22 Its effect on general law of the land U. B R. 1907 P. 5 (Contract) Col. 251 P. I.

(9) APPROBATION AND REPROBATION

23 *Pleadings—Defendant approbating and reprobating.*

Held, that it is a sound principle of law that as between the same litigants defendant cannot defeat the claim of the plaintiff by a plea negativing a contention successfully advanced by him in a former suit, if he thereby approbates and reprobates. VARAJLAL SOLOT *v.* BHAIJI NAGARDAS. **6 B. L. R. 1103.**

24 Appeal to Privy Council-Act of Governor-General of India in Council-Act of State.

The petitioner applied for leave to appeal to Privy Council against an order of the Governor General of India in Council removing him from the Government of the State of Panna.

Held that the act was clearly a political act—an act of State—done by the Viceroy in Council in the interest of the State of Panna, and the inhabitants of Panna, and for the peace and good Government of India generally, and the Privy Council were precluded from entertaining a petition for leave to appeal against an act of that character. IN RE MAHARAJAH WADHAYA SINGH. **6 B. L R. 763 (P. C).**

25 Legal representative, meaning of—Personal decree—Decree against life holder—Holding property with power to litigate in respect of it—Execution against successor, 8 C. W. N. 843 Col. 1146 P. I.

(10) ATTESTATION OF DEEDS

26 Improvements by a stranger on another's property—Equitable right, compensation for—Improvements. 2 N L R 34 Col. 568 P I.

(11) **Award.**

27 *Award—Specific, enforcement of.—*

Where the award directed that the lessee should sue and obtain decrees against the tenants for the arrears due from them, and that on his executing a sale-deed of those decrees to the lessor, the latter should pay to the lessee the amount entered in the decrees.

Held, that a decree for specific enforcement of the award could properly be made in such a case.

When a party to an agreement referring disputes to arbitration has chosen to accept and act on the award of the arbitrators, as if it were a good and binding award, and has taken all the advantages it gave him, he cannot be allowed to say that he was not bound by it. BRIJ MOHAN LAL *v.* SHIAM SINGH. **W N A 1901 p 208.**

(12) BENAMI TRANSATION—PLEA OF.

28 Suit against benamidar when maintainable. 4 C. L. J. 22—10 C. W. N. 650 Col. 21 P I.

29 Benami Transaction. 8 C. W. N. 620 Col. 22 P. I.

30 Sale by real owner under fictitious deed—Purchase by third person from the fictitious vendees with consent of and on representations made by the real owner—Real owner's right to set up his title against second purchaser. 2 A. L. J. 97 Col. 19 P. II.

(13) CIRCUMSTANCES BY.

31 Widow by—Hindu Law—Widow's power to alienate—Consent of the only male reversioner. 25 B. 129 Col. 2136 P. I.

(13) CIRCUMSTANCES BY.

32 *False description in the Register kept under Registration Act.*

If a purchaser or mortgagor is responsible for the insertion, in the register kept under the Registration Act, of an inaccurate description of the property acquired by him and a subsequent purchaser, in the belief that the description in the register is correct, takes a conveyance for value of that very property under the impression produced by the description in the register, that it has not been dealt with, then the court may under appropriate circumstances be justified in holding that the doctrine of estoppel is applicable. SAKHARAM GANGADHAR, IN RE. **5 B. L R 85.**

(14) COMPANIES CASES.

33 Company refusing to recognise the purchaser as share-holder after granting pucca receipts. 3 B. L. R. 86 Col. 474 P, II.

34 Execution of decree-Parties are bound by the compromise made by them. 29 C. 577 Col. 494 P. II.

(15) COMPROMISE DECREE.

35 Sale proclamation—Contents of—Investigation. 31 C. 922 Col. 1499 P. I.

36 Hard and unconscionable bargain—Money lent under pressing necessity—Compound interest. 8. O. C. 193 Col. 607 P. II.

(16) CONDUCT BY.

37 *Execution of rent decree-Third person's property sold—Decree-holder not liable, for negligence, but wrongful act—Estoppel, by conduct.*

A rented a *serai* from B, for his machinery for four months, paying one month's rent in advance. C with A's permission stored his turbine in the same place. Subsequently A removed his machinery, but C's turbine remained in the *serai*. B sued A, for rent unpaid and got an *exparte* decree in execution of which he sold up

Estoppel *(Contd.)*

A's turbine, A then sued B. for the value of the turbine;

Held, that the suit could not be considered as an action for tort on account of negligence, but that the defendant was accountable to plaintiff in damages, though his wrong-doing was unintentional, as on an action for conversion. The question of contributory negligence could only arise in the case of an action based on negligence. The plaintiff's neglect in so far as it excused the defendant's wrong-doing, could only be taken into account in assessing damages, by requiring the plaintiff to prove strictly the damage suffered by him.

On the question whether the plaintiff was estopped by his conduct from alleging the turbine to be his and whether he should be held to have represented it to belong to H, *held* that there was no representation by the plaintiff on which any reasonable man could hold that the turbine belonged to H, and that the plaintiff by omitting to notify the goods to be his could not be held to have intentionally permitted the defendant to believe the turbine to be H's, and that he was not, therefore, estopped from alleging it to be his. 5 B L R App. 71, 3 B 74, 3 B L R 413, 11 B H C R 46 referred to and 20 C. 296 followed. PARMESHARI DAS *v.* BASHESHAR NATH. **129 P R 1908.**

38 By conduct—Evidence of intention necessary. JANGI NATH *v.* JANKI NATH. **2 A L J 225.** *See Hindu Law—Joint family.*

39 Equities between prior and subsequent mortgagees. 1 A L J 590 Col. 646 P I.

(17) CONSENT.

40 Continued arrangement when binding 4 C. L. J. 323 Col. 242 P I.

(81) CONSENT ORDER

41 Bequest of annuity to daughter and after her to her children 29 B. 133 Col. 2033 P. I.

42 Decree set aside on appeal and suit remanded by consent of parties for trial on merits. 25 A. 137 Col 1628 P. I.

(19) CONTRACT

43 Attempt by party to rescind agreement of which his heirs afterwards seek specific performance. 31 C. 584 Col. 248 P. I.

(20) DEFINITION OF

44 *Definition.*

Estoppel is a rule of evidence which in certain circumstances precludes a person from establishing real facts and compels him to abide by a certain conventional set of facts. MEHERALLY MOORAJ *v.* SAKERKHANOOBAI. **7 B. L R. 602.**

(21) ELECTION BY

45 Bequest to widow—Adoption a condition precedent—Estoppel. 9. C. W. N. 309 Col. 566. P. I.

(22) ELEMENTS OF

46 *Evidence Act*, 1872, *Section* 115—*Estoppel—Onus.*

The party pleading estoppel must establish it clearly and by cogent evidence. ABA *v.* SONUBAI. **3 B. L. R., 832.**

Estoppel *(Contd.)*

47 Entries in pass—Bonus—Effect of. 25 B. 499 Col. 10 P. II.

48 Revenue—Free land—Suit for pre-emption with respect to—Nazul or Government land held revenue free whether constitutes a mahal with the rest of the village. 10 O. C. 257 Col. 671 P. II.

49 Execution of decree—Interest awarded by decree of first court—Decree of appellate Court silent as to interest—Execution postponed from time to time on judgment debtor agreeing to pay interest as mentioned in the application for execution. 6 B. L. R. 217 Col. 320 P. I.

50 Alienation of portion of share in the Narwa. 6 B. L. R. 428 Col. 188 P. II.

51 Statement known to be false by person to whom it is made. 30 C. 539 Col. 236 P. I.

(23) EVIDENCE REGARDING.

52 Adverse possession by stranger—7 B L R 836 Col 2065 P I.

53 *Evidence Act (I of 1872), Section 115 — Estoppel.*

In a suit for pre-emption in respect of a sale effected in June 1895 it was contended on behalf of the pre-emptor that the vendee held no lands which gave him the right of suit, having previously parted with all his land, and that he was estopped under Section 115 of the Evidence Act from showing that he held any such lands by an allegation made by him in a written statement filed on the 7th January 1897 in a suit for pre-emption instituted by another person against him as vendee of certain land.

Held, that Section 115 of the Evidence Act was not applicable until it was established that the vendee intentionally caused or permitted the pre-emptor to believe that he had no lands on the date he filed the written statement, and that in consequence of that belief the pre-emptor forebore to sue for pre-emption in respect of the land. MUHAMMADI *v.* GOKAL CHAND. **26 B L R 1903.**

(24) EXECUTION CASES.

54 Order for substitution of the heirs of the deceased judgment debtor—Sale proclamation—31 C 822 Col 874 P II

55 Decree payable by instalments—Default in payment of instalments. A W N 1905 P 263—28 A 249 Col 1792 P I.

56 Objection by defendant that S. 244 barred a separate suit. 11 C W N 145 Col 1124 P I.

57 Sale of non transferable holding—Landlord and tenant—Knowledge of judgment debtor—Confirmation sale—9 C W N 972 Col 1082 P I.

58 Sale in execution—Objection by judgment debtor after sale that property not saleable. A W N 1907 Col. 193, 155 P I.

59 Decree for sale of property not liable to attachment or sale—Objection not raised in original suit but raised against application for execution—A W N 1905 P 138—27 A 564 Col 1043 P I.

Estoppel *(Contd.)*

60 Application to set aside sale—Parties—Benami purchase. 31. C. 662 Col. 1549 P. I.

61 Auction purchase—Permanent lease by an occupancy raiyat—6 C. W. N. 916 Col. 108 P. II.

(25) EXECUTOR.

62 A suit is commenced by the presentation of the plaint 1 M. L. T. 71 Col 1066 P. I.

(26) FACTS AND LAW, QUESTIONS OF.—

63 *Construction of document—Sale—Mortgage—Estoppel—Question of Law.*

Where the executant in consideration of a specified sum transferred land to another as security or the amount and the period for redeeming the Law was fixed at three months and it was provided that if the land was not redeemed within three months he would have no right to claim the property and there was no provision as to payment of interest.

Held, that the document must be deemed to be a mortgage and not a sale.

The question of estoppel is a mixed question of law and fact and parties are entitled to adduce evidence to support or negative the estoppel pleaded in the case. NAGINDAS HARJIVANDAS *v.* KARA JESANG. **6 B. L. R. 630.**

(27) HEIRS.

64 *Father and son—Dayabhaga—Mussammat Etwaria* v. *Chandra Nath Mukherjee—Hindu Law—Dayabhaga—Ancestral dwelling house—Improvments by son—Father's right to eject son—Estoppel—Injunction restraining son from trespassing.*

The plaintiff, a Hindu father, governed by Dayabhaga sued the defendant, his son, for his ejectment from ancestral dwelling house and for an injunction restraining him from entering the house. It was found that the defendant had spent a considerable sum out of his own earnings in improving the house and redeeming some of its portions from mortgage. It was further found that before suit the son had commenced to ill-treat his father and to behave in such a manner as practically to destroy the peace of the family.

Held, that the claim must be decreed, the plaintiff not being estopped in any way from seeking the relief.

That as the suit was tried by a Court not competent to try the question of title to the house in suit, it being beyond its pecuniary jurisdiction, the injunction would remain in force till the defendant succeeded in obtaining, if he could, a decree for possession of the property either in whole or in part by a suit instituted in a Court of competent jurisdiction.

The questions of the rights according to Hindu Law of father and son in ancestral property and of estoppel discussed. DHARMDAS KUNDU *v.* ANULYA DHAN KUNDU. **3 C. L. J. 616.**

65 Probate and Administration Act (V. of 1881) Former proceedings must be put in evidence to support the plea of resjudicata. 9 C. W. N. 938 Col. 933 P. I.

Equitable relief *(Contd.)*

66 Entering on property as waqf—Heir of wakf property. 4 C. L. J. 424 Col. 243 P. I.

67 Father estopped—Son estopped—Alienation of ancestral property—Nearest reversioner estopped by acquiescence from questioning alienation. 35 P. R. 1907 Col. 750 P. II.

68 Gift by father—Ratification by son—Gift to sister—Hindu Law—Gift to female—15. M. L. J. 492 Col 534 P. II.

69 Legal representation—Appeal to Privy Council—Act of the Governor-General of India in Council. 8. C. W. N. 841 Col. 47. P. I.

(28) INSTALMENT DECREE.

70 Whether execution is in time is question of Law—Instalments. Default in payment of. 27 B. 1 Col 1242 P. I.

71 Property held by head of Mutt—Presumption. 26 M 79 Col 744 P I.

(29) JOINT TORT FEASORS.

72 Carrying of fraudulent purpose into execution. 15 M. L. J. 478 Col. 550 P. I.

(30) JUDGEMENT BY

73 Purchaser previous to suit—Vendor, possession of—Fraud. 32 C. 357 Col: 238 P. I.

74 *By judgment—Issue not raised—Res judicata—Decree against widow when binds reversioners—Stranger assisting a suit, when bound—A judgment when binds succeeding shebait—Civ. Pro. Code (XIV of 1882), S. 138,—Document, Adverse possession, pleaded in appeal—Limitation—Female trustee—Extinguishment of title.*

A judgment obligatory upon either of the parties to the suit, is binding upon both, as the merits have been determined and judgment entered thereon in their presence, it is conclusive upon both of them until reversed. 13 C. 352 (356); 15 M. 477; 7 A. 606 (F. B.) (619); 8 A. 324 (332), referred to.

Quaere Whether in the case of equitable estoppels, there may not be exceptions to the rule.

A party will be concluded by a former judgment, if he could have used it as a protection, had the judgment been the other way and a person can claim the benefit of a judgment, as an estoppel upon his adversary, if he would have been prejudiced by a contrary decision of the case.

Res judicata would apply, although no issue has been expressly raised. The test is, whether the question so raised by the parties in their pleadings was actually submitted by them to the Court and adjudicated upon.

An estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work upon which it must have been founded. 28 M. 338 referred to.

Partition can take place only upon the assumption that both the parties are interested in the subject-matter of the litigation.

A decree obtained upon a fair trial in a suit by or against a Hindu widow, or daughter or mother, is effectual as against the reversioner, unless it can be successfully impeach-

Estoppel *(Contd.)*

ed on special grounds 9 M I A 539 (604)—2 W. R. (P. C.) 31 ; 11 I. A. 197—11 C. 186 ; 20 I. A. 183—21 C. 3 ; I. C. L. J. 46—27 A 37 ; 28 A 241, referred to.

A stranger promoting, litigation or assisting a suit, does not make him bound by the judgment. His being an agent or attorney or aiding any party does not estop him from impeaching the judgment, but where he is so identified in interest with one of the parties, that he might have been a party himself and might have participated in the conduct of the proceedings, and where, as a matter of fact, though not on the record, he has taken a direct interest in the institution and progress of the suit, has actually controlled the proceedings, examined witnesses, and preferred an appeal, he may be estopped by the judgment quite as much as the party on the record. 25 A 300; 60 Am Dec 575 referred to.

A judgment against a former *shebait* is binding upon succeeding *shebaits*, who, in fact, constitute a continuing representation of the idol's property 2 I A 145 (152)—14 B L R 450—23 W R 253, referred to.

S. 138 of the Code of Civil Procedure is a safeguard to prevent fraud by the tardy production of suspicious documents and not to shut out formal evidence beyond suspicion, such as certified copies of public documents like records of Government or judicial procceedings.

If a document has been received and acted upon a Court of appeal ought to be very slow to interfere with the exercise of discretion by the original Court 13 M I A 77--12 W R 32 (P C) referred to.

If the question reduces to one of law upon facts admitted or proved it is not only competent to the Court but expedient in the interest of justice to entertain the plea of adverse possession; the plaintiff may be allowed to succeed on a title by adverse possession pleaded, for the first time, in the Court of appeal, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. 28 I. A 81 (88)—24 M. 387 referred to.

The effect of a statute of limitation must be determined with reference to the actual state of the title when time begins to run, and when the time has once commenced to run against the absolute owner, no subsequent alteation in the title will stop it.

Excepting the cases of succession a *debutter* estate, during the incumbency of a female trustee, resides in her as fully and effectually as it does in a male trustee and in such a case, the male trustee who succeeds reversionary heir, cannot claim the benefit of the Art. 141 of the Limitation Act.

If the title of the true original owner has been completely extinguished by adverse possession, even if he should re-acquire possession, he is not thereby remitted to his original title. 11 B. L. R. 237 ; 21 A. 204 ; 1 F and

Estoppel *(Contd.)*

F. 27=27 L. J. Ex 297; 21 W. R. 693 (Eng), referred to. LILABATI MISRAIN *v.* BISHUN CHOBEY, **6 C. L. J. 621.**

75 *Partition decree--Mortgagee no party, if bound---Mortgagee takes no advantage of judgement---Estoppel.*

Held that the judgment and decree in a partition suit to which a prior mortgagee is not made a party, are not binding upon the mortgagee (1) 12 W R 362; (2) 4 C 692 (3) 8 A 324; (4) 22 C 364; (5) 152 U S R 301; (6) 130 Fed. Rep. 152; (7) 121 Fed. Rep. 874; (8) 75 Fed. Rep. 929, followed.

In such a case he cannot take advantage of any finding in the said judgment. The estoppel must be mutual 19 W. R 114 relied upon. SURJA PROSAD THAKUR *v.* RAJMOHAN TOPEDAR, **8 C. L. J. 478.**

(31) LANDLORD AND TENANT.

76 Building—Presumption as to permanent tenancy—Confusion of boundaries. 5 C. W. N. 846 Col. 233 P. II.

77 *Denial of landlords title by tenant—Landlord and Tenant—Lease—Tenant for a term of years—Suit for recovery of possession—Tenant to surrender possession after expiry of lease—Estoppel.*

A tenant is estopped from denying the title of the landlord who lets him into possession.

Where a tenant entered into possession under a lease granted to him by the landlord and during the period of his tenancy nothing occurred which could be treated as an ouster of the tenant so as to operate as a determination of the lessor's rights as they stood at the date of the lease by him to the tenant.

Held, that even apart from the right of the landlord under the covenant to recover possession at the expiry of the term of the lease, the tenant was bound to surrender at the expiry of the term. BANKALA VITTIL USMAN KOYA *v.* CHIDNIAMOK KAUSA AKOTH, **15 M. L. J. 368.**

78 Denial of landlords title by tenant—Benami purchase—Revenue sale. 28 M. 526 Col. 18 P. II.

79 Denial of landlords title by tenant—Essentials of—Entry as tenant. 4 B. L. R. 964 Col. 2057 P. I.

80 *Denial of landlords title by tenant--Pleading.*

The rule that a tenant is estopped from denying title of his landlord applies only to the title of the landlord who lets the tenant in. If the tenant did not obtain possession from a person who was only recognised as landlord either by express agreement or by attornment or former acknowledgment by payment or rent, he may always show that his conduct was due to mistake or ignorance of facts relating to title, misrepresentation or fraud. 3 Bing. 474 relied on. KETU DAS *v.* SURENDRA NATH SINHA. **7 C W N 569.**

80 (a) Denial of landlords title by tenant—Amendment of plaint. 7 C W N 575

Estoppel *(Contd.)*

Col. 212 P. I.

81 Encouragement of another by landlord lay out money on his land under an expectation. 28 C 693 Col 329 P II.

82 *Patta, objection to—Landlord and tenant—Suit for rent—" Indefiniteness"—Estoppel by conduct of tenant.*

A clause in a *patta* providing that, in the event of the tenant raising wet cultivation on dry land with *Sircar* water, he should pay increased rent according to the rent of the neighbouring wet lands, is not bad for indefiniteness. There is a material distinction between the power of the Court in dealing, in suits under S. 8 or S. 9 of the Rent Recovery Act, with questions which have not been settled by contract or specifically provided for by law and its power when dealing with a litigation arising out of a contract constituted by an accepted *patta*. In determining objections founded on the alleged uncertainty of a term in a contract, the test is not whether the term is in itself certain but whether it is capable of being made certain. A provision in a *patta*, that the customary fees payable by the tenant for the services of the village accountant and other public servants of the village would be summarily recovered and charged with interest if in arrear, is not an improper term. *Semble*, that a tenant may be estopped from objecting to the terms of a *patta* where he has accepted pattas containing similar terms for a series of years previously in respect of the same holding and has by his conduct led the landlord to suppose that the *patta* would not be objected to.—SREE SANKARACHARI *v.* VARADA PILLAI. **13 M L J 429=27 M 332.**

83 Patta, objection to—Patta in the name of tenants—Vendor—Delivery in pass years—Objection for the first time. ZAMINDAR OF ETTIYAPURAM *v.* SANKARAPPA REDDIAR. **27 M 483.**

See Madras Rent Recovery Act (VIII of 1865) S. 7, 38, 39, 40 and 78.

84 *Purchase by landlord of a non-transferable holding in execution—Previous mortgage—Estoppel—Evidence Act (I of 1872), S. 115.*

In execution of a money decree, the landlords of a non-transferable occupancy holding purchased the holding after it had been mortgaged by the tenants in favour of a third party.

Held, that in a suit by the latter to enforce the mortgage, the landlords were not estopped from setting up the defence that the holding was not transferable without their consent.

That the sale of the holding by the landlords did not amount to a representation that it was transferable without their consent, but only that it was transferable with their consent.

That the landlords did not merely purchase the equity of redemption, the English law of mortgage not being applicable to the case.

The law of estoppel in this country is contained in S. 115 of the Evidence Act (a). BIBI ASMATUNNESSA KATUN SAHEBA *v.* HARENDRA LAL BISWAS. **8 C L J 29=C W N 721.**

85 Raiyatwari Tenure — Right of occupants 13 M. L. J. 262 Col. 1830 P. I.

86 *Tenants—Transferee's right to question landlord's title—Estoppel—Ejectment suit.*

In a suit in ejectment by a landlord against the tenant and his transferees on the expiry of the terms of the tenancy, the transferees are precluded from pleading any other right that they may have to possession of the lands (*viz.*, that he is a member of the same Tawazhi as that of the plaintiff). PARATTAHATH KUNHI MAYAN *v.* PARATTAHATH MUHAMMAD. **16 M. L. J. 351.**

87 Tenant alleging that landlord only a benamidar. 141 P. R. 1906 = 13 P. W. R. 1907 Col 243 P. I.

88 Tenure, sale of — Sale subject to payment of arrears of rent. 6 C. W. N. 877 Col. 118 P. II.

89 Representation by landlord — Rule of equity. 7 B. L. R. 27 = 29 B. 580 Col. 239 P. I.

90 Vesting of interests of lessor and lessee in lessor — Patni lease. 28 C. 744 Col. 727 P. I.

(32) MINORS.

91 Compromise by guardian—Compromise of uncertain rights by guardian on behalf of minor. 15 M. L. J. 494 Col. 489 P. II.

92 *Minor—Estoppel by conduct.*

The guardian of the minor lived at Gaya, and the minor at Shahabad. The latter went about collecting rents for himself and he also put in a petition to the Court that he was over eighteen years of age and asking to be allowed to manage his own affairs.

Held, that the Minor was estopped even through his guardian from suing again for rents which had already been paid to the minor. RAM RATTAN PERSHAD *v.* SHEO NANDAN SINGH. **6 C.W.N. 132=29 C. 126.**

93 Representation by infant as to his age —Discretion of Court. 30 C 539 Col. 255 P. I.

94 His statement as to age—Duty of Court, parties and pleaders, 3 B. L. R. 535 Col. 697 P. II.

(32) (a)—MISREPRESENTATION.

95 Matter of law—"Mokurari Istamrari, construction of. 30 C. 883 Col. 153 P. I.

(33) MISTAKE.

96 Certainty of estoppel—Temple to receive assessment—Mohini arrangement Government by. 14 M. L. J. 379 Col. 936 P. I.

(34) MORTGAGE CASES.

97 Co-mortgagors remark—Endorsement on mortgage by the plaintiff that he was co owner in the property moratgaged and that he consented to the mortgage. 4 B. L. R. 25 Col. 648 P. II.

98 Construction—Mortgage of a Taluka

Estoppel *(Contd.)*

as hustobudi--The nature of security for plaintiff's loan. 9. C. W. N. 710 Col 221 P. I.

99 *Mortgage decree--Execution-sale—Sale of property not included in the decree—No objection by judgment-debtor—Private sale by heirs of judgment-debtor—Rights of purchasers inter se*

One P mortgaged half of his share in a certain property to one G, who brought a suit on the mortgage and obtained a decree for sale of the share included in the mortgage. But owing to some mistake or over sight, the entire share of P was put up for sale and was purchased by one B, who was a stranger to the parties. The sale was confirmed in the presence of the parties and a certificate of sale was granted to B, who obtained possession and the usual *dakhil kharij* proceedings took place. The judgment-debtor P, though he had full knowledge of all these proceedings raised no objection. After the death of P, his heirs sold to H the half of P's share in the property which was not included in the mortgage and H brought this suit against B to recover possession of the property so sold to him.

Held that H could not be regarded as a *bona fide* purchaser, inasmuch as if he was not already aware of the facts connected with the sale to B, he could have easily ascertained them by making enquiries as to how B came to be in possession. So, in equity, he was not entitled to succeed against B, who purchased the property apparently in good faith.—BALDEO PRASAD *v.* FAKHR-UD-DIN, **27 A. 62.**

100 Mortgage by alienee of talukdar. 26 B. 757. Col. 222 P. II.

101 Mortgagor pleading Registrar's want of jurisdiction to register. 31 C. 146 Col. 298 P. II.

102 *Mortgage--Prior and puisne mortgages--Estoppel.*

In 1887 *B.* mortgaged the land in suit to *K.* who in the same year mortgaged his mortgagee rights together with other properties to *N.* A further charge was created by *K.* in 1890, by a mortgage which also included some of lands held by *K.* in ownership by purchase. *N.* having sued on his mortgages of 1887 and 1890, obtained a decree in 1896 against *K.* personally as well as against the mortgaged properties. In execution of his decree *N* applied for attachment and obtained prohibitory orders under section 268 of the Civil Procedure Code, which enjoined *K* from recovering the mortgage money from *B.* until further orders. *N.* further obtained attachment orders under section 276 of the Civil Procedure Code. *B.* with the leave of Court mortgaged in 1896 the land in suit to *N.* In 1902 *K* brought a suit for recovery of possession of mortgaged land in the mortgage executed in his favor in 1887. *N.* pleaded that the suit was barred by limitation and on the ground of acquiescence and estoppel *B.* in his application for leave to make a private alienation of property to satisfy the decree of *N.* had admitted the mortgage in favor of *K.*

Held, that the suit was not barred by limitation, for under section 19 of the Limitation Act, the application for leave to mortgage made by *B.* operated as an acknowledgment of *K.*'s right and saved limitation.

Held, also, that *K.* was estopped from questioning the mortgage of 1896 or setting up his prior mortgage rights as a mortgagee against *N.* as he had led *N.* to believe that the mortgage of 1896 was proper and acceptable to him. KANSHI RAM *v.* BADDA. **23 P L R 1906.**

103 *Prior and subsequent mortgagees—Sale in a suit by subsequent mortgagee, prior mortgagee no party—Prior mortgagee bidding at sale without mentioning his own incumbrance—Subsequent suit for sale by prior mortgagee—Estoppel:—*

A prior mortgagee sued for sale or foreclosure. The principal defendant was a puisne mortgagee. The defendant obtained a decree for sale without making the prior mortgagee a party. The property was put up for sale as free from incumbrances: the plaintiff bid at the sale, but made no mention of his own mortgage, and the property was purchased by one *R. C.* The plaintiff then sued on his mortgage and got a decree for foreclosure, but failed to obtain possession. *Held*, that the plaintiff was estopped by his own conduct in bidding at the sale in execution of the defendant's decree without disclosing the existence of his own mortgage from disputing *R. C.*'s purchase.—MAUJI RAM *v.* MOHAN SINGH. **1907 A. W. N. 278; 4 A. L. J. 709.**

104 *Mortgage--Suit for sale of mortgaged property—Sale proclamation notifying property to be sold subject to mortgages subsequently proved invalid—Auction purchaser's liability to pay mortgagor the amount covered by such incumbrances.*

In the sale proclamation issued in execution of a decree for sale of the mortgaged property it was notified that there were two previous mortogages existing on the property. The Court gave permission to the decree-holder to bid at the auction on her representation that on account of the heavy incumbrances bidders might not come forward. The decree holder purchased at the sale, which was subsequently confirmed, 8 out of 9 villages put up for sale. The two mortgages notified in the proclamation were afterwards declared invalid by Courts, the decree holder and another person, purchaser of the 9th village, got possession without having to discharge the incumbrances which had been notified in the sale proclamation. Thereupon the plaintiff who had become entitled to the proprietary rights in the villages brought the present suit against the representatives of the decree-holder, purchaser, and another suit against the purcheser of the 9th village to compel them to pay to him, as unpaid purchase money the sums which the invalid mortgages had purported to secure.

Estoppel *(Contd).*

Held by *Stanlay C. J.* and *Blair J.* (Burkitt J. *dissenting*) that it seemed impossible to hold that the auction purchaser who admittedly intended to buy the property in dispute subject to two mortgages which were specified in the sale proclamation could successfully claim to have purchased an unincumbered estate and the plaintiff was entitled to recover from the purchasers such amount of the mortgage debt secured by the previous mortgages as was proportionate to the value of the property the equity of redemption of which had been purchased.

Per Burkitt J. that the purchaser took the risk of having to pay for those incumbrances, if valid, and as they turned out to be void there was no reason why she should be compelled to discharge them. INAYAT SINGH *v.* IZZAT-UN-NISSA BEGAM. **A. W. N. 1904 P. 174=27 A. 97 (F. B.)**

105 Prior mortgagee no party to a suit on a subsequent mortgage. A. W. N. 1905 P. 263—28 A. 249 Col. 1792 P.I.

106 *Redemption—Prior mortgagee's right to compel puisne mortgagee to redeem whole—Estoppel by defence raised in the previous case.*

By a mortgage of 1879 and a subsequent agreement, *S* became the mortgagee in possession, for 12 years of a 4 annas share of *K.* and an 8 annas share of B. in two villages. *K.* mortgaged in 1888 his 4 annas share for 30 years to the plaintiff, who redeemed the mortgage of 1879 and took possession of both shares. *B.* mortgaged his 8 annas share to the defendant, in 1897, who then sued the plaintiff for redemption of that share on the payment of the amount due on it under the mortgage of 1879, The plaintiff insisted on the defendant redeeming the whole share of 12 annas, and the defendant's suit was dismissed. In 1899, the defendant brought another suit for redemption of both shares, obtained a decree and took possession. In 1901, plaintiff sued for redemption of the 4 annas share of *K* only, on payment of the amount due on it under the mortgage of 1879, but offered to redeem the share of *B.* also. The defendant did not accept the offer.

Held. that the plaintiff was entitled to redeem *K's* 4 annas share. JAWAHIR SINGH *v.* BALDEO BAKHSH SINGH, **10 O. C. 193 (P. C.)**

107 *Redemption—Construction of mortgage deed—Compound interest—Maintenance—Enhanced Revenue—Arrears of rent—Accounts filed in previous suit for possession—Estoppel—Recovery of costs whether a point could for the first time be raised in Privy Council—Practice.*

A mortgage deed, provided "that in case of default in payment by me of instalments of interest at the time herein appoined, the mortgagee shall have immediately on such default, power either to recover the whole of his principal, interest, and further interest on the said interest according to the rate herein fixed......or the said mortgagee shall, in default of payment of the instalment or instalments of interest aforesaid, take possession of the mortgaged property."

Held, by their Lordships agreeing with the Lower Appellate Court that the mortgagee was not entitled to compound interest, since he entered into possession of the mortgaged property.

Held also that, under the mortgage deed in this case, the mortgagee was entitled to get from the mortgagor, over and above the usufruct of the mortgaged property, the amount paid by him on account of maintenance and enhanced Government revenue.

The mortgage deed also provided that "whenever after the term of the mortgagee or during the said term pay to the mortgagee in any month of Jeth, the whole of the mortgage money, and the whole of the interest together with Government revenue, arrears of rent and *takavi* advances, due from tenants, and other expenses incurred under the terms of this document, without raising any objection of law, such as limitation, etc.; I, the mortgagor, shall have power to redeem the mortgaged property,"

Held agreeing with the lower Courts that the mortgagee was entitled to recover from mortgagor arrears of rent due from tenants, even when such arrears were statute-barred as against the tenants.

The mortgagee sued the mortgagor, alleging that at the date of the suit there was due to him a sum of Rs. 33,087-13-3 and, paying for a decree for possession of the property, or, in the alternative, for recovery of that sum further interest. A Commissioner appointed to make up the accounts reported that Rs. 330,87—9—8 were due to the mortgagee at the date of the suit. The Court in giving judgment, held, that there was no necessity for passing an order as to the amount due under the mortgage bond saying that the account was correct, and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It was contended by the mortgagee, in a subsequent suit brought against him by the mortgagor for redemption of the mortgaged property, that the decree in the previous suit must be accepted as setting the amount due to the mortgagee on the date of that suit.

Held, by their Lordships, adopting the conclusion of the Lower Appellate Court, that nothing had occurred in the previous suit to raise an estoppel against the mortgagor, and, therefore, he might in the subsequent suit, show, if he could, that, under the terms of the deed compound interest was not payable.

In the absence of any provision in that behalf, in the mortgage deed, the mortgagee was not entitled to recover costs of previous suit

Held, also that a point not taken by a party

Estoppel *(Contd.)*

before either of the Lower Court was not open to it, at the time of the hearing of the appeal before their Lordships. MUHAMMAD NASEEM v. MIRZA MUHAMMAD ABBAS KHAN. **10 B. L. R. 126 (P. C)**

108 *Redemption—Mortgage—Clog on equity of redemption.*

The mortgagor mortgaged the property with possession, and the deed contained the usual *gahan lahan* clause. The mortgagor failed to pay within the stipulated period, and about a year after his failure the parties made up an account of the mortgage, and it was agreed that the mortgagor should sell the property to the mortgagee. The mortgagor paid Rs. 10 or 12 to the mortgagee for costs of repairs, and the mortgagee continued in possession as owner. They acted upon that understanding for several years.

The District Judge held that this fresh transaction extinguished the mortgage and passed the property to the mortgagee as purchaser.

Held, that the view of the District Judge was wrong, as there was no bargain independent of the mortgage.

It cannot be contended in such a case that the principle of either estoppel or acquiescence concludes the mortgagor and bars his right to redeem.

The mortgagee cannot, at the moment when he is lending his money and taking his security, enter into an agreement, the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent and independent of the original bargain. KANHYA LAL BHIKARAM v. NARHAR LAXAMANSETH. **5 B. L. R. 140 =27 B. 297.**

109 Redemption suit –Sale of mortgaged property for arrears of government revenue. 25 A. 371 Col. 311 P. II.

110 Redemption—Mortgage—Occupancy rights. 5 B. L. R 652 Col 216 P. II.

(35) NEGOTIABLE INSTRUMENTS.

111 Essence of negotiable instrument in good faith, meaning of. 8 B. L. R. 921 Col. 531 P. II.

(36) OATHS

112 Whether oath taken in a previous proceeding in a conclusive evidence is a susequent one. 33 C. 386 Col. 386 P. II.

(37) OBJECTION TO JURISDICTION.

113 Lower courts decision to dispose of the case Suit under valued. 15 M. L. J. 487 Col. 760 P.I.

114 Trial by a Judge having powers of a small cause court. 25 B 417 Col. 1341 P I.

115 No transferability of holding after confirmation of sale. Knowledge of Judgement-debtor—Confirmation of sale—Suit for recovery of possession by Judgement. 9 C. W. N. 972 Col. 1032 P. I.

116 To right to appeal—On family property—Hindu Law—Maintenance—Widow's right to maintenance. A. W. N. 1901 P, 207—

Estoppel *(Contd.)*

24 A. 160 Col. 391 P. II.

(38) OBJECTION TO RIGHT OF SUIT AND EXECUTION.

See Execution of decree.

(39) PARDA NASHIN LADIES.

117 Possession of widow entitled to maintenance and not to life estate. 29 C. 664 Col. 2072 P I.

(40) PARTIES IN PARI DELICTO AS TO CARRYING ON FRAUDULENT PURPOSES.

118 Decision not bad, although no district issue were raises. 15 M. L. J. 478 Col. 549 P I.

(41) PARTNERSHIP.

119 Partnership—Auction purchaser — Contrary pleadings. 3 A L J 456—28 A 681 Col 1105 P I.

120 Partnership—Lender taking profits and active interest and representing himself a partner to others—10 C W N 313 Col 376 P I.

(42) PLEADINGS BY.

121 Pleadings by—Snbsequent suit for balance of mortgage debt. 27 A 254 Col 689 P I.

122 *Pre-emption—* Lis Pendens – *Re-sale of property after filing of plaint Subsequent vendee added as defendant and plaint amended—Pre-emptor not entitled to benefit of section 52 of Transfer of Property Act, when subsequent vendee establishes preferential right. T P A (IV of 1882) S. 52.*

The plaintiff instituted a pre-emption suit against the heirs of the vendee, who had since the sale, but before the service of the summonses, re-sold the property in suit to a third party. The plaintiff amended his plaint by the leave of the Court and added the subsequent vendee as a defendant in the suit, and impeached the sale made to him as collusive and also set up his right of pre emption as against him. The subsequent vendee pleaded that he had a preferential right to pre-empt, that he had so pre empted and the sale to him was a genuine sale. The Court of first instance came to the conclusion that having regard to the provisions of section 52 of the Transfer of Property Act the plaintiff's right to pre-empt was not defeated by the sale to the subsequent vendee.

On appeal the preferential right pleaded was allowed and the suit dismissed on second appeal.

Held, that as the plaintiff had amended the plaint and made the subsequent vendee a defendant and the preferential right of the defendant was established, the plaintiff was not entitled to claim the benefit of section 52 of the Transfer of Property Act, and that the suit was rightly dismissed. MANPAL v. SAHIB RAM. **A W N 1905 P 94-27 A 544.**

123 Possession as owner of certain land withdrawn with liberty to bring fresh suit. A W N 1905 P 18. *See Easement. No 30.*

124 *Landlord and tenant-Ejectment suit—Denial of tenancy and possession Plea of want*

Estoppel *(Contd.)*

of notice to quit—Estoppel by pleading.

A defendant in an ejectment suit, who denied the plaintiff's title and the lease, alleging possession of the property in a third party, cannot contend that the plaintiff ought to have served him with a notice to quite. 1 M. L. J. 218 followed. KIZHAKKIN-YAKATH ABDULLA NAHA *v.* K MOIDIN KUTTI. **2 M. L. T. 368=17 M. L. J. 287.**

125 Objection to first Court's Jurisdiction by plaintiff in second appeal. 15 M. L. J, 487 Col. 761 P.I.

126 Trial by a Judge having powers of a Small Cause Court—Jurisdiction. 25 B. 417 Col. 1341 P. I.

(43) Pre-emption Cases.

127 Evidence Act 115 not repealed by S. 13 Punjab Laws Act IV of 1872—Waiver. 135 P. L. R. 1905 Col. 238 P. I.

128 Family property—Widowa's right to maintenance. A. W. N. 1901 P. 207—24 A. 160 Col. 391 P. I.

129 *Pre-emption in respect of mortgage—Mortgage-money fraudulently overstated—Decree on payment of amount really due—Claim by mortgagee against morgagor for refund of difference-*

The pre-emptor obtained a decree for possession by right of pre-emption in respect of a mortgage on payment of Rs. 525, the consideration mentioned in the mortgage-deed being Rs. 904. The mortgagee sued the mortgagor for refund of Rs. 379, the difference disallowed by the Court.

Held, that as it was proved that Rs. 904 was not the amount due on the mortgage, and the mortgagor and the mortgagee had joined together for the purpose of defeating the rights of pre emptor, no refund could be allowed, though the suit was founded upon a stipulation contained in the mortgage-deed to the effect that if the mortgage-money due to the mortgagee was in any way jeopardized, the mortgagee would be entitled to realize it with interest at 9 per cent. per annum. BALBHADDAR NATH *v.* SHEODIHAL. **W. N. A. 1902 p. 149=24. A. 514.**

130 *Pre-emption—Plea that a sale was in reality a gift—Estoppel—Representation.*

The pre emptor contended that the parties to a sale-deed were estopped from proving as against him that the transaction was in reality different from what it appeared to be, *held*, that before the plea of estoppel could be maintained it must be proved that the plaintiff believed the representation and brought his suit in consequence of that belief S. C. A. No. 340, 1904, 1 O. C. 75 and 20 C. 296 referred to. NAWAB BEGAM *v.* HAMID ALI. **11 O. C. 176.**

131 Vendee's explanation—Written statement. 26 P. L. R. 1903. *See No. 53 supra.*

(44) Public way, right of.

132 *Public way, Right of—Implied grant—Estoppel—Remission of revenue on land used as public way—Right of owner to claim compensation.*

Held, that the defendant by his conduct in allowing the right of way over his land to be used for a few years without objection, and in accepting remission of revenue for the portion of the land taken for the purpose, was estopped from denying the right of plaintiff or of any one else having occasion to pass over the ground so long as it was shown as a road in the village settlement, and was not entitled to claim any compensation for such user. MAHANT BHAGWAN DASS *v.* MUNSHI ABDUL HAQ, **125 P. L. R. 1902.**

(45) Record by.

133 Denying landlord's right to receive entire rent. 9 C. W. N. 928. *See Ejectment of suit No. 1.*

(46) Representation by.

134 Representation by—Real owner's right to set up his title against second purchaser. 2 A. L. J. 97 Col. 19 P. II.

135 Representation of an existing fact. Trust property. 7 B. L. R. 179 Col. 545 P. I.

136 Representation by a widow that she was competent to adopt. A. W. N. 1908 P. 231. *See Evidence Act I of 1872 S. 115 (P. II).*

137 Representation to a person knowing facts. 3 N. L. R. 72 Col. 474 P I.

138 *By representation not acted upon—Detriment :—*

Where a representation to a person is not acted upon by him to his detriment there can be no estoppel. ADVOCATE GENERAL *v.* KARAMAILY. **4 B L R 865 at 868.**

139 As to a deed—Matter of law. 30 C. 883 at 894 Col. 887 P II.

(47) Silence by.

140 Silence—Improvement by lessee while a prior lessee was entitled. 29 C. 871 Col. 569 P. I.

141 Silence when fraudulent—Defence in previous suit. 32 C. 357 Col. 238 P. I.

142 Silence by—Sale—Proclamation—Omission to state arrear of rent. 5 C. W. N. 497 Col. 1533 P. I.

143 Silence in suing not estoppel. 5 P. W. R. 1908 Col. 1872 P. I.

(48) Vendor and vendee—Title.

144 *Estoppel of vendor—Transfer of Property Act s. 41—Evidence, Act, S. 115.*

The principal of estoppel embodied in section 41 of the Transfer of Property Act, which is substantially the same as that in section 115 of the Evidence Act, implies a wilful misleading of the purchaser, by some breach of duty on the part of the owner, but mere acquiesence, on the latter's part, cannot create such estoppel. VAITHIANATHA AIYAN RAMASAWMY AIYAN *v.* KANAKU KUTTALANATHAN YELAWUDHAN. **21 T. L. R. 236.**

(49) Waiver.

145 *Execution of decree—Service inam property—Attachment—Sale of emoluments of village officers—Madras—Hereditary Village Officer Act (III of 1895), Section 5—Direction in decree for sale* ultra vires*—Estoppel—Waiver.*

Estoppel *(Contd.)*

When restrictions upon alienation by parties or attachment or sale by Court declared by law are merely for the benefit of particular persons it is open to those persons to waive the benefit introduced in their favor and on such waiver, the transfer can be given effect to, and a sale, necessary for that purpose, may take place. Also, when enactments prohibiting transfers have wider objects, such transfers are binding upon the actual individuals making the transfer, on the principle of a personal estoppel by reason of a personal interest possessedby those individuals. But when the prohibition has some object of public policy in view the rule is to enforce the prohibition literally and strictly.

Section 5 of the Madras Village Offices Act has been framed on considerations of such a policy and the prohibition contained in the section must be taken to be absolute and to deprive Civil Courts of all jurisdiction to give a direction for sale of the *inam* property specified in the section. A direction in a decree for sale of such property is altogether *ultra vires* and Courts are bound on the matter coming to their notice to abstain from enforcing the direction. RAJA OF VIZIANAGARAM *v.* DANTIVADA CHELLIAH. **M. L. J., 1904, p. 468=28 M., 84.**

146 As to notice by new negotiation—Reversal of decree by full court. 27 B. 563 Col. 752 P. I.

147 Irregularities in execution sale. 2 C L. J. 584 Col. 620 P. I.

148 As to jurisdiction in execution Break in sale—Reasonable explanation of the service. 6 B. L. R. 557 Col. 628 P I.

149 Jurisdiction—Mortgaged property situate outside Jurisdiction of court. 27 M 118 Col. 1106 P. I.

Evidence.

1 Acknowledgement.
2 Admissibility.
3 Admission of in appeal.
4 Appreciation of.
5 Award.
6 Circumstantial.
7 Collector's books.
8 Commission evidence.
9 Coecuuted cases in.
10 Co-partnership.
11 Copy of a deed.
12 Copy of deposition where witness alive and not called.
13 Custom.
14 Date of birth of.
15 Death bed attentions.
16 Divorce cases.
17 Documents.
18 Easement cases.
19 Estoppel.
20 Execution of decree cases.
21 Experts of.
22 False in part if false in whole.

Evidence *(Contd.)*

23 Gurdian and Wards Act, cases under.
24 Hindu Law. Family custom.
25 Malicious prosecutien cases.
26 Maps.
27 Market—Rate of.
28 Marriage.
26 Mode of recording.
30 Mortgage cases.
30 (a) Notice of demand before.
31 Notice of sale irregular.
32 Oath
33 Objection to admission of.
33 (a) Oral admissibility of.
34 Partition.
35 Practice.
36 Pre-emption cases.
37 Proceeding of circuit committee.
38 Pro note.
39 Rate of rent.
40 Rent receipts.
41 Revenue sale.
42 Register of Baptism.
43 Register of inventions.
44 Register of deeds.
45 Remand for.
46 Review, Sale.
47 Secondary evidence.
48 Secret trust.
49 Stamp, want of.
50 Statement of age in deposition.
51 Settlement, decisions in.
52 Settlement, entries.
53 Value of estate.

(1) ACKNOWLEDGEMENT.

1 Suit on acknowledgement—Suit on a balance of accounts - Acknowledgement of accounts on behalf of family. A. W. N. 1906 P. 185 Col. 32 P. I.

2 Under Mohamedan Law—Marraige—Doctrine of acknowledgement not a rule of evidence. MUSST BIBEE FAZILAT UNNESSA *v.* MUSST BIBEE KAMARUNNESSA. **9 C W. N. 352.** *See Mohamedan Law (Legitimacy).*

(2) ADMISSIBILITY OF.

3 *Agreement inadmissible for want of registration—Document rejecting and confirming agreement, how far admissible evidence of the agreement.*

That a transaction of long standing may be presumed to have been in all respects rightly executed or legally done, in the absence of evidence to the contrary.

When a document comprising an arrangement relating to immoveable property is inadmissible in evidence for want of registration a subsequent registered document reciting the arrangement and confirming it is admissible in evidence in proof of the arrangement. *L R 20 I A 120 followed.* JAMNA BAI *v.* DHARSEY. **4 B L R 893.**

4 Arbitration—Stating a case by arbitrators to court for opinion. 10 B L R 351 Col 893 P I.

5 Compromise—Petition registration—Agreement. 27 P R 1906 Col. 465 P I.

6 In creditors suit—Award in a partition

Evidence *(Contd.)*

dispute between family members—Relevancy against strangers. 26 M 28 Col 2132 P I.

7 *Of Identifiers reputation—Will—Proof of will—Evidence as to due execution and registration—Property obtained—Presumption as to official acts duly performed.*

The registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, are competent to act, and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will, unless it be shown that a deliberate fraud on him has been successfully committed, be presumed to be done duly and in order. A will propounded in this case was upheld as being genuine on the evidence as to due execution and registration, and on the other circumstances and probabilities of the case and the decree of the High Court, which had reversed that of the Subordinate Judge, was affirmed. Evidence of the general reputation of character of the identifiers in the Registration office was inadmissible to refute the *bona fides* of the transaction.—GANGAMOYI DEBI *v.* TROILUCKHYA NATH CHOWDHRY, **16 M L J 161=3 C L J 349=8 B L R 375 =10 C W N 522=33 C 537 (P C).**

8 Mode of proof — Objection of admissibility of evidence and mode of proof when to be taken. 9 C. W. N. 111 Col. 2042 P. I.

9 Of document — Deciding the genuineness or otherwise of document—Practice. 8 B. L. R. 973. *See Document No. 13.*

10 *Document—Admissibility of unregistered document—Purpose.*

That the registration of the leases granted being compulsory, they were not admissible in evidence for want of registration.

That exemption from registration of grants made by Government was limited by Act XXVII of 1868 to grants in reward for special services.

That S. 97 *(d)* of the Registration Act, 1871, and section 90 *(d)* of the Registration Act, 1877, manifestly exempt only grants or assignments by Government, which, under the respectively succeeding sections, are kept open to inspection and do not cover private documents purporting to be executed on behalf of minors or other private individuals.

An unregistered document inadmissible in evidence for the purpose of affecting immoveable property or of any transaction affecting such property may yet be looked to, not in any way as creating a title, or as showing a transaction that affected the property, but merely as containing a clear and exhaustive statement of the adverse possession set up by a person whose claims were admittedly limited to the rights enumerated in such document. THAKORE FATESINGJI *v.* BAMANJI A. DALAL. **5 B L R 274= 27 B 515.**

Evidence *(Contd)*

See for other facts Col. 37 P. I. and estoppel No. 6 (a)

11 Of document — Sale proclamation — Contents of—Appeal. 27 M. 259 Col. 1117 P. I.

Note. 27 M. 259 read for 26 M. 259.

12 Oral evidence—Bond—Admissibility of to show that a debt bond was an assignment of future rent. 4 C L J 402 Col 210 P. I.

13 Oral evidence—Admissibility of evidence of authority to adopt. 13 M L J 283 Col. 473 P. I.

(3) ADMISSION OF AN APPEAL.

14 Suit to set aside—Sale certificate—Defect in service, not cured by knowledge. 1 C. L. J. 550 Col. 166 P. II.

15 Fresh evidence admissible when inherent defect apparent on examining the evidence. 31 M. 114 Col. 1682 P. 1.

16 Objection in second appeal—Assignment of decree passed under s. 88 Transfer of Property Act before filing of appeal. 23 A. 331 Col. 674 P. I.

(4) APPRECIATION OF.

17 Documents compulsorily registerable and not registered — Evidence of collateral purposes. 9 B. L. R. 393 Col : 468 P. I.

18 Heading of deposition is no part of evidence and no admission. 26 A. 108 (P. C.) Col : 162 P. I.

(5) AWARD

19 Secondary evidence of, inadmissible under S. 91 Evidence Act—Award by arbitrator. 111 P. L. R. 1907 Col : 476 P. I.

(6) CIRCUMSTENTIAL

20 *Probative, force of—Inference of guilt when to be drawn.*

Per Hill, J.—It is a fundamental principle of universal application in cases dependant on circumstantial evidence, that in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. For conviction for attempt it is necessary for the prosecution to shew that the actual transaction had commenced which would, if not interrupted, have ended in the crime. If the accused had handed back the bill with the endorsement upon it that might have been sufficient to constitute an attempt. EMPEROR *v.* IMAM ALI SIRCAR. **8 C. W. N. 279.**

(7) COLLECTOR'S BOOKS

21 Collateral facts. Relevancy of—Purpose of—Rule relating to possession. 6. B. L. R. 983 Col : 152 P. I.

22 *Khasra, admissibility of entries in remarks, column of.*

Held, that entries made by the Patwari in the remarks column of the *Khasra* are admissible in evidence. 3 O. C. 204 referred to. KHALIL-UR-RAHMAN *v.* SRIPAL SINGH. **11 O. C. 195.**

23 *Mutation in the Revenue Records. Possession.*

The mere act of mutation of names in the Revenue records is insufficient to prove by

Evidence *(Contd)*

itself transfer of actual possession of the mutated land but it is some evidence of possession. JAWAHIR *v.* JAIMAL SINGH. **142 P. L. R. 1901.**

(8) COMMISSION—EVIDENCE.

24 Evidence taken on, not evidence in suit until tendered by party—Commission. I. C. W. N. 794 Col. 1605 P. I.

25 *Report of Local Commissioner—Local Commissioner appointed by incompetent Court.*

Where the decree passed by the District Judge on appeal is set aside as passed without jurisdiction and the appeal is decided by the Divisional Judge acting on the report of a local Commissioner appointed by the District Judge, *held*, that the proceedings of the local Commissioner could not be treated as evidence for purposes of decision as the authority of the local Commissioner proceeded from an incompetent Court. NUMDAR *v.* NAIM. **40 P. L. R. 1902.**

(9) CONNECTED CASES IN.

26 Legal Practitioner—Advocate—Professional misconduct—Compromise—Agreement. 33 C. 151 (P. C.) Col. 504 P. I.

(10) CO PARTNERSHIP.

27 *Co-partnership.*

It might happen that brothers managing and enjoying their shares separately, continued, with their families, to live together, and their doing so would not necessarily prove co-partnership. SHEO BAKHSH *v* AUSERI SINGH. **F. C. C. O 953 11-12 M. 1905.**

(11) COPY OF A DEED.

28 *Court copy of a title-deed not objected to when filed—Estoppel.*

The plaintiff filed a Court copy of a title-deed without objection. Objection was taken during the argument that he had not shown any of the statutory grounds for the admission of such secondary evidence.

Held, that the defendant's allowing the copy to be marked without objection would not estop him from afterwards objecting to it.

The copy should not have been marked until evidence had been given which made it receivable. KISTNA DOOS *v.* MUKTAMALA SANTANI. **3 M L T 297.**

(12) COPY OF DEPOSITION OF WHERE WITNESS ALIVE AND NOT CALLED.

29 Copy of living deponents statement inadmissible except under special circumstances. 2 A. L. J. 91 Col. 171 P. I.

30 Statement in writing by person who could have been called as a witness but was not—Report of patwari. 25 A. 143 (P. C.) Col. 171 P. I.

(13)—CUSTOM.

31 *Alienation of occupancy right—Usage of—Evidence—Transferee allowed to hold and pay rent as marfatdar—Mutation of name.*

In this case it was proved that for 15 or 16 years before suit, occupancy holdings had been transferred in the Pergunnah as also in the village, and the landlords had allowed the transferees to hold possession and pay rent as *marfatdars* and granted them receipts as such, but would not substitute their names in the *sheristha* unless some payment was made by way of *selami* or *nazar.*

Held, that the evidence was insufficient to establish a custom or local usage of transferability of occupancy holdings. SREEMUTTY KURANI DANI *v.* SAJONI KANT SINGH **12 C W N 539**

32 Keitma adoption—Burmese Law—Proof—Variation in evidence as to time of adoption, effect of. 32 C 219 Col 2045 P I.

33 Finding in favour of existence of custom based upon—Insufficient evidence as to custom. 30 A 211 Col 734 P II.

34 Impartible estate—Compromise of doubtful claim—Joint family—Self-acquired property. 23 A 203 Col 489 P II.

35 Custom, evidence. 8 O C 112, 2 C L J 20 A W N 1905 P 266, 29 M 21, 6 C L J 218, 4 A L J 792, 2 O C 281, 7 O C 131 *See Custom Evidence No 13 to 26 Col 728 to 735 P II.*

(14) DATE OF BIRTH OF.

36 *Proof of date of birth—Minority—Plaintiff having three years to sue after attaining majority Limitation Act IX of 1908 S. 7—Nature of evidence required to prove date of birth.*

Although in India it is difficult to prove fact as the date of birth after a lapse of many years, and it would be unreasonable to require such a class of evidence as would be justly demanded in a similar case in England, the evidence must yet be such as to carry reasonable conviction to the mind.

In this case on the proof of the date of the plaintiff's birth depended the question of whether or not the suit was brought within three years of her attaining majority, and it was held that the evidence was insufficient to prove the true date of her birth, and that therefore the suit was barred by limitation. NAWAB SHAH ARA BEGAM *v.* NANHI BEGAM. **11 C W N 130=1 M L T 429=5 C. L J. 4=9 B. L. R 80=17 M L J 32=29 A 29 (P C).**

(15) DEATH BED ATTENTIONS

37 *Death bed attentions, value of—Funeral expenditure—Inheritance.*

In dealing with claims to inheritance, unless it can be shown that the ordinary duties of affection or kindred have been intentionally and deliberately neglected, so as to raise a presumption of the rupture or interruption of the connecting bond, evidence referring to particulars of death-bed attentions or expenditure on the funeral obsequies may generally be passed over as of little or no importance 2 U B R (1892-1896) 184 referred to. MAUNG SEIN *v.* MAUNG KYWE. **4 L B R 291.**

(16) DIVORCE CASES.

38 Divorce—Condonation of adultery—Adultery after condonation—Costs—28 C. 221 Col. 677 P. II.

(17) DOCUMENTS.

39 Admitting in evidence—Deciding the genuineness or otherwise of documents, 8 .B

Evidence *(Contd.)*

L. R 973. *See Document No. 14.*

40 Execution of—Voluntary conveyance—Suit to set aside—Circumstances—Misjoinder of causes of action. 26 B. 577 Col. 852 P II

41 *Material alteration of a document—Addition of name as an executant—Admissibility in evidence.*

Held, that alteration in a material particular of a deed, after execution, and without the consent of the other party to such deed disentitles the party who has so altered it from seeking afterwards to enforce it. Addition of a name as one of the executants of the deed is an alteration in a material particular. KARAM ALI *v.* NARAIN SINGH. **P. Record 91 of 1900=35 P. L. R. 1901.**

42 *Material alteration of a document.*

Held, that the affixing of a stamp on an account in a *Bahi*, and the writing of words "half rupees 500" and 'Ticket one anna' on the left outside the stamp was not a material alteration of the agreement which rendered the document inadmissible in evidence. BELI RAM *v.* BHAGWAN DAS. **P. L. R. 40 of 1901.**

43 Mortgage deed—'Omni rite esse acta'—Forcloseuro suit. 2 N. L. R. 10 Col. 608 P. I.

44 Obiter remark as to—Ancient document, presumption as to—Genuineness of signature in issue. 29 C 740 Col. 192 P. I.

45 Produced after closing case but before the opposite party begins his case—Exercise of judicial discretion. 33 C. 1345. *See Discretion No. 12.*

46 Road Cess Act S. 95—Document, admissibility of, not objected to in the lower Court. 6 C. L. J. 22 Col. 92 P. II.

(18) Easement Cases.

47 Obstruction before two years—S. 568, admissibility of additional evidence on appeal-Suit for right to way. 6 C. W. N. 31 Col. 1682 P. I

(19) Estoppel.

48 Manager—Agent—Overt Act—Estoppel. 7 B. L. R. 836 Col. 2065 P. I.

(20) Execution of Decree Cases.

49 *See Execution of decree.*

(21) Experts Of.

50 *Expert—Evidence, if admissible.*

Evidence of experts or men in the trade cannot be given to show whether or not a combination is such as is calculated to deceive the purchaser. It is a question entirely for the Judge. Evidence of facts, which may assist the Judge to come to a conclusion whether one mark is a colourable imitation of another may be given. 1899 *A. C., 83 at 85, followed.* As to the old practice *L. R., 7 App. Cas, 219 referred to.* NEMI CHAND *v.* WALLACE. **4 C. L. J 268=10 C. W. N. 107.** *See for other facts Col. 794 P I*

(22) False in Part if False in whole.

51 Evidence of witnesses who have heard names of ancestrals recited—Evidence of relatives—Grounds for discrediting evidence—Mode of dealing with evidence. 32 C. 84 (P C) Col.168 P. I,

Evidence *(Contd.)*

(23) Guardian And Wards Act Cases Under.

52 Right of parties to tender evidence—Report of Collector, 4 B. L. R. 800 Col. 809 P. I.

(24) Hindu Law—Family Custom.

53 Compromise of doubtful claim-Self-acquired property. A. W. N. 1904 P. 244 Col. 489 P. II.

(25) Malicious Prosecution—Cases

54 *Want of reasonable and probable cause—Malice.*

In cases of malicious prosecution, want of reasonable and probable cause is in itself some evidence of malice.

Malicious prosecution means that proceedings which are complained of were initiated in a malicious spirit; that is, from an indirect and improper motive and not in furtherance of justice SRI NATH SHAHA *v.* L. E. RALLI. **10 C W N 253.**

(26) Maps.

55 Description in plaint—Administrative divisions—Points not raised in the first court. 3 C L J 560 Col 594 P II.

56 *Thakbust and Revenue Survey Maps, evidentiary value of—Statement recorded in the presence of parties, effect of.*

In a dispute, whether certain land belonged to the estate of the plaintiff or to that of the defendant, the plaintiff produced *thakbust* as also survey maps of the year 1852-53; the *thakbust* may contain a statement, which supported the plaintiff's case. The predecessor of the appellant defendant had full notice of the *thak* proceedings, and he objected to the boundary lines as laid between his and the plaintiff's estate, but the objection was disallowed. The defendant produced a survey map of 1855-56 of the district, which contained his estate, in support of his case, but he did not produce any *thakbust* map of the same year, and there was no evidence to support the accuracy of the survey map.

Held, that the evidentiary value of the *thakbust* map, and the survey map produced on behalf of the plaintiff, was greater than that of the survey map produced on behalf of the defendant. Jagadindra Nath Roy *v.* Secretary of State for India. I L R 30 Calc. 291; L R 30 I A 44, Syama Sundri Dassya *v.* Jagobhundhu Sooter, I L R 16 Calc. 186 and Nobo Coomar Dass *v.* Gobind Chunder Roy, 9 C L R 305, referred to. DUNNE *v.* DHARANI KANTA LAHIRI, **31 C 621.**

(27) Market Rate of.

57 Breach of contract by decree holder—Damage—Computation of. 1 L. B. R, 1900-1902 P. 262 Col. 604 P. II.

(28) Marriage.

58 *Mahomedan Law—Marriage—Legitimacy of children—Presumption.*

Under the Mahomedan Law, mere co-habitation and birth after co-habitation would not be sufficient to raise the presumption of marriage, but that co-habitation must be a

Evidence *(Contd.)*

co-habitation as man and wife and there must be a treatment tantamount to an acknowledgment of the fact of the marriage and the legitimacy of the children. *Khajah Hidayut Ullah* v. *Rai Jan Khanum* (3 M. I. A. 295) and *Ashraf-ud-dowllah* v. *Hyder Hussein* (11 M. I. A. 94) referred to. MASIT-UN-NISSA *v.* PATHANI. **A. W. N. 1904 P. 12=29 A. 295.**

(29) MODE OF RECORDING.

59 In English—Irregularity cured—Not language of the Court. 34 C. 396 Col. 1232 P. I.

60 *In English—Agreement by parties as to evidence in one suit to be treated as evidence in another—Jurisdiction of Court.*

Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way, and it is a common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used. RAMAYA *v.* DEVAPPA GANPAYA. **7 B. L. R. 642.**

61 In small cause suits—Mamorandum of substance of evidence. 9 C. W. N. 418 Col. 435 P. II.

62 In small cause suit—Recording of—Substance of evidence. 9 C. W. N. 420 Col. 1477 P. I.

(30) MORTGAGE CASES.

63 Redemption suit—Mortgage deed containing clause for forfeiture of property—Transfer of possession. 1 L. B. R. 1900-1902 P. 215 Col. 312 P. II.

(30 (a) NOTICE OF DEMAND BEFORE.

64 Forclosure proceedings—Service of notice—Demand by registered notice—Burden of proof. 63 P. L. R. 1902. *See Demand No. 1.*

(31) NOTICE OF SALE IRREGULAR.

65 Separate shares, sale of—Material irregularity—Proof of substantial injury resulting. 9 C. W. N. 343 Col. 35 P. II.

66 Separate shares, sale of—Setting aside sale—Material irregularity—Substantial injury resulting, proof of. 9 C. W. N. 348 Col. 36 P. II

(32)—OATH.

67 Whether oath taken in a previous proceeding is a conclusive evidence in a subsequent one. 33 C 386 Col 386 P I.

68 *Evidence balanced on both sides—Refusal to take oath, proposed by other party—Its effect.*

Where there is evidence on both sides, and a doubt arises as to which is the true case, a refusal to take oath may well be taken into consideration to decide the point 22 B 683 followed.

But where the Court found that the evidence for the defendant standing alone was not such that it could be safely acted on, the Court could not decide in the defendant's favour, merely because the plaintiff refused to take the oath proposed to him. KOJAKULI RANGA NAICK *v.* GURUVIYA BHATTA. **2 M L T 327.**

Ev dence *(Contd.)*

(33)—OBJECTION TO ADMISSION OF.

69 As to mode of proof—Adverse possession—Possession during submergence—9 C W N 111 Col 2042 P I.

70 Court copy of a document. 3 M L T 297. *See Evidence No 28 supra.*

71 In second appeal—Assignment of decree passed under S. 88 Transfer of Property Act before filing appeal. 23 A 331 Col 674 P I.

72 *Taken in Privy Council—Admissibility in evidence—Kursinama—Evidence Act (I of 1872) S. 32 cl. (5)—Statements by members of family as to relationship—Document admitted in first Court without objection—Objection to admissibility not allowed on appeal.*

In an application for Letters of Administration, the right of the applicants to be considered the next heirs of the deceased depended on proof that the relationship between their geat great grand-father and the great-great grand mother of the deceased was that of full brother and sister. To prove this a *kursinama*, or genealogical table, made by the ancestress of the deceased "by the pen of gomasta," and alleged to have been filled by her in 1804 in a suit to establish the same fact, and a certified copy of an *ewaznama*, or deed of exchange, dated 17th January 1782 and corroborating the *kursinama* as to the relationship, were produced by the applicants. The *kursinama* was admitted in the first Court without objection. Both documents, which were pronounced genuine and admissible in evidence by the District Judge, were held by the High Court to be forgeries :—

Held, that the *kursinama* was adimssible in evidence.

Held, also, that it was too late on this appeal to object to the admissibility in evidence of a document which had been admitted without objection in the first Court. The certified copy of the *ewaznama* was also held to be admissible in evidence. On the question of the genuineness of both documents their Lordships supported the conclusion arrived at by the District Judge, and held that the title of the applicants was established. SHAHZADI BEGAM *v.* SECRETARY OF STATE FOR INDIA. **9 B L R 1192=6 C L J 678=2 M L T 433 =34 C 1059 (P C).**

73 To irrelevant evidence—Objection as to admissibility on appeal. 28 C 142 Col 155 P I.

33 (a)—ORAL ADMISSIBILITY OF.

74 Question as to who were the parties to a contract. 18 M L J 1—31 M 45 Col 201 P I.

(34)—PARTITION.

75 *Hindu Law—Partition—Proof.*

A gift by a Hindu widow of the share of her deceased husband in family property acquiesced in by the whole family is strong evidence of separation of the members of the family. The fact that a person availed himself of the services of his collateralt in the administration of his property, at the same time that he gave them main-

Evidence *(Contd).*

tenance and paid the expenses of their marriage and other ceremonies does not raise any presumption against his separation from the family.

A deposition made by a widow to the effect that the family was joint, was considered not sufficient to establish jointness, when other evidence on record showed that separation had previously taken place. DEOKI SINGH *v. Mussammat* ANUPA. **1 M L J 96=16 M L J 109=10 C W N 838 (P C).**

76 *Hindu Law--Partition. Evidence of--Cessor of commensality.*

It is not necessary under Hindu Law that there should be a partition deed to evidence separation; it is enough if the fact of separation or rather the intention to divide appears clearly from the declarations and conduct of the parties.

A cessor of commensality is not of itself conclusive evidence of partition, but it is an element to be considered and the question in each case is—was the cessor with a view to partition in the legal sense of the word? The answer to this question must depend in each case upon its circumstances. JIVUBAI *v.* KRISHNAJI ANNAJI. **6 B L R 351.**

(35) PRACTICE.

77 *Admissibility — Evidence—Information from outside the Court.*

It is improper for a Court to receive any information of any kind in reference to a case, whether it be relevent or not, other than such as comes before it in the way which the law recognizes in the form of a legal evidence. MOHOLAL TARACHAND *v.* SANKLA KEVAL. **6 B L R 789.**

78 Appellate Court's interference in finding of fact—Evidence of collateral purposes. 9 B L R 393 Col. 468 P. I.

79 Counsels giving evidence on behalf of their clients. 9 B L R 1044 Col. 692 P. II.

80 Dismissal of case—Lease — Construction of document. 27 A. 190 Col. 538 P. II.

81 *Documents of a company--Privileged Practice—Evidence--Identification--Documents passing between a company and its officials after a threatened suit, not per se privileged.*

The documents, for which a company claims privilege, must be described sufficiently for the purpose of identification to enable the Court to order their production should the Court think right to do so. 7 Q. B. D. 430 followed.

The papers which passed between the Railway Company and its officials relating to the subject matter in dispute since the plaintiff threatened a suit are not by nature privileged. If privilege is claimed for any of them, the grounds thereof should be clearly set forth in the affidavit. NEM CHAND MANAJI *v.* R. D. SETHNA. **10 B L R 796.**

82 Judges notes of counsels address. 9 B L R 1042 Col. 690 P. II.

83 Panchnama—*Proof*

It is necessary if a *Panchnama* is to be put in that it should be legally proved, for it

Evidence *(Contd.)*

does not prove itself. EMPEROR *v.* MOTI DONGARSHET GUJAR. **7 B L R 978.**

(36) PRE-EMPTION CASES.

84 Existence or non-existence of pre-emption—Construction of document. 2 A L J 6 Col 549 P. II.

85 Neighbouring instances—Houses and shops in Mohalla Haripur and Nimwala Bazar of Jagadhri Vicinage. 39 P W R 1907 Col. 812 P. II.

86 Neighbouring instances — Barwala in Jagadhri. 51 P L R 1907 Col. 816 P. II.

(37) PROCEEDINGS OF CIRCUIT COMMITTEE.

87 Mokhasa tenure—Meaning of—Service tenure. 29 M. 52 (P. C.) Col. 417 P. II.

(38) PRO NOTE

88 Oral evidence as to written document. 28 M. 544 Col. 533 P. I.

(39) RATE OF RENT.

89 Decree by a co-sharer landlord if. 10 C W N 1084 Col. 664 P. II.

(40) RENT RECEIPTS.

90 Sub-division of holding — Grant of separate receipt by the landlord—Joinder of parties. 10 C W N 216 Col 129 P. II.

(41) REVENUE SALE.

91 Inadequate price — Separate shares—Notification of sale. 32 C. 542 Col. 37 P. II.

(42) REGISTER OF BAPTISM.

92 *Register of baptism containing statement of date of birth in evidence of age—Attestation of sale deed, when operates as estoppel.*

While a register of baptism, is evidence of baptism and of the date of it, even if it states the date of a person's birth it is no proof of the age of that person further than that, at the date of such ceremoney, the person referred to was already born. Evidence regarding the date of a man's birth has been held under certain circumstances to be admissible under S. 32 (5) of the Evidence Act. 25 M. 183 followed; but, in the case of an entry in the register in question, there is nothing to show by whom the statement entered was made much less than the person making the statement had any special means of knowledge.

Mere attestation of a sale-deed cannot always be held to work an estoppel; the principle on which the law rests is that it would be most inequitable and unjust to a person that if another by a representation made, or by conduct amounting to a representation, has induced such person to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who noted under it. Unless therefore, the representation of the party to be estopped has been really acted upon, the other party acting differently from the way in which he would otherwise have acted, no estoppel arises. The person deceived must not only believe the thing to be true, but he must also act upon such belief, "so as to alter his own previous position" and where there has been no such belief and no such action

Evidence *(Contd.)*

there can be no estoppel 4 C W N 283 and 21 A 316 followed. MR. COLLIER *v.* MRS L. BARON, **2 N L R 34**.

(43) REGISTER OF INVENTIONS

93 Suit for fringement of patent—Defence that patent wrongly granted 4. A. L. J. 11—A. W. N. 1907 P. 23 Col : 793 P. I.

(44) REGISTER OF DEEDS

(94) Registration—Agreement by plaintiff not to prosecute claim and not to execute decree. 15 M. L. J 370 Col : 461 P. I.

95 Agreement to let—Lease unregistered. 17 M. L. J. 218 Col : 419 P. I.

96 Compromise — Petition registration—Admissibility. 27 P. R. 1906 Col : 465 P. I.

97 Compromise petition—Give up a lease file in criminal cases 12 C. W. N. 854—35 C. 1010 Col : 495 P. II.

98 Document—Admissibility in evidence of compulsorily registerable unregistered document relating to immovable property for collateral purpose. P. W. R. 1906 P. 128—143 P. L. R. 1906 Col : 820 P. II.

99 Lease—Construction of document. 27 A. 190 Col : 538 P. II.

100 *Lease—Registration compulsary—Admissibility of.*

A claimed the land under one B an defendant alleged that it belonged to them as the successors in title of one D. A sought to use in evidence an unregistered, though compulsorily registrable lease, which B. had given to D. urging that the lease though unregistered was yet admissible for the purpose of showing that the possession with D. was permissive and not adverse as against B. under whom the plaintiff claimed.

Held, an unregistered instrument, of which registration is compulsory, is admissible only to prove a collateral fact, that is to say, such an instrument may be admitted in evidence for proving something independent of, or divisible, from the purpose for which the law requires registration. The admission in evidence of the unregistered lease-deed in the present case as indicating the quality of possession of the land with the alleged lessee thereunder was illegal, being in contravention of the express terms of S. 49 of the Act, because the transaction was one affecting immoveable property. NARAYAN BISNOI *v.* JASWANT SINGH. **I. N. L R. 147**.

101 Lease—Amalnama not registered and not forming lease 33 C. 402 Col : 458 P. I.

102 Lease—Primary and secondary evidence Lease and counterpart BAIDYA NATH DUTT *v.* KAMINIKANT GUPTA. **6 C. L. J 572**.

See Lease.

103 Mortgage—Subsequent registered receipt for further advance and admitting consideration of the mortgage-deed. 8 P. W. R. 1907 Col. 268 P. II.

104 Mortgage—Unregistered mortgage with implied personal convenant to repay. 4 L. B. R. 52 Col. 489 P. I.

105 Partition deed Document relating to both moveable and immoveable properties 119 P. L. R 1906 Col. 477 P I.

106 Receipt for payment of mortgage money. 39 P. R. 1904. Col 481 P. I.

107 Will—33 C. 537 *See Evidence No 7 Supra.*

(45) REMAND FOR.

108 Evidence taken by the District Court 10 B. L. R. 536=32 B. 441 Col 730 P. I.

(45) REVIEW.

109 Sale and not mortgage—Oral evidence a mortgage or a sale. 11 O. C. 95 Col. 215 P. I.

110 *Sale certificate if necessary to be filed for establishing auction purchaser—I title. Decree against landlord, if evidence against tenant.*

An auction-purchaser can establish his title by evidence independently of the sale-certificate. A sale certificate is not the title, but merely the title-deed 27 B. 379 and 5 A. 305 followed.

A person, claiming to have a proprietary right to certain lands and having a decree against other persons who set up similar proprietary right to the same lands, can produce that decree in evidence against the tenants of the latter, who were not parties to the suit in which that decree was obtained, and who do not claim independently of their landlords 25 C. 522 referred to. TANTARDHARI SINGH *v.* SUNDAR LAL MISSIR, **7 C. L. J. 384**.

(47) SECONDARY EVIDENCE.

111 Acknowledgement—Mortgage suit—26 M. 34 Col. 1774 P I.

112 Execution signing mortgage deed. Document. U. B. R. 1907 P. I. Stamp. Col. 890 P. I.

113 Mortgage deed, terms of—Redemption.—Burden of proof. 11 O. C. 285 (B) Col. 311 P. II.

114 Pro-note—Suit—Loss—Proof of contest 5 A. L. J. 162=A. W. N 1908 P. 91 Col. 200 P. I.

115 Varying terms of deed—Oral evidence to contradict compromise 41 P. L. R 1904 Col. 212 P. I.

116 Will—Presumption of revocation-Onus of proof. 31 C 885 Col 516 P. I.

(48) SECRET TRUST.

117 Effect on deed on subsequent conduct of the parties. 30 C 738 (P. C.) Col. 537 P. II.

(49) STAMP. WANT OF.

118 Post dated cheque—Duly stamped. 6 B. L. R 699 Col. 879 P. I.

119 Pro-note—Oral evidence as to contents of documents. 66 P. R. 1906 Col. 882 P I.

120 Pro-note—Impounded instrument admissible in evidence on payment of penalty. 9 B. L. R 122 Col. 883 P. I.

121 Pro-note payable in Madras—Pro note stmaped immediately after signature. 24 M. 259 Col. 341 P. I.

122 Pro-note U. B. R. 1907 P. 5. *See Evidence No. 112.*

(50) STATEMENT OF AGE IN THE HEADING OF DEPOSITION

123 25 M. 183. *See Col. 167 P. I.*

Evidence *(Contd.)*

(51) SETTLEMENT, DECISIONS IN.

124 Hills included in the boundaries of Inamdars village. 28 M. 69 Col. 2055 P. I.

(52) SETTLEMENT ENTRIES

125 Entry of a person's name at the last revision of settlement is conclusive. Fixed rate tenancy. A. W. N 1906 P. 68. *See N. W. P. Agra Tenancy Act II of 1901 S. 9.*

(53) VALUE OF ESTATE

126 Suit to set aside sale for arrears of revenue—Evidence. 6 C. W. N. 688 Col. 35 P. II.

Evidence Act (I of 1872)

1 *See Act I of 1872 (Evidence Act.) Cols. 147 to 248 P. I.*

2 S. 11 and 43—Orders recorded in a suit not inter partes, relevancy of 4 N. L. R. 129 Col. 1474 P. I.

3 *S. 13—Transactions inter alias—Jhum. cultivation outside settled estate-Compensation-Onus-Statement of facts in preamble of statute-Question of fact or law.*

When Reg. III of 1891 is applied to any lands it would confiscate proprietary rights and give compensation in exchange. Therefore the Government has to show, that the facts of any case are such that the Regulation applies thereto. The Government must prove that at the Permanent Settlement, its Officers included amongst the assets of the estate, income derived by its owners from *jhum* cultivation carried on beyond the limits of the estate.

The argument, that under the Regulations, then in force no assets not arising out of the estate could be lawfully taken into accounts and that a strong presumption was thus raised that the course which was in accordance with law was followed in a particular case, was not entertained in the face of the preamble to the Regulation which shows that in a number of cases the income of *jhum* cultivation carried on beyond the estate was rightly or wrongly taken into account. The owners of the estate proved that as early as 1837, they received *kabuliyats* from tenants carrying on *jhum* cultivation on the disputed land, that in 1842 and 1843 they succeeded in defeating an attempt on the part of persons interested in the adjoining *mouzah* to exercise rights over the land, and that on several occasions they successfully resisted proposals on the part of the Revenue authorities to settle portions of the land as *ilam* land, open for settlement.

Held, that from this and other evidence of continuous possession and enjoyment, it should be inferred that the land was included within the permanently settled estate of the owners, and the Regulation had no application to it.

The question here was in one sense a question of fact, but every point in the process of the reasoning involved considerations of law, and thus although the findings of the Courts in India were concurrent, the Judicial Committee could review such findings in appeal.

Evidence Act (I of 1872) *(Contd)*

MAHOMED ALI HAIDAR KHAN *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, **12 C. W. N. 1095 (P. C.)**

4 S. 13 —Admissibility in evidence—Judgement in previous suit. 12 C. W. N. 739 Col. 851 P. II.

5 *S. 32—Partnership—Account books and their effect—A partner can surcharge and falsify the accounts—Sleeping and the managing partners—Commissioner.*

If under S 32 of the Evidence Act account books are admitted in evidence before the Commissioner as having been kept in the ordinary course of business by person deceased, it is in the discretion of the Court to hold that they are sufficient evidence of the transaction to which the entries of the book relate without further proof, 6 B L R 50 followed.

Such books being accessible to all the partners and being kept more or less under the surveillance of them are *prima facie* evidence against each of them ; and also for any of them against the others. But they are not conclusive evidence and a person can by clear evidence show that there is an error in them A question of surcharging and falsifying accounts, must be clearly proved by the person impeaching them, and if there is any doubt it will be determined against him.

Although the law of partnership is a branch of the law of agency, yet the position of the partners *inter se* cannot be yet altered because one partner chooses to take no part in the business, nor can he acquire greater rights on that account against his partners. Managing partners are principals as well as agents and cannot be compelled to prove payments made by them in the same way as an agent.

A sleeping or dormant partner is in law a partner who is not known as such to third parties dealing with the firm. A partner who takes no part in the business may be called commonly a sleeping partner, but this term should never be used in defining the relationship of partners *inter se.* It has nothing to do with the amount of work done by an individual, as a managing partner may conduct the whole business of a firm and will yet be a sleeping partner, if he is known only as a manager to persons dealing wiih the firm. The partner who takes no active part in the business of the firm does not occupy a more favourable position as regards his partners on that account, nor is he entitled to any protection as against them. DAJI ABAJI KHARE *v.* GOVIND NARAYEN BAPAT, **10 B. L. R. 811.**

6 *Ss. 32 (2) 35—Chawkidari register, showing chakran land "made in the ordinary course of business,"*

By Reg. XX of 1817 no duty of keeping a register of *chawkidari chakran* lands is imposed on a Daroga.

Held, that from the precise and uniform character of the entries as to such lands appearing in a register kept under the Regulation there could be no doubt that they were

Evidence Act (I of 1872) *(Contd.)*

made under proper direction in the ordinary course of business though outside the statutory duty of the person who made them.

Held, also that S 35 of the Evidence Act did not cover such entries, but S. 32 (2) of the Act applied and they are admissible in evidence 25 A. 90 referred to.

The phrase "in the course of business" does not apply to any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but to business of professional employment in which the declarant was ordinarily or habitually engaged.

The "business" referred to may be of a temporary character 23 B. 63 referred to. SHEONANDAN SINGH *v.* JEONANDAN DUSADH, **13 C. W. N. 71.**

7 *S. 32 (3)—Depositions—Admissibility—Presumption—Indian Merchant Shipping Act (V of 1883)—Preliminary enquiry—Statement not challenged.*

In the course of a preliminary enquiry, held under the Indian Merchant Shipping Act of 1883, to investigate into a collision, the defendant Company being represented by their attorney, certain officers of the defendant Company made certain statements on oath.

Held, that the failure of the attorney of the defendant Company to challenge the accuracy of these statements afforded a strong presumption that the imputations against the defendant Company therein contained were correct, and on this ground among others, statements were admissible in evidence. Simpson *v.* Robinson, 12 Q B 511, R. *v.* Coyle, 7 Cox C C 76, Morgan *v.* Evans, 3 Cl. Fin. 159, Freeman *v.* Cox, L R 8 Ch. D 148, Hampden *v.* Wallis, L R 27 Ch. D 251, and Sookram Misser *v.* Crowdy, 19 W R 283, referred to. ASIATIC STEAM NAVIGATION COMPANY *v.* BENGAL COAL COMPANY. **35 C 751.**

8 *S. 32 (5)—Pedigree—Proof of—Knowledge of names of ancestors from hearing them recited on ceremonial occasions—Pedigree made post litem motam—Controversy in different matter from that which if after suit would render statement inadmissible—Document made on particular occasion for specific purpose treated as declaration—Proof of heirship—Act No. I of 1872 (Indian Evidence Act), Section 32, clause (2).*

The plaintiffs sued to recover immoveable property as next heirs, through their father, of one Gur Sahai. The principal defendant was the sister's son of Gur Sahai. On the plaintiffs' oral evidence and on certain pedigrees produced by them the Subordinate Judge was of opinion that Gur Sahai and the plaintiffs' father were descended from one common ancestor, from whom they were only seven degrees removed, and that their claim was proved. The defendant produced a pedigree which showed that Gur Sahai was descended from another ancestor than that stated in the plaintiffs' pedigree and was in the 15th degree from

Evidence Act (I of 1872) *(Contd.)*

a common ancestor, and the plaintiffs' father in the 16th degree, and he contended that under Hindu law heirship did not extend beyond the 14th degree, and that therefore he, though only a sister's son, was to be preferred to such remote relations as heir The judgment of the Court of the Judicial Commissioner on appeal, after a lengthy and adverse criticism of the plaintiffs' evidence concluded as follows: "The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that accepting the pedigree file by the appellant" (defendant) the plaintiffs are heirs of Gur Sahai, as according to it they are Samanodakas and therefore in the absence of other nearer heirs exclude the defandant, who is the son of Gur Sahai's sister."

Held that the above paragraph did not under the circumstances and for the reasons stated by their Lordships of the Judicial Committee preclude the plaintiffs from endeavouring to sustain, on this appeal the finding of the Subordinate Judge in their favour.

Held also that the pedigrees put in by the plaintiffs were not ancient family records handed down from generation to generation and added to as a member of the family died or was born; but documents drawn up on particular occasions for a specific purpose by members of the family, and were accordingly to be treated as mere declarations made by the persons who respectively drew them up or adopted them.

One of the pedigrees dated in 1892 was held by the Court of the Judicial Commissioner to be inadmissible in evidence as having been made *post litem motam*, although the controversy which originated in 1891 did not relate to the heirship to Gur Sahai but referred to an entirely different matter.

Held it was wrongly rejected as evidence. To make a statement inadmissible on the ground that it was made *post litem motam* the same thing must be in controversy before and after the statement is made.

Freeman *v.* Phillips, 4 M and S 486, In re Shrewsbury Peerage, 7 H L C 1, and Duke of Devonshire *v.* Neill, 2 Ir. L R 132, followed.

The pedigree was admissible as a declaration made by a deceased member of a family touching the family reputation on the subject of its descent.

A pedigree, also rejected by the Judicial Commissioner's Court as an inadmissible, was one signed by a deceased member of the plaintiff's family, in the handwriting of such deceased member's son, and was stated to have been obtained from his father as a statement of the family descent for the purpose being given in evidence in cer

Evidence Act (I of 1872) *(Contd.)*

tain criminal proceedings.

Held that it had been adopted by such deceased member of the family, and not being shown to be *post litem motam* it was admissible in evidence. KALKA PRASAD *v.* MATHURA PRASAD, **13 C W N 1=18 M L J 424=4 M L T 380=10 B L R 1088=8 C L J 447=5 A L J 701=11 O C 362=30 A 510 (P C).**

9 S. 35-13 C. W. N. 1. *See No. 6 supra.*

10 S. 43-4 N. L. R. 129. *See No. 2 supra.*

11 S. 51 Opinion of expert witness as to value of—Land—Evidence to be guide in ascertaining market value. GOVERNMENT OF BOMBAY *v.* MERWANJI MUNCHERJI CAMA. **10 B. L. R. 907.** *See Land Acquisition Act I of 1894 S. 23 (P. II).*

12 *S. 76—Receipt of money due to plaintiff by defendant—Liability—Sind Encumbered Estate Act XX of 1881 S. 10—Bombay Act V. of 1879, S. 176—Manager's power to recover deficit on resale of a lease by issuing a warrant of attachment.*

The Manager of Encumbered Estates has under S. 10 Act XX of 1881 power of the Collector for the purpose of recovering rents and profits due in respect of the property under his management. The Collector has also the power under S. 176, Bombay Act V of 1879, to recover a deficit on re-sale or on arrears of land revenue by issue of a warrant.

The deficit on a re-sale of a lease, being merely damages for breach of contract to take the lease, the Manager is not authorized to issue a warrant of attachment. 7 B. L. R. 1117 referred to.

Where money is recovered by the defendant which, in justice and equity, belongs to the plaintiff under circumstances which render the receipt of it, a receipt by the defendant to the use of the plaintiff, the latter is entitled to recover. 15 C. 656, 25 M. 548 referred to. BACHOMAL *v.* THE MANAGER, ENCUMBERED ESTATES IN SIND. **2 S. L. R. 20.**

13 S. 91—Agreement admissible—Oral evidence barred. 145 P. W. R. 1908-89 P. R. 1908 —*See Registration Act III of 1877 S. 17 (P. II)*

14 S. 91, 92-18 M. L. J. 1-3 M. L. T. 259-31 M 45 Col 201 No. 155 P. I.

15 *S. 92—Registration Act S. 17, cl. (b)—Variation of terms of registered deed by compromise in mutation proceedings—Admissibility.*

A co-owner executed a mortgage stipulating that the property could not be redeemed within 25 years. In the Revenue Court a co-owner of the mortgagor objected to mutation of names. The matter was compromised, and the mortgagees' names were entered in the revenue registers, and it was provided that the mortgage could be redeemed in Jeth of any year. In a suit for redemption brought within 25 years, *held*, that the compromise could not be admitted in evidence inasmuch as it purported to modify the terms of the registered mortgage, and that the terms of a registered deed of mortgage could not be varied except by a registered instrument

Evidence Act (I of 1872) *(Contd.)*

SADARUDDIN AHMAD *v.* CHHAJJU, **5 A. L J 717.**

16 S. 92, 137—Evidence to prove that person signing a pro-note signed not only as principal but also as an agent to a principal not named—Admissibility—MAX MINK *v.* SHANKAR DAS. **116 P. W. R. 1908.** *See Resjudicata.*

17 *S. 92 (2)—Formality of document.*

In considering the degree of formality of the document, the fact that it was not drawn up by a skilled lawyer is of much more importance than the fact that it was registered.

The document contained (inter alia) the following: "when any money is obtained by sale of the goods of the said mortgaged shops, it should not be paid to others in consideration of other debts, but it shall be paid to creditor, Chokalingam Chetty, in consideration of this principal and interest.

Held that this was not inconsistent with the oral agreement by which the sale proceeds, after being so paid to Chokalingam, were paid back wholly or partly to the mortgagor to enable him to replenish his stock, and by which the stock so replenished was recovered by the mortgagee.

Held, therefore, that the evidence of the oral agreement was admissible under proviso 2 to S. 92 of the Evidence Act. S. N. NACHIAPPA *v.* A. K. A. M. CHOKALINGAM, **14 B. L. R. 231=4 L B. R. 240.**

18 *S. 92 (4)—Registered partition deed—Subsequent disposal—Oral evidence—Land suit delaying suit no abandonment—Punjab Courts Act XVIII of 1884, Ss. 3 and 70 Punjab Tenacy Act XVI of 1887, S. 4—Indian Contract Act, IX of 1872, Ss. 44, 62 and 63—Admissibility of evidence in question of law S. 70 (b).*

One K having three sons B, L, and N. executed in 1892, a registered partition deed allotting certain lands in G. to B. and keeping the rest with him for L. and N & the deed was also signed by B. It further provided that this remaining property will remain in K's possession with full power of disposal until his death.

The lands reserved by K. contained also a well called Sitawala and a piece of land on Saidullahwala well at T. K applied to the Revenue authorities on 24th March 1893 for mutation of these lands in the name of B. and on third April, 1893, the Tahsildar ordered, and on 2nd May, 1893, mutation was accordingly effected. On the same 3rd April, the Tahsildar acting on another undated application of K directed mutation in B's favor of the lands at G mentioned in the said deed as given to him and was finally effected on 20th May, 1893. But no change was made in the revenue records as to the other land which remained recorded as the property of K.

This state continued until 1900, when both K and B died. B left a boy C of 15 or so who in May 1904, sued L and N for recovering possession of 10 Bighas of land at

Evidence Act (I of 1872) *(Contd.)*

G on the alleging that during his minority they wrongfully seized the land and incroporated it with their garden.

It was pleaded by L. and N. that Sitalwala and Saidullahwala wells were given to B, in exchange for 10 Bighas. To this C. replied that it was an additional gift to his father B by K.

The application of 24th March, 1893, was not forthcoming, nor the mutation proceedings based thereon stated that the said two wells were given in exchange.

Now L and N wished to prove this point by oral evidence while C. contended that S. 92, Proviso 4, barred them from doing so.

Held, by majority (Chatterji and Rattigan J J), that the agreement or grant by way of exchange in respect of the land in suit was, in point of fact, a subsequent isolated fresh trasaction relating to that property alone, after the title to it and to the rest of the land granted by the deed of 1892 had completely vested in B, and therefore amounted to a re grant of it by B to L and N and their father K, and could be proved by oral evidence.

Per Johnstone, J The evidence of the alleged exchange involves rescission or modification of the terms of the registered deed of 1892 and is therefore inadmissible. 869 P R 1883, 30 P R 1884, 14 P R 1889, 9 A 249, 11 B 672, F. by Chatterji and D. by Johnstone; 22 M 264, 26 M 195, 27 M 361, F. by Johnstone and D Chatterji 5 C W N 296 F by Johnston 62 P R 1879, R. by Chatterji; P L R (1900), 459, R. by Johnstone.

Hled, also that a suit for land falling within the definition of land given in S. 4 of the Punjab Tenancy Act XVI of 1887 is a "land suit" within S. 3 of the Punjab Courts Act XVIII of 1884. The fact that the land did not fall within this definition when the cause of action arose or some change occurred therein after institution does not make the slightest difference in the nature of the suit. 20 P R 1894, C. A. 1190 of 1906 followed 31 P R 1906 distinguished.

Held, futher, that in the absence of express abandonment there is no abandonment in Law within the period of Limitation. Of course long unexplained delay in suing is relevent in certain cases 85 P R 1892, 51 P R 1898, 43 P R 1901 followed.

Per Johnstone, J. Question of admissibility of evidence is a point of law within S. 70 (*b*) of the Punjab Courts Act, 1884.—CHOUDHRI BHAGWAN SINGH *v.* CHOUDHRI NARAIN SINGH. **129 P W R 1908.**

19 *Ss. 92, 99 extrinsic evidence fraud and collusion—Pre-emption suit whether sale or mortgage.*

By the express terms of S. 92 the barrier against extrinsic evidence is one to be used only as between the parties to the instrument, or by their representatives in interest. S. 99 expressly gives a free hand to persons who are not in the above category, and, by necessary implication when read with S. 92, gives similar freedom to the executants of documents against such strangers. The object of S. 92 is to bind an executant by his writing for the benefit of other party to the contract. Once the parties agree as to the nature and extent of their contract, S. 92 immediately goes out of the case. It exists only to control dispute between such parties or their representatives in interest. Either side may give extrinsic evidence to vary the terms of the document, if the issue regarding the real nature of the written transaction is one between the parties thereto and a third person not bound by the writing.

The moment an issue can be raised as to whether or not an apparent sale is a mortgage, or the like, it necessarily opens the field of extrinsic evidence to both parties. It is always open in a pre-emption suit for an apparent vendor and vendee, if they are agreed that there has been no real sale, to prove as against the pre-emptor, that, what seems on the face of the writing to be a sale, was controlled by some agreement which bars, or places limitations on, the right of pre-emption. Such agreement may be fraudulent and collusive, but does not prevent its being put forward as a plea, and evidence being given to prove it. If the Court finds fraud and collusion, it will, of course, relieve the pre-emptor against it. That is a matter for adjudication in each particular case. The fact that a plea may be made fraudulently or collusively is not itself any reason for refusing to admit it, or evidence in support of it. GANGABAI *v.* PANDOO. **4 N. L. R. 115.**

20 S. 105—Retirement of permanent partner from partnership—Onus of proof. 75 P. R. 1908 Col. 592 P. II.

21 S. 106—Suit for damages by legal representative of deceased person killed by accident while travelling in Railway. 4 M. L. T. 251 Col. 273 P. II.

22 *S. 108—Evidence—Presumption of Death—Onus of proof.*

Section 108 of the Evidence Act raises no presumption as to the *time* of a person's death

It is incumbent on him, who alleges that a person died at some antecedent date, to prove that fact by evidence.

Per Geidt J. The question for which provision is made in S. 108 of the Evidence Act is the question whether a man is alive or dead when the question of death is raised, and not whether he was alive or dead at some antecedent date. (1907). FANI BHUSHAN BANERJI *v.* SURJAYA KANTA ROY CHOWDHRY. **5 C. L. J. 649 = 11 C. W. N. 883 = 35 C. 25.**

23 S. 111—Burden of showing good faith where one party stands in fiduciary relationship to another. 12 C. W. N. 1102 Col. 424 P. II.

24 S. 115—Purchase by landlord in execution of money decree. Law of estoppel in force in this country. 8 C. L. J. 29 = 12 C. W. N. 721 = 35 C. 904. *See Estoppel (Land lord and tenant).*

Evidence Act (I of 1872) (*Contd.*)

25 *115—Estoppel—Adoption-Suit by adoptive mother to set aside an adoption made by her.*]

In a suit to set aside an adoption brought by the adoptive mother against her adopted son it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant; that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of it celebrated, and the defendant performed the *sradh* ceremony of his adoptive father. It was further found that the defendant had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, and that for this purpose he had incurred heavy liabilities. *Held* that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void. Thakoor Oomrao Singh *v.* Thakooranee Mehtab Koonwer, N. W. P., H. C. Rep., 1868, p. 103 A, distinguished. Sarat Chunder Dey *v.* Gopal Chunder Laha, I. L. R., 20 Cal., 296, Sukhbasi Lal *v.* Guman Singh, I. L. R., 2 All., 366, Durga *v.* Khushalo, Weekly Notes, 1882, p 97, Kannammal *v.* Virasami, I. L. R., 15. Mad., 486, Ravji Vinayakrav Jaggannath Shankarsett *v.* Lakshmibai, I. L. R., 11 Bom., 381, and Santappa *v.* Rangappaya, I. L. R., 18 Mad., 397, referred to. DHARAM KUNWAR *v.* BALWANT SINGH, **S. A. L. J. 568=4 M. L. T. 385=A. W. N. 1908 P' 231=30 A. 549.**

26 *S. 115— Transfer of Property Act. S. 6 (a)— Estoppel—Recital in a deed effect on collateral action—Transfer of chance of an hair-apparent, invalid.*

Held, that a transfer of the chance of an heir-apparent succeeding to an estate is invalid and cannot operate to transfer any interest in the property 31 B. 165, F; 31 C. 667, 13 C. 262, 10 A. 133, 29 A. 163, 10 H. L. C. 191, 19 Ch. D. 342 and L. R. 13 A. C. 523, Referred to.

Held further, that neither mutation of names nor transfer of possession can pass any title where the law requires a registered deed. 26 C. 81 referred to.

Where a distinct statement of a particular fact is made in a recital of a bond and a contract is made with reference to that recital, *held*, that the party making the statement would not be estopped from disputing the fact so admitted in an action not founded on the deed but wholly collateral to it. 14 A. and E 781, 6 H. and N. 520. R; L. R. 2, Ch. D. 72. *approving* 8 M. and W. 209 followed.

Held also, that a promise not being a representation as to an existing fact. cannot by itself be the foundation of an estoppel. BAJRANG SINGH *v.* BHAGWAN BAKHSH SINGH, **II O. C. 301.**

27 S. 115—Estoppel against a minor, misrepresentation by a minor. 5 A. L. J. 674 Col 622 P. II.

28 S. 115—Estoppel by conduct. Relief in equity—Conditions for seeking. 150 P. R. 1908 Col: 438 P. 11.

29 *S. 116—Estoppel of tenant—Where deed executed in the name of the benamidar, the real owner is the land-lord within the meaning of the section—Action on deed not maintainable by benamidar:*

Where a deed is executed by a tenant in favour of a person, *benami* for another, the real owner and not the *benamidar* is the landlord whose title the tenant is estopped from denying under section 116 of the Evidence Act, In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled. A *benamidar* as such has no right to sue unless he can show a legal right to sue under the general law. Kuthaperumal Rajali *v.* Secretary of State for India, (I. L. R., 30 Mad., 245 followed. KUPPU KONAN *v.* THIRUGNANA SAMMANDAM PILLAI. **31 M. 461.**

30 S 123, 124, 162—Courts' power to record evidence. Validity of reasons for non-production. 4 M. L. T. 317 Col: 701 P. II.

Evacuations

1—Receiver in administration suit—Purchaser at sales in execution of mortgage decree Transfer to benamidar pendente lite. 9 O. W. N. 226 col 578 P. I.

Examiners Board of

1 Duty of Board of Examiners for pleadership and Mukhtarship Examination 28 C. 479 Col. 448 P. I,

Exchange

1 Of holding Bhaooli rent shortly before return submitted—Annual value how to be assessed—Alteration in area of holdings and tenures by reason of exchange among tenant if must be specified in return—11 C W. N. 211 Col: 78 P. II.

2 *Of occupancy rights—Punjab Tenancy Act (XVI of 1887), S. 77 (3) d—Suit by a tenant for declaration that he is occupancy tenant—Jurisdiction of Civil or Revenue Court.*

Held, that S. 77 (3) d of the Punjab Tenancy Act governs a suit by an occupancy tenant of specific land for a declaration that he is occupancy tenant, having exchanged his original occupancy holding with the original occupancy tenant of the land in suit and that such a suit lay in the Revenue Court—ATTAR SINGH *v.* RALA SINGH, 139 P. R. 1906, *Civil.*

Excise Act XXII of (1881).

1 *S. 25—Sale of land in default of Excise Revenue—Prior incumbrance—Revenue Act (XVII of 1876), s. 135.*

The sale under s. 25, Act XXII of 1881, is not a sale free from all prior incumbrances. By s. 135, Act XVII of 1876, when land is sold on account of arrears of land-revenue other than the land on account of which the revenue is due, no interest save those of the defaulter alone, shall be proceeded against, and no incumbrances created or contract entered into by him in good faith shall be rendered invalid by such proceeding. BABU SINGH *v.* PATAN DIN, **3, O. C. 79.**

Excise Act XXII of (1881) (Contd)

2 *S. 28 N. W. P. Tenancy Act (II of 1901, Local), Section 177--Appeal--Suit for recovery of fees under the Excise Act—Relief for compensation joined not entertainable by the Assistant Collector--No appeal lies*

Section 28 of the Excise Act is confined to the recovery of arrears of fees. Under the section the plaintiff is not entitled to sue in the Revenue Court for recovery of compensation or damages in respect of a breach of contract.

Where, therefore, a claim for fees amounting to a sum below Rs. 100 is not entertained by the Assistant Collector, no appeal lies to the District Judge under section 177 of the Tenancy Act supplemented by section 28 of the Excise Act and no second appeal will lie to the High Court. JUGAL KISHORE *v.* MUL CHAND. **W. N., A., 1906, p. 314.**

Excise Act (Punjab) XII of 1896.

See Punjab Excise Act XII of 1896.

Excise Law—Transfer of liquor shop without cicence of illegal Contract 31 C. 798 Col. 274 P.I.

Exclusion from joint property.

See Limitation Act Art. 127.

Exclusion from inheritance.

Estate of divided deceased sister—Equal rights of elder brothers or sister on failure of younger brothers or sisters—Execution of children of brother predeceasing his divided deceased sister. 1 L. B. R. 1900--1902 P. 140 Col. 239 P. II.

See for other cases Hindu Law and Mahomedan Law.

Execution.

Of a document--What amounts to. 1 C. L. J. 126 Col. 888 P. II.

(*See Execution Assignment of decree*).

Execution of Decree.

1. Absolute decree to be made before execution.
2. Agreements concerning.
3. Application for execution.
    1. Amendment of decree.
    2. By Benamidar.
    3. Dismissal of.
4. Appeal.
5. Arbitration.
6. Assignment of decree.
7. Attachment in.
8. Certifying satisfaction in.
9. Combined decree.
10. Compromise decree.
11. Construction.
12. Continuation of proceedings.
13. Contribution,
14. Court executing decree.
15. Court Fee.

Execution of decree (Contd.)

16. Declaratory decree or decree for injunction.
17. Decree in appeal.
18. Decree to be subsisting before.
19. Deposit to take back,
20. Execution for the part decreed—Appeal as to the other part.
21. Father and son.
22. Foreclosure decree.
23. Heirs of judgment debtor.
24. Injunction decree.
25. Instalments decree.
26. Joint decree.
27. Judgment creditors duty.
28. Jurisdiction.
29. Knowledge of judgment debtor of execution proceedings his omission to object sale.
30. Limitation.
31. Manager of joint family.
32. Mesne profits.
33. Mortgage decree.
34. Obstruction.
35. Partition decree.
36. Possession-for-decree.
37. Practice.
38. Questions to be decided in execution.
39. Rateable distribution.
39. (a)—Receiver.
40. Rent decree.
41. Representative.
42. Resjudicata.
43. Restitution or Restoration.
44. Revision.
45. Revivor.
46. Sale in.
47. Security.
47. a)—Signing.
48. Simaltaneous execution in different Court and manners.
49. Small cause courts decree.
50. Stay of execution.
51. Step in aid of execution.
52. Substitution of heirs.
53. Succession application.
54. Surety's liability.
55. Transfer of dercee for execution.

1 ABSOLUTE DECREE TO BE MADE BEFORE EXECUTION.

1 Absolute decree to be made before execution—Conditional decree—Notice to opposite party in passing order, 10 C. W. N. 306 Col. 695 P. II. No.23 (306 for 206).

2 Absolute decree to be made before execution—Foreclosure decree, 8 0 C. 75 Col. 677 P. I.

3 Absolute decree to be made before execution—Decree for sale on a mortgage. 28 A. 193 Col 673 P. I.

2 AGREEMENTS CONCERNING.

4 Not to execute decree against a particular defendant. 15 M. L. J. 370 Col. 461 P. I.

5 *Superseding decree—Execution of decree—Agreement varying or satisfying decree—Sanction of Court—Mortgage-deed executed in satisfaction of decree—Discharge of decree.*

A mortgage deed was executed as an adjustment and in satisfaction of two decrees as

Execution of decree *(Contd.)*

also in consideration of a the husband was to pay his wife a monthly allowance of Rs. 44 and allot her a house near his own for her residence.

Held that the order passed under section 488, of the Criminal Procedure Code was superseded by the arrangement come to between the parties in the Civil Court. 23 *Bom* 484 *followed.* NUR MUHAMMAD *v.* AYESHA BIBI. **A. W. N. 1905 P. 57.**

6 *Made without satisfaction of court.*

Held, that the word "void" in second paragraph of section 257 A of the Civil Procedure Code means "void" for all purposes and not only for purpose of enforcing execution, and that "every agreement for the satisfaction of a judgement debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree" is void for all purposes in so far as it provides for the payment of any sum in excess of the sum due or to accrue due under the decree unless made with the sanction of the Court which passed the decree

Per Rennie, J.—That an agreement entered into between the parties to a decree in lieu of the judgment debt may be enforced as decree when it does not provide for payment of any sum in excess of the judgment debt, and the agreement is certified to the court or in other cases when sanction of the court is obtained as to its terms.

Per Robertson, J. save as provided by Ss. 206 and 210 of the Civil Procedure Code a decree can not be altered at the request of parties. If the parties desire to satisfy the decree by an agreement which does not exceed the amount of the decree they can do so, and the agreement will not be void, but unless certified, will not be noticed in the judgment debtors' favour by the executing court, but if the agreement substituted for the old decree provides for a payment of any thing in excess of the decree such an agreement shall be void for all purposes ; it will not satisfy the decree which will remain alive subject to other considerations and it will not be enforceable as a contract unless assented to by the Court. PALA MAL *v.* HARI RAM, **38 P. R. 1904**

7 To pay interest on decree. Decree of appellate court silent as to interest. 28 B. 393 Col. 320 P. I.

8 Varying or satisfying decree—Agreements sanction of Court. Execution of original decree—Limitation.

A decree was passed by the District Judge for Rs. 84,552 on the 20th October 1906. It was transferred for execution to a subordinate Judge on the application of the decree holder made on 18th October 1897. After notice was issued to the Judgement-debtor on the 18th November 1897 the parties agreed on the 5th February 1898 that satisfaction should be effected by instalments with interest. On the 16th March 1898 the Subordinate Judge recorded that the decree was satisfied. Rs. 1,500 were paid out of Court to the decree-holder. On 12th October 1900, the decree-holder applied to the Court for execution by arrest of the judgement debtor for failure to pay instalments. Questions arose whether the original decree could be executed either in its original form or as modified by agreement, or whether it had been extinguished by the substitution for it of an agreement on which a suit must be filed, and whether the application of 1900 was an application for execution of the original decree ?

Held, that the application of the 12th October 1900 must be treated as an application of the original decree, which was capable of execution. That the order recording satisfaction did not bar execution as it amounted merely to striking the execution proceedings off the register of pending cases. That the decree was kept alive by the applications of the 18th October and 18th November 1897 and the application made on 12th October 1900 was within time. That the agreement was void for the sum made payable thereunder was in excess of the decretal amount and the interest provided by the agreement could not be recorded. NAMAN RAM *v.* MUHAMMAD NAWAZ KHAN. **27 P. L. R. 1905.**

9 Varying and satisfying decree. Decrees and orders under Divorce Act. 98 P. L. R. 1902=18 P. R. 1903 Col. 2173 P. I.

10 *Modified by consent and payable by instalments. Limitation Act IX. of 1908 Art. 182.*

Where a decree is modified by order of Court, and made payable by instalments upon agreement of both the parties, time for an application to execute the decree runs from the date of failure to pay instalments agreed upon, and not from the date of the decree

Where the decree provided that upon default in paying four instalments the whole decretal amount would be recoverable,

Held, that the decree-holder could execute the decree for the whole amount when four instalments were unpaid, though they were not consecutive ones RAJA RAM *v.* HARGOPAL SINGH. **45 P. L. R. 1903.**

(3) APPLICATION FOR EXECUTION.

1 *Amendment for.*

11 Amendment of decree after rejection of appeal under S. 551 C P. Code (1882)—Mistake in decree 74 P. R. 1905 Col. 1487 P. I.

12 Amendment of—Defective application. 112 P. L. R. 1902 Col. 1158 P. I.

13 Amendment is not a step in aid of execution—Application for. A. W. N. 1905 P. 108—27 A. 575 Col. 1486 P. I.

14 Amendment to proceed agains property—Order for amendment 15 M. L. J. 243 Col. 1139 P. I.

15 Amendment of application for execution—Attachment of immoveable property. 2 A. L. J. 367 Col. 1999 P.I.

16 By assignee of property decreed. 30 A. 28 Col 1592 P. I.

17 By assignee. Fresh suit—Plaint may be treated as application for exceution. 28 M. 64 Col 1501 P. I.

Execution of decree *(Contd.)*

18 By assignee—Sale by such assignee in execution of rent decree. 1 C. L. J. 500 Col. 143 P. II.

19 By assignee—Stay of execution–Assignment of decree. 28 M. 357. Col. 1113 P. I.

20 Assignment of decree. Jurisdiction of Court passing decree. 156 P. L. R. 1905 Col. 1073 P. I.

21 Assignment of decree -Dismissal without enquiry of an application under S. 232 C. P. C. (1882), failure to appeal from. 16 M. L. J. 27 Col. 442 P. II.

22 By assignee—Order allowed to become final—Transfer of decree for execution. 28 A. 613 Col. 440 P. II.

23 By assignee. Notice to assignor and judgement debtor. 29 C. 235 Col 1501 P. I.

24 By assignee—Execution by transferee from decree holder. 14 M. L. J. 393 Col. 1502 P. I.

(2) BENAMIDAR FOR EXECUTION.

25 Benamidar's application for execution. 10 O. C. 263 Col. 2005 P. I.

26 Civil Procedure Code (1882) S. 108 applicable to execution proceedings. 3 C. L. J. 276 Col. 907 P. I.

(3) DISMISSAL OF—FOR FEES UNPAID.

27 Dismissal of for fees unpaid. Continuation of old proceedings. 5 C. W. N. 347 Col, 1998 P. I.

28 Dismissal of new attachment, Second application 2 A. L. J. 276 Col. 2000 P. I.

29 *Dismissal- Attachment whether falls through or not.*

In execution of a decree obtained by the decree holder, a certain property belonging to the judgement-debtor was attached and, in due course, it was sold. The sale, however, was subsequently set aside on the 24th September 1904. On the same date, the Court made the following order: "The sale having been set aside, the decree-holder is directed to take further steps for sale within 3 days hence. Put up on 28th September 1904, for order." On the 28th September 1904, the date fixed, the following order was recorded. "No further steps taken, dismissed." The 28th September seems to have been the last date, when the Court sat before the Dusserah vaction; and it was not till the 17th November 1904, that a petition was presented by the decree holder asking for issue of proclamation for sale of the property which had already been attached.

Held, (Ghose and *Casperse, JJ.)* That because the execution case has been dismissed by reason of no steps having been taken by the decree-holder, within a certain time limited, to bring the property to sale, the attachment that has already been put upon it does not necessarily fall through. 9 M. I. A., 324, *referred to.*

It could never have been intended, and in a case like this it is always a question of intention, that all that had been done antecedent to the order in question by way of attachment for the purpose of bringing the property to sale, must be taken to have fallen through and that the decree-holder should begin again, as if in a fresh execution-case. The decree holder is, therefore, not liable to take out a fresh attachment. GOBINDA CHANDRA PAL *v.* DWARKA NATH PAL. **33 C. 666.**

30 Dismissal of—Order dismissing application for execution without fixing a date for its disposal.—130 P. L. R. 1902 Col. 896 P. I.

31 Distinction between application and an application to take a step in aid of execution – 24 M. 188 Col. 1991 P. I.

32 By executor— Application by executor under the will of a Hindu Lady Joverned by the Dayabhaga School—Objection by her sons on Judgement debtors. 11 C. W. N. 239 Col. 442 P. II.

33 *Will—Executor. Remuneration of—*

The Probate Court in India is competent to award remuneration to an executor to whom no legacy has been left by the testator, *In re the Estate of the Late Sardar* DAYAL SINGH, MAJITHIA, DECEASED. **195 P. L. R., 1905 = 76 P. R 1905.**

4 APPEAL.

34 Auction parchase subsequentty added as respondent—Auction purchaser made respondent after institution of appeal. 2 A, L. J. 516 Col. 1362 P. I.

35 Order passed in—Second appeal against orders in execution. 10 C. W. N. 284 Col. 66 P. II.

36 Whether Appellate Court can alter effect of decree—Delivery of land standing crops—Appeal from order of execution. 3 L. B. R. 1906 P. 129 Col. 1509 P. I.

(5) ARBITRATION IN.

37 Costs question as to reffered in by agent of judgment-debtor having no express power to refer it to—Subsequent retification by principal of his agent—Reference of the question of costs to arbitration. 8 O. C. 263 Col. 456 P. II.

(6) ASSIGNMENT OF DECREE

38 Question of validity of assignment—Jurisdiction of court passing the decree. 156 P. L. R. 1905 Col. 1073 P. I.

(7) ATTACHMENT IN.

39 Application for -Ommission to verify inventory of property sought to be attached. A. W. N. 1905 P. 263 Col 1234 P. I.

40 By Courts of different grades—Attachment by several courts—Sale by court of lower jurisdiction. A. W. N. 1904 P. 161 = 27 A. 56 Col. 1164 P. I.

41 Claim to, by person other than Judgment- debtor. 118 P. R. 1907 Col 1564 P. I.

42 Suit to establish title and possession—Order passed without investigation. 87 P. R. 1904 Col. 1523 P. I.

43 *Debts of —Execution of Decree—Civil Procedure Code, s. 266—Application for attachment of debts said to be due to judgment-debtor—Denial of debts by alleged debtors.*

Where a Court is asked in execution of a decree to attach debts alleged by the decree-holder to be due by third persons to the judgment-debtor, it is no business of the

Execution of decree *(Contd.)*

Court to determine in the first instance whether the debts are really due or not, or to refuse execution if the parties alleged to be debtors to the judgment-debtor deny that they are so. But after attachment, the Court may either sell the debts after giving notice to the intending purchasers that the existence of some of them is denied by the alleged debtors, or may appoint a receiver to realize the debts by bringing suits against the debtors. MAHARAJA OF BENARES *v.* PATRAJ KUNWAR, **28 A. 262.**

44 Decree of—Appeal against attached decree—Right of parties to the decree to compromise the suit induriously affecting the right of the attaching decree-holder. 22 P. R. 1905 Col 1599 P. I.

45 Attachment of property in wife's name —Onus of proof. 17 M. L. J 339 Col. 20 P. II.

46 Of grant -- Resumption of rent free land by mistake—Grant made to compensate loss. 8 C W N 665 Col. 144 P. I.

47 Jagir of—Attachment of Jagir. Held that the Jagir called as Pattidari Jagirs. 92 P L R 1904 Col. 1162 P. I.

48 Jewels—Question relating to execution —Attachment of articles not covered by attachmehnt order. 14 M L J 295 Col. 1108 P. I.

49 Attachment of immoveable property— No discription or specification of interest— Returned for amendment. 2 A L J 367 Col. 1999 P. I.

50 *Personal decree against a Hindu widow —Execution of decree - Personal decree—Hindu widow—Only life interest liable to attachment and sale.*

Parbati Bai v. *Govinda 11 C. P. L. R 226 affirmed.*

In execution of a personal decree against a Hindu widow nothing more than her life interest in an estate inherited by her from her husbands can be attached and sold. 11 M I A 241 ; 2 I A 275 ; 16 C 511 ; 17 M 208, 2 C P L R 226 referred to. NANHO AND KASHIRAM *v.* SALIGRAM. **15 C P L R 35.**

51 *Removal of attachment sale—Attachment, removal of—Application for execution, effect of striking off—Sale after attachment, void—C. P. Code, S. 276.*

Held, that the mere fact of an application for execution having been struck off the file does not necessarily imply that the attachment has been removed, nor can such removal be inferred from the mere fact that the decree-holder erroneously applies for a fresh attachment. It is only where the execution case is struck off after a complete termination of the case and the execution proceedings are put an end to, that such an inference can be drawn.

Held, further, that this is a matter, which must be determined according to the circumstances of each case and that, under the circumstances of the present case, the attachment had not been withdrawn. RAM DAS *v.* RAM TAHAL DAS. **8 O C 152.**

Execution of decree *(Contd.)*

52 Property wrongly attached—Regular suit will lie whether there has been an application under S. 278 Civil Procedure Code or not. U B R 1901 P. 129 (C. P. C.) Col. 1520 P. I.

53 Standing crops of—Punjab alienation of Land Act (XIII of 1900) S. 2. 14 P R 1905 Col. 587 P. II.

54 Salary — Attachment of salary of a Railway Servant -Authority of Court. 30 C. 713 Col. 1511 P. I.

55 Water—Advantage rate—Pension Jagir —Khush-hais-i-yati income—Attachment of —Power of execution court—Interpretation of decree. 96 P R 1906 Col. 145 P. I.

56 *Property wrongfully attached in execution of decree—Decree-holder who wrongly attaches liable for damage.*

Applicant in execution of a decree wrongly attached certain lime belonging to respondent as the property of the judgement-debtor. The respondent got the attachment removed. While it was under attachment the lime was damaged by rain and the respondent ultimately sold it at a loss. He sued in the Court of First Instance for the difference in value. The Court gave him a decree which was upheld in the Lower Appellate Court. The applicant came up in revision on the grounds that the Lower Courts were in error in holding that by attachment ownership was divested from the owner and made over to the attaching creditor, whereas the only effect of attachment was that the custody of the property was temporarily placed in the Bailiff of the Court. It was argued that the owner remained the owner and it was therefore his business to roof the shed where the lime was and protect his own property, and if he neglected to do so, he should bear the loss.

Held, that a wrongful attachment is the direct act of the decree-holder and not of the officer of the Court, and that the decree-holder who wrongfully attaches the property of a stranger is a trespasser and wrong-doer and is responsible for all damages.

References.

O'Kinealy's Civil Procedure Code, page 440.

I. L. R. 3 Bom. page 74.

Law Reports, Privy Council, 1889-90, page 17 U. B. R. 1901 P. 7 (Execution of decree).

57 Wrongful attachment, damages for. U. B. R. 1902 P. 5 Col. 256 P. I.

(8) CERTIFYING SATISFACTION IN.

58 Satisfaction of decree payment to one of several joint decree holders. 34 P. R. 1906 Col. 1498 P. I.

(9) COMBINED DECREE UNDER Ss. 88 and 90.

59 Recovery of balance due on mortaage —Civil Procedure Code (Act XIV of 1812) S. 230—Decree for payment of money. 31 C. 792 Col 678 P. I.

(20) COMPROMISE DECREE.

60 Sale in execution of decree of such interest. 10 O.C. 136 Col. 498 P. II.

(11)—CONSTRUCTION OF DECREE.

61 Consent decree—Effect of breach of

Execution of decree *(Contd.)*

the terms of the decree on the part of plaintiff. 5 C W N 536—28 C 557 Col 337 P I.

62 *Execution of decree—Attachment of debutter property—Assignment of decree—Right of assignee to execute decree.*

A judgment-debtor cannot object to an application for execution of the decree passed against him made by one of several decree holders when the applicant states that he has obtained assignment from his co-decree-holders, and those decree-holders state in Court that they have no objection to the execution of the decree at the instance of the applicant.

Debutter property is not under the Hindu Law absolutely inalienable or altogether *extra commercium.* It can be alienated for legal necessity. And when a *Shebait* as such trespasses on the property of another and so commits a tort and he issued for this tort and cast in damages, the *debutter* property can be sold in execution of such a decree.

The parties cannot be permitted to go behind the terms of a decree. The duty of an executing Court is to execute the decree and not to alter it or enquire into the question of its propriety. KRISHNA KISSORE CHAKRAVARTI *v.* SUKHA SINDHU SANYAL. **10 C W N 1000.**

63 *Execution of decree—Construction of decree—Decree of Appellate Court affirming and adopting part or whole of decree of Lower Court, how to be construed—Appeal—*

A. and B. separately sued S. for certain sums of money. The Sub-Judge decreed the suits providing for interest at a certain rate from the date of the institution of the suits till payment. On appeal the mandatory portion of the judgment of the Judicial Commissioner's Court was as follows:—"The appeals are allowed, the decrees of the Subordinate Judge are modified, the amount decreed to A. being reduced to— and that decreed to B. to—The parties will pay and be paid proportionate costs in both Courts." The decree of the Judicial Commissioner's Court in A.'s case was, "It is ordered that the appeal be "allowed and in modification of the decree "of the Subordinate Judge dated—the "amount decreed to A. is reduced to—." A similar decree was prepared in B.'s appeal.

A. and B. respectively applied for execution claiming future interest from the date of institution of the suits to the date of payment. The judgment-debtors objected to the payment of future interest. The objection was disallowed. On appeal, *held,* that the decrees of the Judicial Commissioner had even not impliedly simply affirmed the decrees of the Sub-Judge as to payment of future interest, and the decree holders were not entitled to future interest.

Where the appellate decree simply affirms the decree appealed against, the latter may and must be referred to in order to construe the former. The same rule applies to cases in which there is a simple affirmation of a part of the decree appealed against. SALIK RAM *v* ATIK HUSAIN. **5 O C. 373.**

12 CONTINUATION OF PROCEEDINGS.

64 Application—Continuation of proceedings—7. B. L. R. 819. *See Execution of decree (31) Practice infra.*

65 *Agra Tenancy Act (II of 1901), Sch. IV. No. 47—Execution of decree—Limitation—Continuation of proceedings.*

On the 14th March 1901 a decree was passed by a Rent Court in favour of the appellants for Rs. 156-14 9. On the 13th March 1904 the appellants applied to execute the decree by attachment and sale of the moveable property of their judgment-debtors. Execution was issued as prayed. Moveable property was attached, but only a small portion of the judgment-debt was realized. On the 22nd August 1904 the decree-holders presented an application to realize the balance of the decretal amount by attachment and sale, of immoveable property belonging to the judgment-debtors.

Held, that the execution was barred by limitation, for the application of the 22nd August 1904 could not be considered an application in continuance of the previous application of the 13th March 1901.—15 M. L. J., 324 *referred to.* MOHABBAT BAHADUR LAL *v.* UDAKUNWAR3 **A. M. L. J. 324 = A. W. N. 1906 P. 97.**

66 Subsequent application for sale of the entire property—Whether in continuation of the previous application. 33 C. 689 Col : 1998 P. I.

66(a) When prior application to be considered pending. 18 L. J. 46 Col : 1994 P. I.

66 (*b*) *Application in continuation of previous proceedings.—Limitation.*

The sale of an immoveable property, which had been attached was ordered on 7th December 1903. The Amin reported on 13th Jaunary that sale could not be held as there were no bidders. The decree-holder was informed and allowed time till the 10th February to pay in fees for a fresh sale. He took no steps and the case was ordered to be struck off "for the present." On the 13th January1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold.

Held, that this was not a fresh application in execution, but merely an application to revive the former proceeding and was not barred by limitation 5 C. W. N. 347 D. 18 A. 482 R. MUJIB-ULLAH *v.* UMED BIBI **A. W N (1908). 227.**

(13) CONTRIBUTION.

67 Fresh suit—Obstruction by party to suit, not being a judgment-debtor—30 M. 72 Col : 1566 P. I.

68 Mortgage—Purchase by decree-holder one of several mortgaged proprietors—Contribution in execution not allowed. 34 C. 13 Col : 640 P. II.

69 Sale Warranting of Pitle—Caveat emp-

Execution of decree *(Contd.)*

tor. 27 A. 537 Col : 1557 P. I.

70 Transfer of decree—Execution against others—Contribution—4 A. L. J. 405=A. W. N. 1907 P. 164 Col. 2023 P I.

(14) COURT EXECUTING DECREE.

71 Duty of Court—Execution court not competent to vary decree in execution proceedings—28 C. 353. Col. 870 P. II.

72 Duty of Court—To facilitate enquiry. 4 B. L. R. 960 Col. 947 P. I.

73 Functions of—Issue of notice—Notice to surety. 29 B. 29 Col. 1370 P. I.

74 Issue of sale proclamation. A. W. N. 1901 P. 167 Col. 1531 P. I.

75 Issue of sale proclamation—Court's duty.

It is the duty of court before proceeding to set in execution of a mortgage decree to examine the mortgagor and mortgagee and ascertained whether the mortgaged property is subject to any other incumbrance. 7 C. W. N. 766=30 C. 599 at 607.

See for other facts Col. 651 and 654 P. I.

76 Issue of sale proclamation—Decree for sale of property not liable to attachment 27 A. 684 Col. 948 P. I.

77 Irregularity—Execution after attachment—Validity of further proceeding. 32 C. 1104 Col. 1514 P. I.

78 Its jurisdiction—To question validity of decree. 145 P. L. R. 1906 Col. 800 P I.

79 *Its jurisdiction.*

Held,—that a Court to which a decree has been sent for execution has not jurisdiction to execute such decree when it is in excess of its pecuniary jurisdiction as an original court 7 M. 397, 17 M. 309, 12 B. 155, 16 C. 457, and 465 P. R. 1901 P. 35 referred to. MAUNG MYAING *v.* ANAMALI CHETTY **U. B. R. 1902 P. 5** *(Execution of decree).*

80 Not to go behind decree—Injunction—Limitation. 29 M. 314 Col. 1986 P. I.

81 Power to amplify decree—1 A L J 541 Col. 1509 P. I.

82 Power of executing court in respect of uncertified adjustment in supersession of the decree. 16 M. L. J. 33 Col. 439 P. II.

83 Power to refer to judgment and award —Interpretation of decree. 83 P. L. R. 1907 Col. 145 P. I.

83 (*a*) Power to after to judgment and other documents to interpate decree. 6 P. W. R. 1908 Col. 1486 P. I.

84 Power to order demolition of construction in excess of decree. 2 A. L. J. 573 Col. 1091 P. I.

85 Power to question validity of decree. 28B. 378=26 M. 31 Col. 73 P. I.

Contra 28 C. 353, 31 C. 922.

86 *Question—Jurisdiction—Decree—Subsequent modification of terms when permissible—Decree for maintenance-Change in the circumstances of parties.*

No modification of a decree can be allowed in execution thereof on grounds not recognised in the decree itself as giving of right to such modification. The same rule applies whether the modification is claimed in applying for, or in resisting execution.

Execution of decree *(Contd).*

Where no right for modification of its terms with reference to post decreted changes in the circumstances or in the relations of the parties is reserved in a decree for maintenance, the remedy appropriate being a fresh suit, no application in execution can be made for such purpose. A separate suit can lie for the modification. 24 Bom. 386 at pages 367 and 390; 9 W. R. 152; 2 Bom. L. R., 191; 1 All. 594; 8 Mad. 94, referred to. MAHARANA RANMAL SINGJI *v.* BAI SHRI KUNDANKUMAR. **4 B L R 431=26 B. 707.**

87 Question of representation Capacity—Decree against father of Mitakshra family. 6 C. W. N. 322 Col. 1118, 1119. No. 838.

88 *Refusal to execute a decree—Jurisdiction—Court passing the decree—Executing Court.*

There is no authority for the unqualified proposition that an executing Court can refuse to execute a decree on the ground that the Court which passed it had no jurisdiction to pass it.

Balaji Vithoba *v.* Balkrishna Raoji (IX C P L R 136) followed; 11 A. 314, 17 A. 478, 4 B. 638, 15 B. 216, 17 C. 699 referred to. KODULAL AGARWALA *v.* BIHARI KURMI. **14 C. P. L. R. 1901 P. 92.**

89 Rehearing—Construction of decree. 28 C. 353 Col. 870 P. II.

90 Restitution, power of—Adjustment of Account. 6 C W N 710 Col. 21 P. I.

(15) COURT FEE.

90 (a) Court fee—Value of suit—Stamp on the plaint. 7 C. L J. 36 (P. C.) Col. 1524 P. I.

91 Court fee—Execution on payment of extra Court fee 30 M. 32 Col. 119 P. I.

16 DECLARATORY DECREE OR DECREE FOR INJUNCTION.

92 Declaratory decree—Separate suit not barred. 2 A L J 573 Col. 1091 P. I.

93 Declaratory decree whether and when executable. 17 M. L. J. 423 Col. 857 P. II.

94 Declaratory decree—Suit for declaration that property sought to be attached belongs to judgment debtor. A. W. N 1907 P. 207 Col. 445 P. II.

(17) DECREE IN APPEAL.

94 (*a*)—Restitution of property—Appeal. 35 C. 265 Col. 1136 P, I.

95 *Decree on appeal, modifying the first decree—Execution of decreee—Civil Procedure Code (Act XIV of 1882)'s. 230.*

A decree for payment of money was modified on appeal.

Held, that the decree to be executed being the decree made on appeal, the twelve years mentioned in section 230 of the Code of Civil Procedure would run from the date of the appellate decree. MAHOMED MEHDI BELLA *v.* MOHINI KANTA SAHA CHOWDHRI. **34 C. 874.**

95 (*a*)—Appeai not pressed—Terminus a quo. 30 A. 385 Col. 1997 P. I.

Execution of decree *(Contd.)*

96 *Decree by first appellate Court—Withdrawal of second appeal—Limitation.*

A applied for execution of the decree of a first appellate Court, more than three years old but within three years of the date of an order of the second appellate Court, dismissing the second appeal, as the result of an application for withdrawal of the second appeal.

Held, time began to run from the date of the order dismissing the second appeal, such order being the one finally disposing of the second appeal, and not from the date of the decree of the first appellate Court. 9 C. 100 approved and followed 22 B. 506 not followed. SADAGOPA RAMANUJA PERIYA JEEYANGAR *v.* LAKSHMI DASS. **1 M. L. T. 283 = 16 M. L. J. 393 = 30 M. 1.**

(18) DECREE TO BE SUBSISTING BEFORE.

97 *Decree to be subsisting before—Suit for possession of land—Appeal by some defendants—Decree reversed on a common ground—Second appeal, the heirs of deceased defendants, not impleaded..*

A obtained a decree for possession. On appeal by some of the defendants, the decree was reversed on a ground common to all the defendants, though all the defendants were not made parties to the appeal. In second appeal, the heirs of a certain defendant, who was not one of the appellants in the lower appellate Court and who died during the pendency of the appeal, were not brought in as respondents to the second appeal; and also the heirs of certain other defendant, who was made a respondent in the second appeal, but who died during its pendency, were not substituted on the record. In execution of the decree obtained by A in second appeal, he proceeded against the said heirs also. *Held*, that the decree on second appeal was not binding against the said heirs and, therefore, could not be proceeded against them. *Held*, also, that where an appeal was preferred by some of the defendants only and the decree of the lower Court was reversed on the ground common to all the defendants, the appellate decree inured to the benefit of all the defendants including those that had not preferred the appeal. ASIBUNNESSA BIBI *v.* WALI AHAMED CHOWDHURRY. **1 C. L. J. 144.**

98 *Existence of the decree at the time of execution—Jurisdiction of Execution Court after decree is set aside—Attachment.*

After a decree is set aside, the execution Court is not competent to take any proceedings in execution, and a renewed decree even on the same terms passed subsequently will not validate any proceedings taken by the execution Court after the decree was set aside. CHETTIATTIL MUHAMOD *v.* KUNHI KORU PUNNOLI MADHAVIAMMA *v.* AMBALI KUNHI KORU. **29 M. 175.**

(19) DEPOSIT TO TAKE BACK.

99 *Limitation—Terminus a quo—Execution of decree—Suit to recover money paid into Court under a mistaken belief on the part of the plaintiff as to his rights.*

In order to obtain the cancelment of the sale of a share in a shop sold in execution of a decree against himself and his brothers, the plaintiff paid into Court Rs. 540-11-0. The sale was cancelled. The plaintiff then applied under section 244 of the Code of Civil Procedure for repayment of the money deposited by him in Court inasmuch as the property sold belonged to him. This claim was allowed; but the decree-holder filed an appeal, and the decision of the Court below was reversed, and the amount deposited in Court by the plaintiff was awarded to the decree-holder. The plaintiff sued to recover this money from his co-judgment-debtors. *Held*, that limitation did not begin to run before the final order assigning to the decree-holder the money deposited by the plaintiff. RAM SARUP *v.* CHAJJU MAL. **3 A. L. J. 667 = A. W. N. 1906 P. 288.**

(20) EXECUTION FOR THE PART DECREED—APPEAL AS TO THE OTHER PART.

100 Decree in part—Subsequent appeal for the part not decreed. 31 P R 1907 Col 1227 P I.

(21) FATHER AND SON (HINDU LAW).

Hindu Law—Father's debt—Joint Hindu family—Suit against father and son on mortgage by father—Suit against son dimissed—Liability of ancestral property.

When a suit on a mortgage executed by a Hindu father filed against the father and his sons is dismissed as against the sons, the decree-holder can bring to sale ancestral property including the sons' shares to satisfy his decree, unless the sons prove that the debts were of such a nature that they were not bound by Hindu Law to discharge them.—W. N. A. 1906 p. 33; 3 A. L. J, 10 *referred to.* CHHANNU TIWARI *v.* DWARKA KUAR. **3 A. L. J. 433 = A. W. N. 1906 P. 137.**

101 *Father and son—Execution—Attachment during father's life time-On death of father sons legal representatives*

Where in execution of a decree against a Hindu father his share of the property is attached and the father dies subsequently, his death does not render it necessary for the decree-holder to take any steps made in the life-time of the judgment-debtor. Where an attachment had been effected, and an order for sale obtained in the lifetime of the father, execution may proceed against the sons in respect of the interest they have acquired by survivorship. Even if there had been no attachment, or a defective attachment, where a valid order for sale had been made during the life-time of the judgment debtor, the effect would be the same as that of an attachment followed by an order for sale. 7 M 369 ref to PEARI LAL SINGH CHANDI *v.* CHANDI CHARAN SINGH. **5 C. L. J. 80 = 11 C. W N. 163.**

See for other facts Col : 1100 P. I.

102 Father's debt—Liability of son for a personal decree passed against father. 27 A. 16 (F. B.) Col. 266 P. II.

103 Exparte decree against Hindu father

Execution of decree *(Contd.)*

and son, personally, on pronote executed by father alone, such decree not reversed or set aside. Competency of son to impeach decree as nullity in execution proceedings. 28 M. 26 Col. 1095 P. I.

104 *Debt of father—Joint Mitakshara family—Son impleaded after father's death—Legality of the debt impeached in execution.*

On the death of a member of a joint Mitakshara family, the son was brought on the record of a suit, as his legal representative, for the recovery of the debt due from the deceased and the Court passed a decree declining to consider the alleged immoral nature of the debt, as it did not arise in the suit against the father.

Held, that the son would be entitled to raise the question of the legality of the debt in execution proceedings. 11 C. W. N. 593 (F. B.) applied. NATHU *v.* AMIR CHAND, 147 P. R. 1907.

105 Order for substitution of the heirs of the deceased judgment debtor—31 C. 822 Col: 874 P. II.

(22) Foreclosure decree.

106 Foreclosure decree—Applicability of—S. 258 C. P. C. (1882)-44 P. R. 1906, 82 P. L. R. 1907 Col. 1496, 1497 P. I.

(23) Heirs of Judgment debtor.

106 (*a*)—By a survivor of two joint decree holders. 10 O. C. 378 Col. 798 P. I.

107 *A widow inherited a part and bought other part from another heir who subsequently obtained a decree against the estate of the deceased widow execution against the part purchased*—Res judicata.

A widow succeeded to a quarter and purchased a quarter of her husband's property. A decree was then passed against the widow for the debts of her husband for which the assets were to be liable. The decree-holder attached the share purchased by the widow. She died without making any objection.

Held, that her heirs could raise the objection that that share was not liable to sale, and that the not raising of the objection by the widow did not preclude her heirs from raising the same objection. The matter had not been the subject of a decision and was not barred as *res judicata*, although the judgment-debtor was bound to resist execution on all possible grounds. MUHAMMAD ISMAIL *v.* WAZIR ALI, **4 A. L. J.** 400.

107 (a) Personal decree against a shebait—Suit to declare that property is endowed. 12 C W N 308; 310 Col 1121, 1122 P I.

108 Omission to substitute the heirs of a defendant. 1 C L J 144. *See No 97 supra.*

24 Injunction decree.

109 Application for—Granting an injunction to abstain from particular Act. A W N 1906 P 10—28 A 300 Col 1996 P. I.

110 Execution of decree for perpetual injunction—Application for. 33 C. 306 Col. 440 P. II.

111 Injunction—Order directed to an officer of the Court. 26 B. 283 Col. 1149 P. I.

Execution of decree *(Contd.)*

(25) Instalments decree.

111 (*a*)—Issue as to payment by instalments. 10 B. L. R. 577 Col. 212 P. II.

112 Instalments remitted by money decree—Decree-holder accepting two instalments. 24 A. 85 Col. 228 P. II.

113 Instalments—Decree payable by instalments—Default in payment—Limitation. A. W. N. 1905 P 268-28 A. 249 Col. 1792 P. I.

113 (*a*)—Power to award fresh instalments. 10 B. L. R. 538 Col. 210 P. II.

(26) Joint decree.

114 Joint decree for money—Payment out of Court to one of the decree holders. 1 N. L. R. 24 Col. 439 P. II.

115 Decree passed jointly against several—Application for execution against one or more of them. 2 M. L. T. 189 30 M. 268 Col. 2022 P. I.

116 *Execution of decree against one of several partners—Only judgment-debtor's interest in the partnership attachable—Procedure to be followed in execution.*

Applicant obtained a decree against respondent Baland Khan and in execution attached a definite sum of money in deposit with the Executive Commissariat Officer on behalf of all the respondents, who were partners in a Commissariat contract. The copartners of Baland Khan applied to have the attachment removed, but the Subdivisional Court refused the application, holding that the proper course for the co partners to take was to sue for a dissolution of partnership. This course the co-partners proceeded to take and pending decision the District Judge issued an injunction to the Subdivisional Court not to pay out the attached moneys to the decree-holder till further orders. In the end the dissolution of the partnership was ordered and in his judgment the District Judge remarked that the moneys under attachment were partnership property and not liable to attachment in execution of a decree obtained against one of the partners separately on his private account. The Subdivisional Judge, acting on the remark in the District Judge's judgment, paid out moneys to the copartners on security being given by them. The present application was made in order that the District Judge's remark might be set aside or else that the Subdivisional Judge's action on the same might be set aside on the ground that the applicant was not a party to the proceedings before the District Court and ought not to be affected by the order in question.

Pointed out—that a third party has a right to attach the interest of a partner in his partnership.

Held,—that the application for attachment was, in the present case, incorrect in form. It should have prayed for the attachment of the judgment-debtor's interest in the partnership.

Held, also—that the interest attached might have been sold and it would then have been for the purchaser to dissolve

Execution of decree *(Contd.)*

the partnership. 4 B 222, 20 C 693, 13 M 447 referred to. NIZAM UDDIN *v.* TOOR KHAN ZULFIKAR KHAN AND OTHERS. **U B R 1901 P 11-13.** *(Execution of decree)*

(27) JUDGMENT CREDITOR'S DUTY.

117 *To disclose encumbrances in his favor --Duty of Judgment creditor.*

A judgment creditor bringing the property of the judgment debtor to sale, is bound to disclose all the encumbrances in his favor and to state whether such encumbrances were created before or after the attachment. If he fails to do so, he cannot afterwards sue the auction purchaser to establish the encumbrances in his favor, provided the auction-purchaser has paid full price without a knowledge of the existence of encumbrances in the judgment-creditor's favor. 12 B 678, 22 B 686, 15 M 412, 3 C P L R 15, 14 C P L R 17, 21 A 309 & 1 C 337 referred to. RANI RATAN KUAR *v.* RATIN LAL SETH MAHESARI. **2 N L R 106.**

118 *Execution by a decree-holder mortgagee —"Legally recoverable" in S. 90, Transfer of Property Act.*

A decree-holder mortgagee, purchasing after leave to bid at the sale, is in the same position as an indepeadent purchaser and is only bound to give credit to the mortgagor for the actual amount of his bid. 16 C. 132, 19 C. 4 and 18 A. 31 referred to.

If the validity of the execution-sale is not challenged in the manner prescribed by law, the judgment-debtor cannot raise the objection when the decree-holder applies for a personal decree for the balance under S. 90 of the Transfer of Property Act. 1 A. L. J. 486 referred to. PARBATI CHARAN ROY *v.* GOBINDA CHANDRA KUNDU. **4 C L J 246.**

(28) JURISDICTION.

119 Jurisdiction of Court. 5 C. W. N. 150 Col. 1072 P. I.

120 Jurisdiction of court to attach and sell property situate outside its territorial jurisdiction. 8 P. R. 1902 Col. 1071 P I.

121 Execution of decree of superior court —Jurisdiction. 9 P. R. 1901 Col. 911 P. I.

122 *Jurisdiction of Court—Additional Subordinate Judge—Bengal, N. W. P. and Assam Civil Court Act (XII of 1887), S. 17—Execution —Application for.*

A decree was made by the Court of an Additional Subordinate Judge. Subsequently another Additional Subordinate Judge was appointed.

Held, that application for execution of the decree passed by the former Additional Subordinate Judge must be made to the permanent Subordinate Judge. TARA CHAND MARWARI *v.* RAM NATH SINGH, **4 C. L. J. 473.**

123 Order of Court without jurisdiction—Consent of parties. 9 C. W. N. 956 Col. 68 P. II.

124 Transfer of jurisdiction—Court which passed the decree. 17 M. L. J. 417=31 M. 537 Col. 1072 P. I

(29) KNOWLEDGE OF JUDGMENT DEBTOR OF EXECUTION PROCEEDINGS, HIS OMISSION TO OBJECT

125 Knowledge of Judgment debtor. 9 C. W. N. 972 Col. 1082 P. I.

(30) LIMITATION

126 Absolute order—Limitation, pendency of application. 1 M. L. T. 291=16 M. L. J. 503 Col. 673 P. I.

127 Acknowledgment—Step in aid of execution—Part payment of principal. 28 M. 40 Col. 1786 P. I.

128 Acknowledgmnet of liability saves limitation of application for application of rent decree not exceeding Rs. 500 3 C. L. J. 347 Col 1776 P. I.

128 (a) Appeal—Withdrawal of Appeal. 87 P. L R 1908 Col 2008 P. I.

129 Application for revision—Date of decree--Limitation. 8 P. R. 1905 Col. 2009 P. I.

130 Application in accordance with law. A. W. N. 1905 P. 136=27 A. 625 Col. 674 P. I.

130 (a) Application for execution of amended decree. 10 O. C. 22 Col. 2150 P. I.

131 Application not in accordance with law does not give fresh start for limitation. A. W. N. 1005 P. 132=27 A. 619 Col. 2012 P. I.

132 Application by mother as next friend of her son wrongly described as minor, not in accordance with law to save limitation 1 M. L. T. 113 Col. 2004 P. I.

133 Application not accompanied by copy of the decree. 31 B. 162 Col. 2006 P. I.

134 Disability—Applying for execution more than three years from last application. 1 N. L. R. 180 Col. 1747 P. I.

135 Disability—Effect of minority of one of several judgment creditors. 27 A. 67 Col. 1746 P. I.

136 Initial disability—Minority—29 B. 68 Col. 1747 P. I.

137 Disability of some of joint decree-holders—Minority. 9 O. C. 269 Col. 1742 P. I.

138 *Disability—Insanity of decree-holder --Limitation--Execution of decree--Limitation Act (XV of 1877), Section 7, 8, Schedule II, Article 179*

Held, that the insanity of the decree-holder which began after passing of the decree did not save limitation which had commenced to run.

The release of the judgment-debtor for failure to deposit subsistence money cannot serve as a starting point of limitation. AYA SINGH *v.* GURDIAL. **72 P L R 1905.**

139 Application for execution of time for payment of mortgage amount—28 M. 211 Col. 2021 P. I.

140 Application for resale of mortgaged property. 1 O. C. Sep 11 Col. 1356 P. I.

141 Application for—To wrong court—Jurisdiction. 5 C. W. N. 150 Col. 1767 P. I.

142 Appeal by some of the judgment-debtor—Agreement in adjustment of decree. 5 O. C. 217 Col. 2001 P. I.

Execution of decree *(Contd.)*

143 Appeal against—By one of the mortgagors—Limitation—A W N 1905 P. 155 Col. 2005 P. I.

144 Agreement for instalments-Construction of order. 5 C. L. J. 25 Col. 436 P. II.

145 Date of decree—Limitation 8 P. R. 1905 Col. 2009 P. I.

146 Delivery of possession—Suit by purchaser from Judgement creditor. 25 B. 358 Col. 1971 P. I.

147 Effect of remand—Suspension of execution by order of Court. 3 A. L J. 8—A. W. N. 1906 P. 27 Col. 2003 P. I.

147 (a) One decree-holder a minor—Extention of time. 7 C. L. J. 308 Col 1744 P. I.

148 Payment out of Court and not certified. 26 A. 36 Col. 1790 P. I.

149 Revivor—Test—Limitation—Continuation of prior proceedings. 7 B. L. R. 819 *See No. 191 infra.*

See also 5 C W. N 347 Col. 1998 P. I. and 1 A. L. J 350 Col 120 P. I.

150 *Revivor—Execution of decree—Res judicata—Continuation of previous application—Application struck off—Petition for attachment of property—No prayer for sale—Continuation of attachment—Objection on appeal—Power of Executing Court.*

The dismissal of an application in execution proceedings will operate as *res judicata* when such dismissal is consequent upon an adjudication of the right litigated between the parties.

The fact that the dismissal of the decree-holder's application was consequent not only upon the adjudication of the right litigated but also upon the ground that in execution proceedings he could not seek for relief by way of declaration as in a regular suit cannot entitle the parties to re open in further execution proceedings the question of right thus adjudicated upon.

An order merely striking a petition off the files is legally inoperative as a disposal of the petition.

In an execution application under Section 235, Civil Procedure Code, there need be no prayer for sale in addition to the prayer for attachment.

An attachment which has been validly made by a Court creates a real charge in favour of the attaching creditor, and cannot cease merely because the land attached is transferred from the jurisdiction of the Court which attached it to another Court, or because the Court to which decree was sent for execution certifies that it is unable to complete the execution of the decree.

When application for execution prays sale of property already attached and attachment and sale of movable and other immovable properties, the application, so far as it prays for sale of property already attached, should be treated only as a continuation of the execution petition filed previously on which attachment was ordered.

An objection raised for the first time in appeal that the transferee decree-holder was not brought on record by the Court which passed the decree is inadmissible in the absence of any evidence in support of the objection. A representative of the judgment-debtor cannot object to the execution of the decree against him on the ground that he has not been brought on the record in accordance with the procedure laid down in the Civil Procedure Code when in previous proceedings no objection has been taken.

A Court to which a decree is sent for execution is competent to bring on record the representative of the judgment-debtor in case of his death before sale of property attached during his lifetime. VENKATAPPIAH AND ANOTHER *v.* JAGANNADHA RAO. 12 M. L. J. 24.

151 Part payment of decretal amount. 27 M. 608 Col. 1785 P. I.

152 Issue of notice under S. 248 C. P C. —Admission. 2 A. L. J. 67 Col. 443 P. II.

152 (a)—Issue of notice under S. 248 C. P. C. 125 P. L. R. 1908 Col. 2003 P. I.

153 Money decree—Application for execution—Admissions as to agreement requiring registration. 18 P. L. R. 1903 Col. 463 P. I.

154 Mortgaged ecree—Decree which leaves matters to be subsequently ascertained, 29 M. 46 Col : 1998 P. I.

155 Res judicata—Application struck off A. W N 1905 P. 237. *See No 208 Col : 952 P. I.*

156 Release of judgment-debtor from jail. 72 P. R. 1906. *See No. 138 Supra.*

157 Revival of first application—Appeal by some of the Defendants against portion of decree dismissed. 2. A. L. J. 276 Col : 2000 P. I.

158 Revival of first application—Application to revise former application for execution 28 A. 651 Col : 1995 P. I.

159 Revival of proceeding—Application for—Decree of rent—Limitation.

A Rent Court passed a decree on 6th March 1894. An application for execution was made on 17th February 1897. Certain immoveable property was attached with a view to sale. The Court on 27th April 1897 passed the following order:—The decree holder applies " for sale in respect to which the Government has ordered that no sale will be allowed, the record will consequently be consigned to records. " On 29th January 1898 the decree-holder presented an application praying that the execution proceedings be renewed and steps taken to sell the attached property. In second appeal held that the application of 29th January 1898 was not a substantive and fresh application for execution, but was one for the renewal or revival of the execution proceedings temporarily suspended or interrupted owing to a cause for which the decree-holder was not responsible and was therefore not barred by limitation under S. 145 Oudh Rent Act. MOHAMMAD SARFARAZ BEGAM *v.* HAR CHARAN DAS 2 O. C 110.

160 Twelve years old decree—Limitation —27 P R 1905 Col 1141 P I.

161 Twelve years old decree—Execution of decree in Court not having jurisdiction,

Execution of decree *(Contd.)*

76 P R 1904 Col 1140 P I.

161 (a) *Twelve years old decree--Execution of decree, application for, on the last day of twelve years succeeding the date of the decree --Civ. Pro. Code, S. 230.*

The applicant obtained a decree against the respondent on the 11th April, 1895. He made several applications for execution from time to time. The last application was dated the 11th April, 1907, being the last day of twelve years succeeding the date of the decree.

Held, that the application could not be granted 6 M 359 not F, 18 A 482 (489) and 21 A 155 referred to. DEOKI NANDAN *v.* SAIYED NAZIR HASAN, **11 C 57.**

161 (b) Twelve years—Application for—On the last day of twelve years from decree —5 A L J 403 Col 1992 P I.

(31) MANAGER OF JOINT family.

162 *Judgment-creditor-Money decree—Execution proceedings-Manager of the family property--Debt binding on the surviving members of joint family.*

A judgment-creditor who has obtained a simple money decree is entitled to show in execution proceedings that the decree was obtained against the judgment debtor in his capacity as manager of the family property and on account of a debt which is binding on the other members of the family. He is also entitled after the death of the judgment-debtor to proceed against the property in possession of the other members of the family. 25 *C* 521 ; 5 *M.* 125 ; 9 *A.* 142 ; 12 *A* 209 ; 6. *B* 564. 11 *C* 293 ; 13 *C.* 21 ; 15 *C.* 70 ; 20 *C.* 453 ; 26 *C* 677 ; 27 *C.* 724 ; 12 *A.* 99 ; 11 *M.* 64 ; 12 *M.* 325 ; 12 *M.* 434 ; 22 *M.* 49 ; 14 *B.* 597 ; 18 *B.* 117 ; 19 *B,* 680 ; 20 B. 338 ; 21 *B* 616 ; 22 B. 825 ; *23 B.* 372 ; 2 C. *P. L. R.* 221 ; 10 *C. P. L R.* 67 ; 5 *M.* 232 ; 13 *M* 265 ; 17 *M.* 144 ; 11 *A.* 302 ; 26 *A.* 449 : 20 *C.* 895 ; 20 *B* 385 ; referred to. KESHEO RAMCHANDRA AND OTHERS *v.* JAWAHIR AND OTHERS. **16 C P L R 1903 P. 19.**

(32) MESNE PROFITS.

163 *Decree against father for mesne profits--Execution-proceeding struck off—Attachment continued--Fresh proceeding without attachment--Death of judgment-debtor before sale --Sons and grandsons if bound.*

If an execution-proceeding is struck off, it does not necessarily put an end to the attachment.

The Court can make an order striking off an execution-proceeding and, at the same time, continuing the attachment 9 C. W. N. 601—32 I. A. 102 ; 1 C. L. J. 381, *relied on* ; 18 A. 49, *Diss.*

The Court, in striking off an execution-proceeding, ordered the attachment to subsist for three months, and before that period expired, the decree-holder made a fresh application for execution, and the Court ordered sale proclamation to issue, in respect of properties attached in the previous proceeding, but the proclamation could not be served on the judgment-debtor, a member of a joint Mitakshara Hindu family, owing to his death.

Held, that, there being a subsisting attachment followed by an order for sale made in the lifetime of the judgment-debtor, the decree-holder was entitled to proceed with the sale and realise his decree 6 I A 88 F 17 I A 194, D 12 A 440 R. PEARY LAL SINHA *v.* CHANDI CHARAN SINHA. **11 C W N 163=5 C L J 80.**

164 Mesne profits—Decree passed jointly against several--Application for execution against one or more of them. 30 M. 268 No. 1013 Col. 2022 P. I.

165 Mesne profits determined in execution. 1 A. L. J. 350 Col. 120 P. I.

166 Mesne profits--Application to ascertain how far an application in execution. 28 C 242 Col. 947 P. I.

(33) MORTGAGE DECREE.

167 Application for execution of mortgage decree after partial satisfaction by a previous execution proceeding. 3 C L J 291 Col. 2002 P. I.

168 *Application for against the successor of the judgment-debtor--Fresh suit, if necessary when successor claims by survivorship under the Mitakshara Law--Civ. Pro. Code S. 244.*

A mortgagee is entitled to execute his mortgage decree against a successor of the judgment-debtor even when he holds the property by survivorship under the Mitakshara Law, without bringing a suit for a declaration that the property in his hands is liable to be sold in execution of the mortgage decree. It is open to the successor to take the very defences in execution proceedings which he might take in a fresh suit. Misc. App. No. 7 of 1905 followed. CHANDRA PROSAD *v.* SHAM KOERI. **3 C L J 131=33 C 676.**

169 Attachment if necessary—Application for removal of attachment, 4 L B R 1907 P 82 Col. 1521 P. I.

169 (a) Decree nisi—Absolute decree. 10 B L R 1057 Col. 429 P. II.

170 Equity of redemption purchased by mortgagor—Transfer of benamidar, pendente lite. 32 C. 198 (P. C.) Col. 578 P. I.

171 Equity of redemption purchased by mortgage—Prosecution. 27 A. 97. *See Estoppel No. 104.*

171 (a)—*If mortgagee can question the sale liability of nij jote lands-Mortgage decree directing sale of nij jote lands mortgaged-Mortgagor-judgment debtor, if competent to raise the question of the saleability of jotes, in execution—Saleability or otherwise of nij jote lands, onus of proof of (Regulation III 1872), S. 11—Sonthal Pergunnahs Regulations - Settlement Court, decisions of—Suit, maintainability of.*

Where a mortgage decree distinctly provides for the sale of certain *nij jote* lands mortgaged, and directs that the mortgage-debt must be realised, in the first instance, by the sale of the mortgaged property, it is not open to the mortgagor judgment debtor to object

Execution of decree *(Contd.)*

to the execution of the decree on the ground that the *jotes* are not saleable.

The onus is not on the decree-holder, in such a case, even if it were open to the judgment-debtor to raise the question of the saleability of the *jotes* to show that the *jotes* are saleable, but on the judgment-debtor to prove that the *jotes* are not saleable.

In the absence of a decision of any settlement Court or of a decision by any Civil Court on the question of the transferability of these *jotes*, a suit for the sale of such *jotes* mortgaged does lie in the Civil Court. KARTIK SAHU *v.* NILAMBAR SINGH. **7 C. L J. 101**.

172 Money decree in mortgagee's favour. 32 C. 283 Col. 715 P. I.

172 (*a*)—Mortgage decree-holder, right to attach. 10 B. L. R. 274 Col. 715 P. I.

173 Mortgage property—Order absolute for sale. 31 C. 373 Col. 905 P. I.

173 (*a*)—Right of mortgagor not paying money on date fixed by decree against him. 3 M. L. T. 281 Col. 676 P. I.

174 Sale in excess of decreed property. 27 A. 62. *See Estoppel No. 99.*

174 (*a*)—*Sale by mortgagee of property not mortgaged, question—Civ. Pro. Code, S. 443—Guardian and Wards Act (XL of 1858), S. 3—Guardian ad litem other than the certificated guardian—Execution suit.*

A puisne mortgagee, who was not made a party to the suit of the prior mortgagee, instead of proceeding against the property sold in execution of the decree of the prior mortgagee, proceeded against other properties of the mortgagor and sold them.

Held, that it was a matter to be complained of and (if wrong) remedied in execution proceedings and not by a separate suit.

If a person, who was not a certificated guardian of the minor, was appointed a guardian *ad litem* at a time when Act XL of 1858 was in force.

Held, that the passing over of the cetificated guardian was not more than an irregularity and would not of itself vitiate either the decree passed or a sale consequent upon such decree. JOGESHWAR NARAIN *v.* LALA MOORALIDHAR. **7 C. L J. 270**.

174 (*b*)—Sale—Whether Court can sell what the judgment debtor could—Auction sale in execution of a decree of immoveable property subject to a mortgage. LUP CHAND *v.* SETH KASTUR CHAND. **7 P. W. R. 1908 =62 P. R. 1908**. *See Mortgage (General.)*

174 (*c*)—Sale—Whether Court can sell what the judgment debtor could. A. W. N. 1908 P. 49 Col. 712 P. I.

(34) OBSTRUCTION.

175 Order rejecting petition under S. 336 Civ. Pro. Code—Revision. 8 P. R. 1903 Col : 1155 P. I.

176 Execution proceedings—Resjudicata. 90 P. R. 1902 Col : 946 P. I.

177 Execution of decrees for possession—Resistence or obstruction in the execution of decree for possession 15 C. P. L. R. 1902 P. 49 Col : 1562 P. I.

Execution of decree *(Contd.)*

178 Resistence by third party—Application under S. 335 filed after limitation period. A. W. N. 1904 P. 46—26 A. 365 Col : 1562 P. I.

179 Execution of decree obstructed—Obstruction removed—Another application for execution. 28 M. 50 Col : 1991 P. I.

180 Compromise between first pre-emptor and vendee—Second suit for pre-emption by second co-sharer filed on the date of compromise. A. W. N. 1905 P. 50 Col : 662 P. I.

181 Obstruction by party to suit, not being a judgment debtor. 30 M. 72 Col : 1566 P. I.

182 Application by decree-holder for removal of obstruction to execution of decree rejected. 9. B. L. R. 936 Col. 1348 P. I.

183 Obstruction to delivery of possession by the third party in good faith 12 C. W. N. 115 Col : 1565 P. I.

(35) PARTITION DECREE

184 Application by defendant—No liability of defendant to pay court fee. 6. B. L. R. 834—29 B. 79 Col : 706 P. II.

185 Application by defendant—Right of defendant to apply for execution. 23 P. R. 1905 Col : 661 P. II.

186 Application by defendant—Partition decree. A. W. N. 1906 P. 53—28 A. 375 Col : 1152 P. I.

187 Application by defendant—Prilimінary decree—Proceedings in suit. 47 P. R. 1906 Col : 1608 P. I.

(36) POSSESSION FOR DECREE

188 Joint property—Illegal ouster of joint owner—Suit for recovery of joint possession A. W. N. 1904 P. 106—26 A. 588 Col. 352 P. II.

189 Delivery of possession—Effect as against party not effected by the decree. 27 M. 262 Col. 1961 P. I.

(37) PRACTICE.

190 *Collector's proposal disapproved of—Execution of decree—Sale of land—Jurisdiction of Civil and Revenue Courts—Revenue Circular No. 66. Defects in.*

When an arrangement proposed by the Collector under section 326 of the Civil Procedure Code does not provide for the satisfaction of the decree within a reasonable period the Civil Court should disallow the arrangement and direct the land of the judgment-debtor to be sold.

Revenue Circular No. 66 is defective, as it provides for no method of settlement where the Civil Court does not accept the proposal of the Collector. JAI BHAGWAN *v.* BUALI BAKHSH **63 P. R. 1906=121 P. L. R. 1906**

191 *Continuation of proceedings—Limitation.*

The Court looks at the substance of the matter, and if it finds that the proceedings before it can only be regarded with justice to the parties as a continuation of the original application which has never come to an end, then instead of investigating any question of limitation it holds that it is not a fresh application, but a continuation of the original application and so within time. MAHOMED

Execution of decree *(Contd.)*

ISOOFSAHEB v. BASHETAPPA. **7 B L R 819.**

192 Khatedars—Non-payment of Government assessment—Person other than the judgment debtor. 9 B L R 1018 Col. 1569 P. I.

193 *Rules to execution different in the two districts—Decree—Execution of decree—Transfer of decree from one district to another—Procedure.*

Where in different districts, different modes of execution are prescribed and where the question is how a decree passed in one, but of which execution is sought in another of such districts, is to be executed, the executing Court must be guided by the rules in force in its own district. MARTAND v. VINAYAK. **8 B. L. R. 832—31 B. 5.**

194 *Specific performance — Compromise—Execution of decree—Contract—Time not essence of the contract.*

When there is a decree, whether passed by consent or otherwise, requiring a party to execute a deed in favour of another, the proper course for the parties is to proceed regularly as if a decree for specific performance was made. Either party ought to submit a draft of the deed to be served on the other side, and the other party should be given the right to object to the terms of the draft. The Court then should settle the terms, and the party directed by the decree to execute the deed should execute and file it in Court.

Held, that the time fixed in the compromise for execution of the deed agreed upon between the parties was not of the essence of the contract. HARE KRISHNA SAMANTA v. PRIYA NATH KHAMROI. **10 C W N 345.**

(38) QUESTION TO BE DECIDED IN EXECUTION.

195 Different suits on different causes of action with regard to the same subject matter 4 C L J 211 Col : 1044 P I.

196 *Purchaser of a portion of the property charged with the payment of a decree, rights of—Liability of other properties charged, when a portion of the property sold subject to the entire charge—Proclamation of sale, entries in, effect of—Question to be decided in each case, what the Court executing the decree intended to sell.*

The appellant having purchased a decree obtained by one A. H. under which it was declared that the amount found due was to be a charge upon several properties, tried to execute it against some of the properties charged with the payment of the decree. He had also purchased one of such properties in execution of a decree held by a third person. At the time of sale it was notified that the property to be sold was subject to the charge created by the decree in favour of A. H. The appellant exempted the property purchased by him and sought to recover the amount of his charge created by the decree in favour of A. H. by sale of the rest of the property. The application was resisted on

Execution of decree *(Contd.)*

the ground that inasmuch as the appellant was, as representative of A. H. the decree-holder and also the judgment-debtor as purchaser of part of the property subject to the charge created by the decree in favour of A. H., the application for execution could not proceed ; and that inasmuch as the decree in favour of *A H* had been entered in the proclamation of sale as a charge upon the property purchased by the appellant, and the proclamation did not disclose the fact that several other properties were charged along with the property to be sold the appellant must be taken to have purchased on the understanding that the property purchased by him was subject to the entire charge.

Held, that the appellant being interested in a small portion only of the property subject to the charge created by the decree in favour af *A. H.*, was entitled to proceed against the properties charged other than the one purchased by him for so much as he may be entitled to recover from such of the properties.

Held, also, that the property purchased by the appellant could not be considered to have been sold subject to the entire charge created by the decree in favour of *A. H.* and that there was no justification for holding that the other properties charged with the payment of the decree in favour of *A, H.*, had been released from their liability. [*Inayat Singh v. Izzat-un-nissa Begam* (1) *Duli Chand v. Ram Kishore Singh* (2), *and Amir Hasan Khan v. Choudhri Hadi Hasan* (3), *referred to.*] ABDUL WAHID KHAN v. NAWAB BAQQAR ALI KHAN AND OTHERS. **10 O. C. 280.**

197 Separate suit barred—Purchase by decree-holder—Application for possession dismissed. 28 M. 87 Col : 1079 P. I.

198 Decree for sale of property not liable to attachment or sale—Objection not raised in original suit but raised against application for execution. A. W. N. 1905 P. 138=27 A. 684 Col. 948 P. I.

199 Execution proceedings—Resjudicata—Application for execution. 4 B. L. R. 960 Col. 947 P. I.

200 Question of assignment of decree—Jurisdiction of court passing the decree. 156 P. L. R. 1905 Col. 1073 P. I.

(*Note*)—*For 156 P. L. R. 1905 read 156 P. R 1905*

201 Dispute between judgment debtors—Separate suit not barred. 29 A. 207 Col. 1089 P. I.

202 *Relating to—Questions relating to the execution of a decree—Court executing the decree—Jurisdiction.*

The rule that all questions relating to the execution of a decree shall be determined by order of the Court executing the decree has no application where the Court executing the decree has itself no jurisdiction 14 C. P L. R. 14 referred to. CHAMRU SAO BANIA v. TULSIDIN SINGH. **17 C. P. L. R. 1904 P. 49**

203 Disputes—Motion for contempt—

Execution of decree *(Contd.)*

Execution of decree. 9 B. L. R. 1361 Col. 1110 P. I.

Note. For 9. B. L. R. 1361 read 9 B. L. R. 136.

203 (*a*) Disputed claim as trust property against its attachment—Decree for sale of wakf valid in certain cases. 18 M. L. J. 21 Col. 1125 P. I.

203 (*b*) Disputes—Question relating to the execution—Contest between the holder of a decree for an undivided share of joint property and an auction purchaser pendente lite. A W N 1908 P 93 Col 1106 P I.

203 *(c)* Disputes—Property dedicated to idol—Limited grant. 8 O L J 20 Col 571 P II.

203 (*d*) *Disputes—Suit for—Decree declaring wife's rights to future maintenance and residence—Effect of—Whether relief can be claimed in execution proceedings.*

In a suit for the restitution of conjugal rights a decree was passed in terms of an award between the parties. It declared the right of the husband to the restitution, and ordered the wife to return to him and live with him. It further declared that the husband should return certain ornaments to her, and it also made provision as to her future maintenance and residence.

Held that the provisions as to maintenance and residence were merely declaratory; and no relief could be granted to her in execution proceedings. MUSAMAT LACHMIBAI *v.* KANIOMAL ASSUDOMAL AND KANIAMAL ASUDAMAL *v.* MUSAMAT LACHMIBAI, **1 S. L. R. 184.**

203 (*e*) Disputes—Suit to obtain possession by assignee of auction purchaser. 5 A L J 285 Col 1098 P I.

203 *(f)* Right to recover losses and expenses contingent on an uncertain future event 2 S L R 33 Col 862 P II.

204 Suit by decree-holder for refund of purchase money, sale set aside. 27 A. 155 Col. 1080 P. I.

(39) RATEABLE DISTRIBUTION OF ASSETS.

205 Assets release in execution of decree --Attachment by court without jurisdiction. 6 P. R. 1903 Col. 1168 P. I.

206 Assets—Dismissal of application on date fixed for passing of order. 32 P. L. R. 1904 Col. 1450 P. I.

207 Assets---Judgment-debtor---Decree-holder--7 B. L. R. 567 Col. 1182 P. I.

207 (a) Right to rateable distribution—Decree-holder's representatives. 3 M. L. T. 249 Col. 1351 P. I.

208 Suit against--Rateable distribution of assets realized by sale of judgment-debtor's property. 27 A. 158 Col. 1181 P I.

209 Suit against---Attachment before judgment. 33 C. 639 Col. 1144 P. I.

210 Suit against--Rateable share of sale proceeds--Application to be made to court which passed the decree or to which it was sent for execution. 1 L. B. R. 1900-1902 P. 121 Col. 1191 P. I.

Execution of decree *(Contd.)*

211 Suit against—Death of judgment-debtor—Question with regard to assets of judgment-debtor. A W N 1905 P 184—28 A 51 Col. 1103 P. I.

212 Suit against—Execution against representative of deceased judgment-debtor. 73 P L R 1904 Col. 1124 P. I.

213 Suit against—Death of decree-holder —Right of person who has obtained succession certificate to the decretal debt. 126 P L R 1904 Col. 1503 P I.

214 Suit against—Execution against representative of judgment debtor 48 P L R 1904 Col. 1145 P. I.

215 Suit against--Execution of decree against legal representative--Transfer of decree. 28 M 466 (F B) Col. 1118 P. I.

216 Suit against—Transfer of judgment-debtor's objection. 8 O C 370 Col. 1107 P I.

39 (a) RECEIVER.

217 *Execution of decree against joint property in the hands of the Receiver--Direction by Court to decree-holders to proceed against property.*

In a suit for partition of joint family property, a Receiver was appointed to take charge of the property in suit. A decree against certain members of the family was, upon the application of the judgment-debtors, ordered to be made over to the Receiver, so that he might try to raise the amount of the decree without causing injury either to the decree-holders or to the judgment debtors. The Receiver reported that he was unable to raise the amount of the decree without selling the property of the judgment debtors. The Court thereupon ordered the decree-holders to proceed against the joint property.

Held, that that order had the effect of discharging the Receiver and that there was no bar to the execution of the decree.—RAGHUNATH NAIK *v.* GOPINATH NAIK. **A W N 1905, p. 110.**

(40) RENT DECREE.

218 Execution of decree for rent due. Third person's property sold in execution. 129 P R 1908--*See estoppel No. 37.*

218 (a) Representative of judgment-debtor--Rent decree obtained by landlord against recorded tenant. 10 C W N 240 Col. 1103 P. I.

219 Transfer of decree for execution—Grounds of transfer--Question relating to execution. 8 C W N 575 Col. 1071 P. I.

(41) REPRESENTATIVE.

220 Question relating to execution-- Judgment-debtor cannot question the effect of decree passed against him. 32 C. 265 Col. 1104 P. I.

221 Representatives of deceased judgment-debtor contending that the property attached is a trust property. Objection against attachment A W N 1906 P 157 Col. 1123 P I.

222 *Hindu Law—Religious endowment—Decree against head of mutt binds successor in execution proceedings—Decree on promissory note executed by head of mutt binds the mutt—*

Execution of decree *(Contd).*

Compromise decree, effect of—Parties to suits—Sishyas cannot be made parties.

A decree passed against the head of a *mutt* as representing the *mutt* is binding on his successor who cannot dispute the validity of the decree in execution proceedings but can do so only by a properly framed suit. Sudindra *v.* Budan, (I L R 9 Mad. 80), referred to and followed. The head of the *mutt* represents the *mutt* even when the suit is brought on a promissory note executed by him and he cannot therefore question the validity of the transaction. The binding nature of the decree in such cases is not affected by the fact that it is based on a compromise. The *sishyas* or disciples of a *mutt* are not co-owners with the head of the *mutt* and have no such interest in the *mutt* property as will entitle them to be made parties in a suit to recover property from the head of the *mutt* MANIKKA VASAKA DESIKAR *v.* BALAGOPALAKRISHNA CHETTY. **16 M L J 415=29 M 553.**

222 (a) Of judgment-debtor and not of decree-holder. 30 A 379 Col. 1547 P. I.

223 Lispendens Mortgagee — Judgment-debtor. 28 C. 23 Col. 571 P. I.

223 (a) Questions arising in execution —Legal representatives. 10 B L R 939 Col. 430 P. I.

223 (b) *Reversioners impleaded as Hindu widow's representatives—Their objection in execution—Suit. P C (1882) S 244.*

On the death of a Hindu widow judgment-debtor, the reversioners to her husband were made parties to the decree. They objected to the execution on the ground that the debt was contracted without legal necessity. Their objections were overruled and they filed the present suit.

Held, that the suit was not barred by the provisions of S 244, Civil Procedure Code, inasmuch as they could not contend in execution proceedings that the mortgagor was not competent to make the mortgage 21 A 277 followed. JAGARNATH SINGH *v.* SHIV GHULAM SINGH **5 A L J 745**

(42) RESJUDICATA.

224 Application struck off. A. W. N. 1905 P. 237 Col. 952 P I.

225 Application for—Dismissed for want of jurisdiction. 27 A. 184 Col. 948 P. I.

226 Application for execution-Procedure-Appeal 139 P. L. R. 1905 Col 954 P. I.

227 *Execution-Prior application claiming interest not awarded by decree—No objection—Objection in subsequent proceedings—Notice on prior application silent as to interest.*

A judgement-debtor can put forward his objection to a claim for interest not awarded by the decree, when the sale proclamation comes up for settlement, and it cannot be held that merely because such objection might have been raised and an adjudication had at an earlier execution proceedings, the executing Court must, by its previous order to attach the property, be held to have decided to accept the claim of the judgment-creditor for interest not given by the decree 15 M. L. J. 7 followed. Especially so, when the notice of prior execution did not at all mention the claim for interest, such prior order is, therefore, no bar by *res judicata* to the judgment-debtor subsequently raising the objection to the claim for interest. VIYATHAN SRIDEVI *v.* NEELAKANTA PATTAR. **17 M. L. J. 311.**

228 Execution of proceedings—Ancestral property, sale of. 28 A. 273 Col. 1129 P. I.

229 Execution of proceedings—Step-in-aid of execution. 10 C. W. N. 209 Col, 1855 P. I.

230 *Res Judicata-Objection to execution of decree.*

An objection by a judgment debtor to the execution of a decree was dismissed for want of prosecution and on the ground of absence of the objector. No appeal was preferred against the order of dismissal. In a subsequent execution proceeding between the same parties: *Held* the judgment-debtor was precluded by the rule of *res judicata* from raising the same objection.—ABADI BEGAM *v.* MUHAMMAD ABDUL GHAFFUR. **3 A. L. J. 198**

231 *Order on application for withdrawal of execution proceedings.*

Held, that an order passed by the Court on an application to withdraw execution petition, on failure by the decree holder-purchaser to deposit the premium within a due date, allowing the application on condition of the decree holder again bringing the same properties to sale and biding for the same amount is invalid and not binding upon the decree-holder who is at liberty to proceed with the sale of the other properties. A Court has no power after adjudication upon the application before it to lay down a rule binding the judgment-creditor in respect of any future application he might make. An order which is not passed by consent can only be binding in respect of the immediate subject matter of adjudication. JNANUDA SUNDARI CHOWDHURANI *v.* NOKULESSWAR ROY CHOWDHURY. **11 C W N. 236.**

232 Objection as to validity of decree—Question of jurisdiction. 28 M. 26. Col. 1095 P. I.

232 (a) Order in execution—Jurisdiction. 11 O. C. 220 Col. 1139 P. I.

233 Res-judicata—*Execution proceedings—Property ordered to be sold subject to mortgage—Subsequent order to sell free of mortgage.*

The Subordinate Judge with the consent of the mortgagee of the property passed an order for sale free of the mortgage. Subsequently without notice to the mortgagee or the judgment-debtor the Court ordered on the application of the decree-holder that the property should be sold subject to the mortgage and a sale was held in pursuance of the order.

Held, that the order of the Sub-Judge revoking the previous order was wrong and

Execution of decree *(Contd.)*

the sale must be set aside. SINNU SASTRYAL *v.* SUBRAMANIA SASTRYAL. **13 M. L. J. 227.**

(43) Restitution or Restoration.

234 Assignee, right of–Execution pending appeal of decree reversed on appeal, right to claim restitution. 33 C. 857 Col. 1369 P. I.

235 Exparte order—Appeal—Restitution interest, claim for, on the amount to be recovered. 28 M. 355 Col. 953 P. I.

236 Excession, execution for–Restitution of thing improperly taken in execution of decree. 9 C. W. N. 381 Col. 1365 P. I.

Note 9 C. W. N. 381 read for 9 C. W. N. 33.

237 Excession, execution for-Restitution-Inherent powers of Court—Review of decree of High Court. 29 A. 655 Col. 1137 P. I.

238 Excession, execution for—Inherit powers of, to compel repayment of money im properly taken out of Court. 27 A. 378 Col. 696 P. I.

239 Possession—Suit by mortgagee for restitution of land so delivered. 5 P. R. 1907 Col 1090 P. I.

240 Refund of money–Application for restitution of excess interest realized in execution. A. W. N. 1905 P. 63 Col. 1485 P. I.

241 Refund of money—Separate suit barred—Claim for refund of amount realized in excess of what was allowed by decree. 45 P. R. 1904 Col. 1082 P. I.

241 *(a)—Refund of money realized in execution of a decree afterwards reversed in appeal – Limitation – Execution of decree stayed by injunction – Procedure.*

An *exparte* decree was passed in favour of the appellants on 7th October, 1901. They had, before the decree, obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July 1904. The suit was retried; and, on the 17th September 1904, the Court of first instance made a decree in favour of plaintiffs for Rs. 17,711-7-0, which was affirmed by the High Court on the 18th December 1906. On the 17th September 1907, the respondents applied for a refund of the difference ~~Rs~~. 1,804.

Held, that the plaintiffs were at liberty to proceed either by application or by suit. 10 M I A 203, 28 A. 665, 29 A. 143 referred to and that the application was not barred by limitation 28 C 113 distinguished. BITHAL DAS *v.* JAMNA PRASAD. **A. W. N. (1908). 206.**

242 Return of what taken in–Restitution 2 C. L. J. 537 Col. 1370 P. I.

243 Reversal in appeal—Restitution of property sold in execution of a decree—Reversal in appeal. 29 A, 143 Col. 1366 P. I.

244 Suit for–Separate suit barred. 3 A. L. J. 601 Col. 1081 P. I.

(44) Revision.

245 *Punjab Courts Act (XVIII of 1884), as amended, Section 70 (I), (a), (b)—Revision—Civil cases Execution of decree—Land suit—Costs allowed to defendants—Right of pro forma defendants against whom proceedings were held ex-parte—Construction of decree.*

The proceedings in the original Court and the lower appellate Court on appeal were held *ex parte* against the *pro-forma* defendants. The suit was decided against the plaintiffs and costs were allowed to the defendants by both the Courts. The decree was ambiguous as to the right of the *pro-forma* defendants to share the costs. Application for execution was made by one of the contesting defendants and allowed by the Original Court but the order was reversed on appeal. On revision under the clause (1), (a) of section 70 of the Punjab Courts Act

Held, that the original suit being a land suit a revision under clause (b) of the section was competent, and that on referring to the proceedings it was clear that the *pro-forma* defendants were not entitled to share the costs awarded against the defendants. CHUNI MAL *v.* DURGA DASS. **196 P L R 1905.**

246 Rateable distribution of assets realized 130 P L R 1905 Col : 1193 P I.

247 Order giving time to the judgment debtor to raise money by private alienation after execution sale invalid Col : 1336 P. I.

248 Dismissal of application on date fixed for passing of order. 32 P L R. 1904 Col : 1450 P I.

(45) Reviver

249 *See application supra.*

(46) Sale in.

250 Absolute order for sale of mortgaged property, application for—Error affecting merits or jurisdiction. 29 C 651 Col: 680 P I.

251 Application for exemption from—Appeal—Revision. A W N 1906 P 62 Col: 1123 P I.

252 Application to set aside the sale after confirmation. A W N 1905 P 162=27 A 702 Col: 1075 P I.

252 (a) *Application to set aside sale—Judgment-creditor coming to terms with judgment-debtor—Auction purchaser's rights and remedy.*

Where a decree-holder comes to terms with his judgment-debtor, it is, as against the auction purchaser, equivalent to a receipt in full of the decretal amount by the decree holder.

On a sale having been set aside by the order of the Court, it lies on the auction purchaser when applying to have that order rescinded, to show that the order had been improperly obtained, *e. g.*, by showing that, at the time of the order, the judgment-creditor had not been satisfied. 29 B. 723, 1 C W. N. 703 refered to. MA SEIN BUWIN *v.* MAHOMED HASSIM. **14 B. L. R. 176.**

252 (b) *Application to set aside—Respondent in England—Service.*

On the first day of sale, the judment-debtor's partner's bid was not accepted and, on the second day, there was some understand-

Execution of decree *(Contd.)*

ing between the partner and the decree holder that they would not bid against each other but that the partner wou'd get the property back for the amount of the decree, and the property was purchased by the decree holder

Held, that there was no fraud on the part of the decree-holder which would justify a Court in setting aside the sale.

The respondent having left for England notice of the appeal was served on him through appellant's agent in England appointed for that purpose the notice having been made over to the appellant's vakil, who transmitted it for service to the agent in England. 23 M 227 (P C), *relied on*; 19 M 315, R; and 7 C 346, *Dist.* SATISH CHANDRA MUKERJI *v.* Col A R PORTER, **13 C W N 18.**

253 Application to set aside sale for fraud —Civil cases. A. W. N. 1905 P. 193-28 A. 84 Col. 1352 P. I.

254 Application to set aside sale—Time essence of the contract. 6 C. L J. 176 Col. 308 P. I.

255 Auction purchaser—Confirmation of auction sale—Misrepresentation as to interest sold 5 C. W. N. 1901 P. 593 Col. 504 P. II.

256 Auction purchaser—Attahment in execution of a money decree—Stay of execution. 29 B. 435 Col. 575 P. I.

257 Auction purchaser—Mesne profits. Date from which auction purchaser is entitled to. 24 A. 475 Col. 1171 P. I.

258 Auction purchaser—Distinction between decree holding purchaser and other purchaser. 1 L. B. R. 1900-1902 P. 22 Col. 884 P. II.

259 *Auction purchaser —Execution-sale— Civil Procedure Code, s. 244—Purchase by decree-holder—Effect of reversal of decree upon sale in execution.*

A obtained a decree against *B* for rent. *B* appealed and questioned only the rate of rent. Pending the appeal, A took out execution, sold *B's* property and purchased it himself. Subsequently *B's* appeal was allowed and the decree was modified, and he applied to set aside the sale under s. 244 of the Civil Procedure Code.

Held, that inasmuch as the Appellate Court set aside the decree and made a new decree in lieu of the decree passed by the first Court, the sale having taken place in execution of the decree, which was set aside by the Appellate Court, could not stand. *Zainul-abdin Khan* v. *Muhammad Asghar Ali Khan*, (I. L. R. 10 All. 166, L R 15 I. A. 12), and *Set Umedmal* v. *Srinath Ray*, (I. L. R. 27 Cal. 810), referred to. CHANDAN SINGH *v.* RAMDANI SINGH. **31 C 499.**

260 Benami purchase, plea of—Suit by certified purchaser for profits against person in possession. 27 A. 443 Col. 1175 P. I.

261 Bona fide purchaser from the auction purcha er who was a decree-holder. 30 M. 295 Col. 878 P. II.

262 Bona fide durchaser—No objection filed—Right to object after sale. 28 B. 125 Col. 1160 P. I.

Execution of decree *(Contd.)*

263 *Bona fide purchaser—Execution-sale— Civil Procedure Code, s. 244—Fraud—Purchaser implicated in fraud.*

A third party, having an interest in a property sold in execution of a decree, can by a suit impugn the sale as fraudulent and collusive and s. 214 is no bar to such a suit. An auction purchaser at such a sale cannot be entitled to maintain his purchase if the proceedings by which he became a purchaser were fraudulent but he is entitled to have his purchase money returned to him. A fraudulent sale becomes invalid quite irrespective of the validity or invalidity of the decree. *Mohesh Chandra Bagchi* v. *Dwarka Nath Maitra* (24 W. R. 260) distinguished and *Khiroda Sundari Debi* v. *Jnanendra Pal Chowdhury* (6 C. W. N. 283) followed. HUNGSHA MAJILLYA *v.* TINCOURI DAS. **8 C. W. N. 230.**

263 (a) *Decree-holder securing sale without disclosing his lien—Purchaser without notice, C P C S. 237 and 287.*

Held, that a person who has caused the property of his judgment debtor to be sold in execution cannot afterwards set up any claim of his own against that property unless he shows that the purchaser purchased with notice of it.

22 B 686, 10 C 609, 15 M 412, 5 C W N 497, 20 B 290, 16 A. 478, 1 B 314 and 12 B 678, referred to. BALDEO *v.* AUSAN SINGH. **11 O C 206.**

264 Certificate of sale not prepared owing to objection of purchaser—Right of pre-emption not affected. 36 P L R 1903 Col: 357 P II.

265 Certificate of sale—Appeal against order refusing amendment of certificate of sale. 23 A 476 Col: 378 P II.

266 Collector by—Transfer of decree to collector, his power to set aside sale—Application after confirmation. 31 B 207 Col: 1179 P. I.

267 By courts of different grades—Sale by court of lower jurisdiction. 27 A 56 Col: 1164 P I.

268 By Court of different grades—Sale by court of lower jurisdiction. A. W N 1904 P 95 Col: 1164 P. I.

268 (a) Decree-holder bidding with Court's permission. 10 B L R 296 Col: 1538 P I.

269 *Entries in sale proclamation regarding incumbrances—Brance, how far binding on purchaser—Validity or otherwise of encumbrances wrongly entered therein—Liability of purchaser at an execution sale to pay off the encumbrances entered therein—Right of original owner to recover amount of encumbrance wrongly notified at the time of sale, but subsequently found to have been paid off—Purchaser at an execution sale for full value, liability of—Trust as to the amount of encumbrances wrongly entered*

On July 4th, 1896, one *C* mortgaged village *G* to the defendant for Rs. 4,000 and on August 21st, 1896, *C* mortgaged the same village *G* and a share in another village *D* to the defendant for Rs. 6,000. In execu-

Execution of decree *(Contd.)*

tion of a money decree held by two other persons the village *G* was put up for sale in October, 1900, and was purchased by the defendant for Rs. 14,633. In the proclamation of sale it was stated that the village was subject to an encumbrance of Rs. 10,000 under the two deeds of 1896, above mentioned. As a matter of fact the mortgage of August 21st, 1896, had been paid off and only a sum of Rs. 5,543 was due on account of the mortgage of July 4th, 1896. After the sale the defendant was in due course put in possession of the property sold. In the present suit, the plaintiff, son of *C*, claimed redemption of the mortgage of July 4th, 1896, contending that the sale of the village *G* was not binding upon him inasmuch as at the time of sale the mortgage of August 1896 had been paid off and the defendant having taken an advantage of this fact was a trustee of the village for him or at least of the benefit improperly obtained by him. The defendant contended that the sale was binding upon the plaintiff. It was proved that the mortgage of August 1896 had been paid off and that the village *G* was not worth more than Rs. 20,000.

Held, that the defendant, having purchased the property for Rs 14.633, with an encumbrance of Rs. 5,543 had paid almost the full value of the property, and had not therefore obtained by his purchase any benefit of which he should be considered a trustee for the plaintiff.

Held, further, that a purchaser at an execution sale cannot avoid his purchase merely because charges not entered in the sale statement are found to be enforceable against the property, nor is such a purchaser bound to admit the existence or validity of charges, merely because they are entered in the sale statement. SETH JAI DAYAL *v.* THAKUR AMBAR SINGH. 10 O C 252.

270 *Of ex-proprietary rights—N W P Rent Act XII of 1881 S 9—Sale of ex proprietary holding in execution of decree, legality of—Rights of purchaser—Suit for declaration for avoidance of sale, maintainability of.*—

Notwithstanding the objection raised by the respondent, an ex proprietary tenant, his holding was sold in execution of a decree against him and purchased by the appellant. On appeal, the property sold was declared to the respondent's ex-proprietary tenure. The present suit was brought for a declaration that the property was his ex proprietary holding and, consequently, was not liable to be sold in execution of a decree against him and the purchaser, present appellant, acquired nothing under the purchase.

Held, that a suit for a declaration of an ex proprietary tenant's right will lie, inasmuch as S. 9 of the Act forbids the sale of such a right in execution of a decree against the tenant. Where such interest is sold, the purchaser acquires nothing by his purchase. 10 A 166 (P C) distinguished. KHIALI RAM *v.* SAHUR ALI KHAN. 2 A L J 358.

Execution of decree *(Contd.)*

271 Interest sold Sale by registrar—Confirmation of auction sale. 5 C W N 593 Col 504 P II.

272 Jurisdiction—Duty of court—Execution after attachment—Validity of further proceedings. 32 C 1104 Col 1514 P 1.

273 Jurisdiction—Objection not raised in original suit but raised against application for execution. 27 A 584 Col 1043 P I.

273 (a) Jurisdiction—Sale in execution of decree of inferior court by order of court of higher grade. 11 O C 41 Col 1126 P I.

274 Lispendens — Attachment in execution of a money decree—Title of the purchaser in execution of the decree on the mortgage. 29 B. 435 Col 575 P. I.

275 Material irregularity in publishing or conducting sale—Defective description of property to be sold. 47 P. R. 1905 Col. 1534 P. 1.

276 Material irregularity — Application to set aside sale—Ommission to specify hour of sale. 31 C 815 Col. 1537 P. 1.

277 Material irregularity—Sale of property of persons not party to proceedings. 32 C. 296 (P. C.) Col 2058 P I.

278 Material irregularity — Representative not added—Nullity of sale—Remedy of representative. 25 B 537 Col 1507 P 1.

279 Material irregularity—Sale held at an earlier hour than that mentioned in proclamation. U B R 1907 P 9 Col 1549 P I.

280 Material irregularity—Failure on the part of decree-holder to make deposit 11 P L R 1907 Col 1536 P I.

281 Material irregularity—Wrong time—Proclamation 4 L B R 1907 P. 123 Col 1552 P. I

282 Mokarrari Tenure—Landlord and tenant—Sale of holding 32 C 680 Col 118 P II.

283 Mortgage decree—Purchase from heir during administration suit—9 C W N 225 (P. C.) Col 578 P 1.

284 Mortgage decree—Decree for sale with personal remedy for balance unsatisfied governed by S. 258 even before sale of mortgaged property 15 M L J 126=28 M 473 Col 1144 P I.

285 Non-payment of portion of purchase money—Sale of immoveable property. 3 L B R 1906 P 225 Col 1539 P I.

285 (a) Non payment of portion of purchased mare A W N 1908 P 107—30 A 273 Col 1539 P 1.

286 Non-payment of portion of purchase money—Application to eject tenant—Decree for rent. A W N 1905 P 213—28 A 131 Col 1998 P I.

287 Of property subject to charge for maintenance—Purchaser's right to recover such amount paid by him, from judgment debtor. 17 M L J 250 Col 324 P I.

Execution of decree *(Contd.)*

288 Purchase with knowledge of defective title- Suit for refund of purchase money—Suit after confirmation of sale. 3 A L J 819 Col 1560 P I.

289 Purchaser of a share partly incumbered—Presumption—Suit for possession. A W N 1907 P 131—29 A 463 Col 1917 P I.

290 Purchase pending appeal—Suit to set aside—Notification of sale. 27 M 94 Col 1378 P I.

291 Right, title and interest of the debtor—Protected interest. 29 C 813 Col 1741 P I.

292 "*Right, title and interest of judgment debtor*"—*Sale prior to passing of Civil Procedure Code, 1877—Joint Hindu Family—Impartible estate—Right of* Zamindar.

In 1873 and 1876, in execution of money decrees against a *Zamindar* who had succeeded to a *Zamindari* in the Madras Presidency by the custom of primogeniture, his right, title and interest in certain villages pertaining to the *Zamindari* were sold. A question arose between the auction-purchaser and the *Zamindar* who had succeeded the judgment debtor after his death, whether what was sold was the life interest of the judgment-debtor in the property or the property itself.

Held, that the question was a question of mixed law and fact and must be decided according to the evidence on record in the case.

That as in 1873 and 1876, according to the rulings of the High Court a *Zamindar* had only a life estate in the *Zamindari* and the parties must be taken to be bound by the law as it was at that time understood the auction purchaser must be held to have bought only the life interest which the judgment-debtor had in the property. The changed view of the rights of a *Zamindar* since 1889 did not affect the sales which took place long before that year. *L R 17 I A 11 at p 16, L R 14 I A 77 at p 83, L R 14 I A 84 at p 85, L R 15 I A 51, L R 26 I A 83, 13 Mad 197, referred to.* ABDUL AZIZ KHAN *v.* APPAYASAMI NAICKER MUNHAR DAS *v.* ABDUL AZIZ KHAN, ABDUL AZIZ KHAN *v.* THE COMMERCIAL BANK OF INDIA LIMITED. **6 B L R 7=8 C W N 186=27 M 131 (P C).**

293 Right, title and interest—Fresh opportunity to argue point raised for the first time on appeal. 32 C. 27 Col. 49 P. I.

294 Restriction to sale of land—Suit to set aside sale for arrears of revenue—Presumption as to service of notices. 6 C. W. N. 688—30 C 1 Col. 35 P. II.

295 Restriction to sale of land—*See Punjab alienation of land Act (XIII. of 1900.)*

296 *Reversal of decree—Reversal of sale—Function of—Cognizance of event subsequent to decree. Exparte decree, setting aside sale, reversal—Order setting aside exparte decree, reversed :—*

A court of appeal is not only competent, but may, under certain circumstances, be bound to take cognizance of an event which has happened since the order, questioned on appeal, was passed by the Subordinate Court. When the decree holder is the purchaser in execution of an *exparte* decree, upon reversal of the decree, the sale falls through. The fact that before the judgment debtor applies for reversal of the sales the plaintiff succeeds in obtaining another decree of similar character against the defendant, does not validate the title based upon the decree which has been reversed. But this does not apply when the order of reversal of the decree is set aside by a superior court and the decree is ultimately restored. 27 C, 810 dist. ; 31 C. 499 ref. to.—HAZARI MULL *v.* JANAKI PROSAD. **6 C L J 92.**

297 Sale in excess of decree—Judgment-debtor standing but not objecting. 27 A. 67 Col. 1740 P. I.

298 Sale proclamation—Contents of—Appeal. 27 M 259 Col. 1531 P. I.

299 Set aside but confirmed on appeal—Suit against purchaser of recovery of purchase money. 27 A. 155 Col. 1080 P. I.

300 Setting aside execution sale—Sale of immoveable property in execution of rent decree below Rs 100—Order refusing to set aside the sale. 1 C L J 454 Col : 1552 P I.

301 Setting aside execution sale—Fraud—Decree. Suit to set aside. 6 C L J 17—4 A L J 467—11 C W N 817 (P C) Col : 1875 P I.

302 Specification of boundaries—Certificate of sale—Order in Objecting proceeding 27 M 361 Col : 1011, 1171 P I

303 Specification of boundaries—Auction sale—Sale in execution of a decree obtained outside the jurisdiction of the Original Side of the High Court 29 C 370 Col : 478 P. II.

304 Staying sale—Invalid sale in execution of decree—Sale in spite of the order staying the sale, effect of on right of co-sharer to claim pre-emption RATAN SINGH *v.* DULAR SINGH. **9 O C 289** *See Pre-emption.*

305 Staying sale—Appellate court can stay sale in execution of a money decree pending appeal, 11 C W.N. 1030—34 C 1037 Col : 1284 P I.

306 *Suit for confirmation of sale, dismissal of Civil Procedure Code S 294—Appeal—Second sale of the same property*

A suit for confirmation of sale (in which the judgment debtor was a party and confessed judgment) having been dismissed, the auction purchaser preferred an appeal in which the judgment debtor was not made a party. The appeal was decreed, but before that, the same property was sold in execution of another decree against the same judgment-debtor.

Held, that the first sale had been set aside and was not restored in appeal as against the judgment debtor who was not a party to the appeal. Hence there was nothing in bar of the second sale, which should stand good as against the first sale.—GIRJA DIYAL *v.* DEBI

Execution of decree *(Contd.)*

PRASAD. **3 A. L. J. 91=A. W. N. 1906 P. 40.**

307 Suit to set aside sale—Affect of confirmation of execution sale. 4 L B R 1907 P 40 Col: 1558 P I.

308 Suit to set aside sale on account of fraud—Sale held in execution of a decree. 24 A 239 Col: 1079 P I.

309 Of superstructure of a house—Tender made the judgment-debtor—Refusal to accept deposit. 3 O C 236 Col: 1514 P. I.

310 *Of tenants house*—Wajib-ul arz—*Permitting tenant to transfer only the materials—Sale of house—Auction purchaser's right.*

Held, that, where the *wajib-ul-arz* of village gave the tenants, residing in that village, only a right to sell or mortgage the materials of their house, a purchaser of the house in auction sale, in execution of decree against the tenant, could not acquire a right to occupy the house, without the permission of the landlord. RAJA MOHAMMAD MEHDI ALI KHAN *v.* GOPAL DAS. **10 O. C., 4.**

311 Of third persons property—His remedy. 12 C W N 151 Col: 331 P I.

Note 12 C W N 151 read for 12 C W N 150.

312 Of village officers emoluments. 28 M 84—*See Estoppel—Waiver.*

313 In violation of S. 99 T P A—Confirmation of sale 2 A L J 123 Col: 712 P I.

314 *In violation of—Attachment of property in execution of supposed decree for balance of mortgage-debt—Transfer of Property Act ss. 88, 90—Mortgage—Civil Procedure Code s. 248.*

The respondent obtained against the appellant a decree for sale under section 88, Transfer of Property Act, but the sale proceeds were not sufficient to discharge the mortgage debt. No decree was ever passed in favour of the respondent under section 90 of the Transfer of Property Act, but applications were made for issue of notices under section 248 of the Code of Civil Procedure and property was attached in execution of a supposed decree for the balance of the mortgage-debt.

Held, that, as the respondent had not obtained a decree under section 90 of the Transfer of Property Act, he could not attach and sell the property as if he had obtained such a decree. 2 Cal., W N 254, dissented from. MATA GHULAM SINGH *v.* KANDHAI BAKHSH **6 O. C. 59.**

315 *Sale—Waiver of right to object of the ground of irregularity and inadequacy of price is not on the ground of fraud—Honest combination and dishonest concert—Fraud—Combination among bidders.*

If a judgment debtor obtains an adjournment of sale upon the condition that he would not raise any objection on the ground of an irregularity and inadequacy of price, he does not waive his right to question the sale on the ground of fraud and he is entitled to have his allegation of fraud fully investigated 6 C L J 62 followed.

It is not an inflexible rule of law that a combination among intending purchasers not to bid against each other cannot under any circumstances amount to fraud 27 I A 17=23 M 227 explained.

All judicial sales of property should be free from undue influence, controlling or stifling competition and threat; but there is nothing to prevent persons from combining from honest motives to purchase property at such sales, 6 Moo. C P 316; 3 Brod. and Bing. 116; 23 R R 626; 6 Car. and Pay. 239; 1 Coll. 243; 8 Jur. 507; 63 E R 402; 26 Beav. 187; 28 L J Ch. 218; 4 Jur (N S) 1290; 7 W R 81; 53 E R 869; L R 19 Eq. 426, referred to.

There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition, 1 C L J 85 referred to.

In each case the test is what was the object of the agreement among the bidders; it is the end to be accomplished which determines whether a combination is lawful or otherwise. If the object be to obtain the property as a sacrifice by artifice, the combination is fraudulent; if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent 15 Howard 494; 6 Wallace, U S 276; 7 Wallace, U S 559; 168 U S 471 referred to.

If fraud is established on the part of either the acution-purchaser or the decree-holder, the execution-sale is vitiated 6 C W N 279; 6 C W N 283, R 20 M 10 dissented from. AMBIKA PRASAD SINGH *v.* R H WHITWELL AND SITARAM SINGH, **6 C L J 111.**

316 Of Zemindars Haq chaharum—A grove in Kasba Utraula was sold in execution of decree, subject to an encumbrance. The Zemindar of the Kasba sued for one-fourth of the sale price plus the value of encumbrance notified as his Hak chaharum established by custom.

Held, that the Zemindar is not entitled to Haq chaharum in the execution of sales merely because he might be entitled to the same in the case of private sales, but that he must establish a special custom entitling him to the Hak in the case of execution sales. MUSAMMAT BHAGWANTA *v.* RAJA MOHAMAD MUMTAZ ALI KHAN. **10 O. C. 2.**

(47) SECURITY.

317 Application for insolvency pending entry of decree-holders debt in Schedule of Insolvency application. 9 O. C. 42 Col. 1156 P. I.

(47 a) SIGNING.

318 Mortgage deed—Stamp duty. U. B. R 1907 P 1 Stamp Col. 890 P. I.

(48) SIMULTANEOUS EXECUTION IN DIFFERENT COURTS MANNERS.

319 U. B R 1904 P. 1 (Execution of decree) Col. 1142 P. I.

(49) SMALL CAUSE COURTS DECREE.

320 Decree passed by Munsiff exercising jurisdiction as Small Cause Court for execu

Execution of decree *(Contd.)*

tion. 3 P. L. R. 1905 Col. 772 P. I.

(50) Stay In Execution.

320 (a) *Impossibility to restore parties to former position – Appeal.*

Held that the fact that it would be impossible to restore the parties in *status quo* may or may not be a ground for granting a stay of execution of a decree ; but it does not render the order refusing the stay a "judgment," and no appeal lies from such order. 24 M. 358 followed. KODIVA SAHIB *v.* SYED RAHIMATALLA SAHIB. **3 M. L. T. 307.**

321 Refusal, no appeal—Appeal against order refusing to stay execution. 29 B. 71 Col. 905 P. I.

322 Refusal—No appeal. 146 P. R. 1907 Col. 1652 P. I.

323 Superior courts, order of—Order staying proceedings—Effect of pending appeal. 3 C. L. J. 67 Col. 1266 P. I.

324 Superior courts order of—Stay of execution pending suit filed by judgment-debtor against decree holder. 41 P. R. 1904 Col. 1508 P. I.

325 Superior Courts, order of — Privy Council. 5 C. W N 562 Col: 1687 P I.

326 Superior Courts, order of—Order absolute for sale. 31 C 373 Col : 905 P I.

327 Superior Courts, order of—Agreement varying or statisfying decree. 14 M. L. J. 359 Col: 950 P. I.

328 Superior Courts, order of—Execution—Application for stay of. 8 C W N 381 Col : 1654 P I.

51 Step in aid of Execution.

328 (a) Suit between decree-holder and judgment debtor. 130 P R 1908 Col : 428 P II.

329 In accordance with law, meaning of. 1 N L R 61 Col : 2075 P I.

330 Application for comfirmation of sale. Purchase of property by decree-holder in execution of his own decree—Application for confirmation of sale not a step in aid of execution. 9 C W N. 31 Col. 1557 P I.

331 Application for issue of notice—Decree made payable by instalments during specified months certain dates. Application for execution merely praying for notice to be issued to the judgment debtor under section 248 Civil Procedure Code. 22 P R 1905 Col 1506 P I.

332 Application for issue of notice – Defective application – Prayer for issue of notice —Step in aid of execution. 116 P R 1907 Col 2006 P I.

332 Application for issue of notice—Execution of decree—Stay of execution—Assignment of decree—Assignment disputed. 28 *M* 357 Col. 1118 P I.

333 (a) Application for issue of notice under S 248 C P C 118 M L J 14 Col : 2016 P I

334 Application for issue for notice—Notice under section 248 C P C 27 B 622 Col: 2020 P I.

335 Application for leave to bid—Step in aid of execution—Resjudicata, 10 C W N 209 Col 1854 P I.

Execution of decree *(Contd.)*

335 (a) *Application for payment of money deposited—No step in aid of execution.*

A decree-holder's application for payment to him of money deposited in Court in partial satisfaction of the decree is not ordinarily an application to take some step in aid of execution within the meaning of Art. 179 (14), Limitation Act, 1877.

The "fruits of the execution of decree" postulate surely that the decree has been executed, and the partial fruits of the execution of the decree equally postulate that *pro tanto* the decree has been executed. To take steps, therefore, to acquire those fruits cannot logically be regarded as a step towards executing the decree ; for *ex hypothesi* the decree must have been executed (in whole or in part as the case may be) before those fruits, whether in whole or in part, can be aquired, whereas the expression "step in aid of execution" must clearly mean that the decree has not been executed when that step is taken. 107 P R 1881, 88 P R 1884, 27 P R 1888, 18 P R 1904, 76 P R 1904, 8 C 89, 10 C 549, 11 C 227, 23 C 196, 10 C W N 28, *F*; 11 M 174, 16 M 452, 17 M 165, 22 B 340, 6 A 366, 12 A 399, *not F.* KASU *v.* ATAR SINGH. **103 P R 1908 (F. B.).**

335 (b) Application for recognition by transferee decree-holder. 18 M L J 24 Col. 1503 P I.

336 Application for rateable distribution of assets—Step in aid of execution—Payment of process fee—Application to set off purchase money against amount of decree 8 O C 161 Col: 2014 P I.

336 (a) *Application for time—No step in aid of execution—Previous application barred—Notice issued.*

An application to grant time is not a step in aid of execution and does not prevent subsequent applications from being barred 27 C 285, 3 C L J 240 followed.

A judgment debtor can contend that a previous application for execution was barred by limitation and is not estopped merely because notice had been served on him and he did not appear to contest the proceedings 8 C 51 and 23 C 374 distinguished. UMED ALI *v.* ABDUL KARIM. **8 C L J 193.**

337 Application for—Without copy of decree—Copy of decree not filed by decree-holder, 28 M 557 Col: 2012 P I.

338 Application for withdrawal of money—Standing to the credit of a decree-holder whether a step in aid of execution. 3 C L J 95 Col 2003 P I.

339 Certifying payment and filing receipt—Decree-holder filing receipt-Certifying payment of part of decree money. 34 P L R 1906 Col 2013 P I.

340 For personal decree—In accordance with law—Step in aid of execution—Where it was not necessary. 4 A L J 40 Col 2007 P I.

341 Payment of money—Application for which no period of limitation is prescribed 10 C W N. 354 Col 1988 P I.

342 For seal warrant A W N 1906 P 269

Execution of decree *(Contd.)*

Col 2003 P I.

343 Application under S 90, T P A—Step in aid of execution—Meaning of application in accordance with law 33 C 867 Col 694 P I,

344 Defamation of subsequent mortgagee —Right to plead limitation—Step in aid of execution. 30 C 761 Col 2016 P I.

344(a) Payment of process fees—Application to take some step in aid of execution A W N 1908 P 74 Col 2016 P I.

345 Resistance of judgment-debtors—Insolvency application—A W N 1906 P 54 Col 1153 P I.

Suspension of proceedings—Revival of decree-holders application. 27 A 334 Col 1992 P I.

346 Application by decree-holder to be put into possession of property purchased by himself. 18 P R 1904 Col 2001 P I.

347 Transfer of decree—Step in aid of execution Limitation—55 P R 1901 Col: 2001 P I No 360

(52) SUBSTITUTION OF HEIRS—LIMITATION.

348 *Application for execution—Substitution of the heirs of a deceased judgment-debtor—C P Code, S. 234—Limitation—Limitation Act, Arts 178, 179 explanation (1).*

An application for execution of a decree made within time against the judgment-debtors, some of whom may afterwards be found to have died before such application, is sufficient to keep the decree alive against all the judgment-debtors or the representatives of such of them as were dead. Subsequent steps in aid of execution, in the shape of application for execution taken within three years of the previous application, though beyond that period from their death, are sufficient to bar the running of the period of limitation. The Code of Civil Procedure does not prescribe any substantive application for the substitution of the legal representatives of a deceased judgment-debtor and an application made for such substitution is in substance an application for execution within the meaning of S 234 of the Code of Civil Procedure and Art. 179 of the Limitation Act. JOGENDRA NATH ROY *v.* RASIK CHANDRA BANERJEE. **2 C L J 544.**

(53) SUCCESSION APPLICATION.

349 Order absolute for sale of a portion of the mortgaged property only proceeds of sale of such portion insufficient to satisfy the decree 25 A 212 Col : 682 P I.

350 *Wrong person—Mistake—Step in aid of execution—Limitation Act (XV of 1877) Art. 179 —Application against a dead person—Bona fide mistake.*

If an application for execution of a decree be made under the influence of a *bona fide* mistake against a dead person, though that application cannot be acted upon, still it is an application in aid of execution within the meaning of Art. 179, cl. 4 of the Limitation Act (XV of 1877), which saves the execution of the decree from being time barred. Samia Pillai *v.* Chockalinga Chettiar, I L R 17 Mad 76, and Balkishen Das *v* Bedmati Koer, I L R 20 Calc. 388, followed. Madho Prasad *v.* Kesho Prasad, I L R 19 A 337, dissented from. BIPIN BEHARI MITTER *v* BIBI ZOHRA. **35 C. 1047.**

(54) SURETY'S LIABILITY—

350 (a) Bond for appearance of Judgment-Debtor—186 P L R 1905 Col 1154 P I.

351 Execution of decree—Surety—Right of decree-holder to proceed against. 30 P L R 1905—50 Col 1510 P I.

352 Stay of execution—Temporary stay —Surety—Discharge of surety. 8 B L R 557 Col 1652 P I.

353 Surety—Discharge of, by giving time to principal debtors. 9 O C 28 Col 356 P I.

354 Execution of decree against surety —8 B L R 367 Col 1371 P I.

355 Surety—Notice to surety—Executing Court may issue notice. 29 B 29 Col 1370 P I.

356 Surety bond—Fresh suit—Proper remedy—Waiver—Objection. 10 C W N 830 Col 1153 P I.

357 Surety for due performance of appellate decree—109 P R 1906 Col 1285 P I.

358 Surety for due performance of decree—125 P R 1906 Col 1285 P I.

359 Appeal—Revision—Court Fees Act Schedule I Article 13, 72 P R 1902 Col: 1155 P I.

55 TRANSFER OF DECREE FOR EXECUTION OF

360 Decree made to another court to which jurisdiction transferred 9 O C 281 Col: 1070 P I.

361 Application to the original court for rateable distribution—Simultaneous 1 C L J 315 Col: 1189 P I.

361 (a) *Application for transfer of decree not presented within the time fixed by the Court—Striking off petition—No disposal of petition.*

A decree holder applied for execution against a judgment-debtor residing outside the jurisdiction of the Court, and the Court without any application by the decree-holder under section 223, Civil Procedure Code, for transmission of the decree, gave the plaintiff a week to apply for an order of transmission, and, as he did not so apply, struck off the petition on the seventh day, *held* that this was not a disposing of the petition and it should still be treated as pending 27 A 334 referred to. PANCHAGNULA SUBRAHMANYAM AIYER *v.* POLIPALLI RANGIAH. **17 M L J 616=3 M L J 261.**

362 Surety for due performance of appellate decree—109 P R 1906 Col 1285 P I.

363 Execution proceedings—4 O C 233 Col 2150 P I.

364 Decree passed by munsiff exercising jurisdiction as small cause court—Transfer to regular side of court for execution—Necessity of application for transfer—3 P L R 1905 Col 772 P I.

365 Transfer to Collector—Appeal against order passed by Collector. 7 B L R 682 Col 1178 P I.

Execution of decree *(Contd.)*

366 Ancestral property—Transfer of decree to the collector. A W N 1906 P 143 Col : 1178 P. I.

367 Execution transferred to collector—Partial execution-Application for instalments. 8 B L R 963 Col: 1982 P I.

368 *Madras Regulation (V of 1804) as amended by Act (IV of 1899) S 35—Rules 7, 9 of rules framed under S 35—Procedure when Government rescinds notification after reference to Civil Court.*

Where the Collector, to whom a decree has been transferred for execution by virtue of a notification by Government under section 35 of the Amended Regulation V of 1804, makes a reference to the Civil Court under Rule 7 of the rules framed under the section and the Civil Court passed a decision in such reference and pending an appeal to the High Court against such decision, the Government rescinds the notification,

Held, that the proper course to be adopted by the High Court was to set aside the decision of the lower Court, without prejudice to the parties raising the question involved in the reference in execution proceedings in the Civil Courts. PULABAIYAGARI MUNISAMY CHETTY *v.* THE RAJAH OF KARVETNAGAR. **30 M. 193.**

369 His power—Civil cases—Separate remedy. 76 P. R. 1903 Col. 1323 P. I.

Civil Procedure Code (Act XIV of 1882), Sections 321, 325—Execution for decree—Powers of Collector.

Section 324 A, paragraph 3 (secondly), of the Civil Procedure Code, makes it quite clear that what is contemplated by section 321 is quite a different procedure from that contemplated by section 322 *et seq* and that the provision in section 324 A, regarding the rendering of accounts of monies and money charges clearly does not bring an order under section 321 within the purview of the restriction of section 325 A upon land dealt with under section 322 *et seq* so long as the land is itself subject to action under sections 322 to 325.

Procedure under sections 322 to 325 is somewhat in the nature of *quasi* insolvency proceedings. Mr. W. H. PEACHY *v.* BISHAN DAS. **61 P. R. 1903.**

370 His proposal of not sale—Suit for a declaration that land in dispute is liable to attachment and sale. 4 P. R. 1903 Col. 1527 P. I.

371 Transfer of—Power of Court to which decree transferred—Sale of ancestral property by collector. 11 O. C. 112 Col. 1503 P. I.

372 Undue influence—Consideration of, in onus omission to frame issue. 77 P. R. 1903 Col. 230 P. I.

Execution proceedings.

1 Resjudicata-Applicability of rule of Resjudicata to. 3 U B R 1907 Col : 948 P I.

2 Suit to set aside sale by a party U B R 1905 P 36 Col ; 1052 P I.

Execution sale.

1 *See Execution of decree—Sale.*

Execution Signing

1 *Execution—Signing—*

A man may sign a promissory note by getting some one to write his name for him. U B R 1897—1901, 11391 ; 1892, 1896, *J* 303 ; 11462 referred to. NGA MYAT THIN, MI MYA *v.* NGA MYE. NGA PO KYIN U B R 1907 P I (Execution singing.)

2 Execution signing that where the defendant was alleged to be withholding an unstamped parabaik document, that did not render secondary evidence admissible. *See execusion—Signing page 5 Col 890 P I.*

Execution Act

1 Execution Act—Effect of Hindu Law on succession. RAJ INDRA BAHADUR SING *v.* RANI RAGHUBANS KANWAR. **15 M L J. 352** *See Oudh Estate Act (I of 1869) S 22.*

EXECUTION OFFICER.

1 Tahsildar without consulting Municipal Council—Validity of grant—Appeal—Darkhast Rules. 12 M L J 417 Col 463 P II.

EXECUTOR.

1 Executor—Appointment of—See Probate and Administration Act—Testator authorizing executor to appoint future executors—5 B L R 639 Col 515 P I.

2 Executor once acting under a will cannot renounce his duties—Practice—Heir suing the executor for accounts—10 B L R 117 Col 1758 P I.

3 *Executor who is also a residuary legatee and a mortgagor—Legatee impeaching mortgage—Legacy charged on property—Notice—Consent—Delay.*

Although a mortgage by an executor who is also a residuary legatee, to secure his private debt, is valid as against creditors, it may be set aside, even at the suit of a pecuniary legatee ; because the nature of the claim of a legatee may be ascertained from the will, whereas, if a reasonable time has elapsed since the death of the testator and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid or that there are other assets for payment of the debts, if any, 1 Ch 963, 11 17 L R (Ir) 361 referred to.

Where several years after the time fixed in the will for payment of the legacy and the legacy remaining unpaid, and a mortgage was executed, the lapse of time was a circumstance that might be taken into consideration in determining whether the executor was acting with the consent of the legatee in effecting the mortgage.

Held, that in the circumstances of the present case the rights of the parties remained unaffected by the delay. THE BANK OF BOMBAY *v.* SULEMAN SOMJI, **C 12 W N 993 (P C).**

Execution Act *(Contd.)*

4 Executor himself a debtor—Limitation Act Section 10 grounds saving, 10 B L R 346 Col: 1434 P I.

5 *Probate—Revocation—*Locus standi *of co-executor to challenge genuineness of will.*

When a probate having been granted in the name of several persons as executors, one of them applied for revocation on the ground that the will was a forgery and that he himself did not apply for probate and was not cited, and that the probate was obtained behind his back.

Held—That he was entitled to have his name struck out of the probate, but he had no *locus standi* to challenge the will. SRI NATH GHOSH *v.* MUKUNDRAM CHUCKERBATTY. **12 C W N 573**

6 Suit prolonged on defendants—Objection unfounded—Partition suit—decree in infants—None parties how far found. BAZIR ALI *v.* HAFIZ NAZIR ALI. **13 C W N 153**—*Col: 685 P II—See partition.*

7 Trespass—Court of wards—Power to possession against. 12 C. W. N., 1065 Col; 716 P. II.

Executor and heir.

1 Rights of creditors of deceased debtor on his estate—Heirs liablity 26 M 792 Col. 1150 P. I.

2 Administrator is binding on his successor—Decree against deceased estate. Form of 29 B 96 Col: 1046 P I.

3 Co-executor—Executor's liability to render accounts, 27 B 281 Col: 24 P I.

4 Debtor—Suit for return of suit by new administrator against the estate of deceased executor 7 C W N 476 Col: 1916 P I.

5 Discretion—Reversion after life estate—Gift to poor relatives dependants and servants —My house moveable property-Securities for money—31 C 166 Col: 400 P I.

6 Duties of—Right to use on debt bound executed in the name of executor. 31 C 89, at 93 Col: 69 P II.

7 Expressor implied appointment of Amendment—Grant of letters of administration by suppression of will appointing no-executors —Effect of sale by such administration—Effect of executors by implication 10 C W N 662 Col: 139 P I.

8 *Implication by—Executors empowered to perform ceremonies and deal with debts and wives empowered to make patni settlements—No inconsisting wives—Right to obtain Letters of Administration.*

A Hindu testator authorized certain persons to pay the expenses of the rites and ceremonies and deal with the debts and dues, and empowered his wives to make *patni* settlement of his immoveable property. One of his two widows applied for Letters of Administration to his estate, which was disallowed on the ground that there were executors appointed by the will.

Held, the duties assigned to the executors by the will are the primary duties of an executor, and the testator intended that they should act as his executors. Under the circumstances of the case, this was not an imprudent action on his part. The powers given to the wives and executors did not clash. The decision of Lower Court was correct. PROMODE BALA DEBI *v.* KRISHNA SUNDARI DEBI. **1 C L J 301.**

9 Bequest to idol-Shebaits right—Probate —Executor by implication. 10 C W N. 232 Col: 514 P I.

10 General Rules and circular order and 83 Act V of 1881—Security Shebait. 6 C L J 453, Col: 80 P I.

11 Joint executors, power of on—One of several joint decree holders cannot give a full discharge for the amount of the decree- 3 A L J 94 Col: 531 P I.

12 *Executor—Liability upon contract of borrowing.*

Held, that upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator *L. R. 7 Ch. App., Cas.* 123; 11 *Morre's P. C. App., Cas* 198 *followed.* DEBENDRA NATH BISWAS *v.* (RADHIKA CHARAN SEN) HEM CHANDRA ROY. **S. C. 8 W. N. C. 135=31 C 253.**

13 Liability for loss caused to estate—Want of diligence—Liability for mismanagement of co-executor. 29 B. 170 Col. 548 P. I.

14 Filing account—Practice—Executor—Duty of accounts—Filing. 7 B. L. R. 451 Col. 681 P. II.

15 Power of restriction by will—Consent of beneficiaries. 3 C. L. J. 260 Col. 531

16 Power to sale—Principal and agent—Common agent of mortgagor and mortgagee —Sooleman Somjee *v.* Rahimtula Somjee. 6 B. L. R. 800.—*See Vendor and Purchaser and Will.*

17 *Probate Act—Hindu or Mahomedan—Title to property —Probate Act.*

Before the Probate Act, a Hindu or Mahomedan executor took no title to property merely as such by virtue of the probate; in the case of Mahomedan executors such a title was created for the first time by the Probate Act. NAWAB AKBARI BEGUM *v.* NAWAB NUZHAT-UD DOWLA ABBAS HOSSEIN KHAN. **1 C. L. J. 594.**

18 *Power to dispose of—Will—Executor—Power to dispose of property—Mortgage by executor—Executor applying trust money for private purposes—Devastation of property—Rigt of legatee.*

In not investigating the title under which he takes, a person is ordinarily guilty of great and culpable negligence which disentitles him from defeating claims that would have come to his notice, had he exercised reasonable care The ignorance resulting from abstention to make the ordinary investigations and inquiries cannot better his position.

Executor and heir *(Contd).*

As to the powers of alienation of executors in India there is no distinction, as there has been in England, between moveable and immoveable property.

Executors have full power of disposal over their testator's estate and generally speaking neither creditors nor legatees can follow assets aliened for value in exercise of that power. And so strong is this rule that the alienees for value are safe in their title, though the alienation was for a purpose foreign to the Will, if they took without notice of this vice But if the alienees take with notice then they are in no better position than the executors from whom they claim, and the assets can be followed in their hands both by creditors and by legatees, who have been prejudicially affected.

A mortgage, by an executor, who is also a residuary legatee, to secure his private debt may be set aside even at the suit of a pecuniary legatee for the nature of the claims of legatees, the taking under the Will may be ascertained; but as to creditors, it is different; if a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts if any, therefore, the mortgagee would be safe as against creditors.

In determining the right of a pecuniary legatee as against a mortgagee from an executor who is also a residuary legatee, the question hinges not so much on the character of the disposition, as upon whether the circumstances justified the inference that the mortgagor was in possession as legatee and not as executor.

When the trust property was mortgaged by the executors for their private purposes and the mortgagee dealt with the mortgagors without making any enquiry as to their title assuming that they were owners of it.

Held, that it was a devastation of the testators assets.

That the mortgagee became a party to devastation and the legatee prejudiced by such mortgage could follow the property into the hands of the mortgagee. GOOLAM HOOSIEN SOMJI *v.* THE BANK OF BOMBAY. SOOLEMAN SOMJI *v.* RAHIMTULLA SOMJI. **7 B L R 408.**

19 Purchase of trust property by—Their relations—Transfer of business to the surviving partner—Good faith—Survival of good will, 9 B L R 606, Col: 551 P I.

20 Release—Interpretation of—Absolute estate—Restriction upon prohibition against alienation invalid, 4 B L R 508 Col: 2130 P. I.

21 *Remuneration of—Will- Executor—Remuneration of.*

The probate court in India is competent to award remuneration to an executor to whom no legacy has been left by the testator.

In re the Estate of the Late Sardar Dyal Singh Majithia Deceased. 76 P R 1905=195 P L R 1905.

22 Security to be furnished by before granting probate—Amount of security, 1 C L J 180 Col: 527 P I.

23 *Solicitor, executor—Remuneration of.*

Where a member of a firm of solicitors is appointed an executor, it is usual to allow him to charge for professional work done by him or his firm and the insertion of such a clause in the will need hardly create a suspicion. Such a clause cannot enable the solicitor to charge for services which an ordinary executor would be expected to perform without the intervention of a solicitor. BAI GUNGUBAI *v.* BHUGWANDAS VALJI. **15 M L J 122; 7 B L R 854; 9 C W N 769 at 780; 28 B 30; 32 I A 142; P. C.**

24 Suit by—Sale for arrears of rent—Incumbrances—Annulment of notice 32 C. 710, Col. 89 P. I.

25 Suit by a person other than—For debts due to estate—3, L. B. R. 192 Col. 514 P. I.

26 Will—Before 1st September 1870—Position of—Mere Manager. 32 C. 861 at 871. *See Hindu Law—will.*

Executor de son tort—Order passed against.

Residuary legatee of judgment debtor. 30 C 104 Col 1148 P I.

1 Creditor—Liability of under Hindu Law when there is a legal representative—Power to pay own debt out of assets—Consent of heir to such payment how far a defence to creditor, action. 28 M 351 Col 720 P II.

2 English Law—Principles of—Applicable to Hindus Termination of his function—10 C W N 566 Col 2039 P I.

3 Executor de son tort—Applicability of principle to Hindus—12 C W N 237 Col 2039 P II.

Executor's year.

1 Executor's year—Construction of trust—Payment of debts and legacies—7 B L R 755 Col 92 P I.

Executory Contract.

1 Assignment of—Fraudulent transfer—Unlawful object—10 C W N 755 Col: 280 P I.

2 Benefit of—Executory contract if can vest in Official Assignee. 11 C W N 566 Col: 553 P I.

Exparte decree.

1 Adjourned date of hearing—Defendant filing written statement and appearing afterwards. 4 M L T 216 Col: 1462 P I.

2 Against several defendants—One defendant can apply—4 M L T 230 Col 1463 P I.

3 Appeal from—Application to set aside

Exparte decree *(Contd.)*

can be heard—12 C W N 815 Col 1463 P I.

4 *Application for setting aside security required—Amount of such security.*

On an application to set aside an *exparte* decree in a suit on a mortgage bond, whereby property was mortgaged for Rs. 6,000, which was worth more than that sum, an order was made directing the *exparte* decree to be set aside on the defendants furnishing security for Rs 10,000 & on their failure to do so upholding the decree.

Held, that the security required by the lower Court was excessive, and it was ordered that the security be reduced to Rs 1,000 to be furnished within a month from the date of the order and that, on such security being given, the case should be restored to the file for trial. MAUNG SEIN *v.* ARMUGAM CHETTY **14 Bur. L R 214.**

5 Application to set aside exparte decree. *See C P C Act V of 1908 O IX R 9 72 P R 1905 No 2088 and O IX R 13 36 P R 1903 NO 2109 110 P L R 1905 No 2131, 8 P R 1803 Reve: No 2132 3 M L T 225 No 2137 P I,*

6 Award—Compromise decree repudiated by defendants whether exparte. 3 C L J 158 Col: 1461 p I.

7 Condition precedent to setting aside—5 A L J 295 Col 771 P I.

8 Costs on—Setting aside of order as to costs—27 A 192 Col 769 P 1.

9 Execution of sale—Reversal of decree—6 C L J 92. *See Execution of decree No 296.*

10 Order setting aside ex-parte decree—appeal—103 P R 1905 Col 430 P II.

11 *Order setting aside ex parte decree becomes inoperative on defendant not paying costs adjudged against him—C P C (XIV of 1882) S 108—Ex-parte decree.*

When an order setting an ex-parte decree is passed conditionally on the defendant paying costs awarded to the plaintiff within a certain time and the defendant fails to make the payment the order becomes inoperative. GHULAM MUHAMMAD *v.* TULSI RAM, **60 P R 1904.**

12 Setting aside of—Principles applicable. 6 C L J 226 Col 1459 P I.

13 Setting aside of—Sale—Appeal—6 C L J 102 Col 1130 P I.

14 *Several judgment debtors—Civil Procedure Code, section 108—Decree set aside as against one of several joint judgment-debtors—Decree passed subsequently against exempted party—Execution of decree—Limitation.*

A decree for sale on a mortgage was passed against several defendants jointly on the 25th of August 1900 and made absolute on the 21st December 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March 1902. Subsequently a decree was passed on the merits against this defendant, and her appeal was dismissed by the High Court on the 16th November 1904. As against this defendant the decree was made absolute on the 27th of November 1905.

Exparte decree *(Contd.)*

Held that the orders of the 25th August 1900 and the 16th November 1904 between them, operated as one decree for the sale of the mortgaged property; that the joint effect of the orders of the 21st December 1901 and the 27th November 1905 was to make absolute this decree, and that an application for execution made on the 21st December 1905 was not barred by limitation. Bhura Mal *v.* Har Kishan Das, I L R 24 All. 383, Sham Sundar *v.* Muhammad Ihtisham Ali, I L R 27 All. 501, and Shaida Husain *v.* Hub Husain, Weekly Notes, 1902, P 184, referred to. GAURI SAHAI *v.* ASHFAK HUSAIN, **4 A L J 552=A W N 1907 P 204=29 A 623.**

14 Substituted service of summons—42 P R 1904 Col 1460 P I.

15 *Suit set down for hearing before date fixed in summons—C. P. Code S. 68, 69, 96, 100, 101, 112 and 113—High Court Rules, Nos. 111 and 112.*

Held that the plaintiff is not entitled to have a suit set down for an *ex parte* decree before the date fixed in the summons for the hearing of the suit, even though the defendant has not filed his written statement within four weeks from the date of the service of the summons as required under Rule 111 of the High Court Rules. DHIRAJ LAL PANACHAND *v.* HORMUSJI EDULJI BOTTLEWALLA. **10 B L R 301.**

16 Transfer of decree—Set aside suit. 78 P. R. 1905 Col. 1460 P. I.

See for other cases C. P. C. Act V of 1908 O IX R 13 Col 1459-1470 P I.

Exparte order.

1 Absolute—Notice to judgment debtor before making order—4 O C 238 Col 1461 P I.

2 *Absolute—Order by Court setting aside of.*

An act of the Court shall prejudice no man and the opposite party has a right to question the act in prior time—BALABAI *v.* GANESH. **27 B 162 at 182.**

3 Admitting appeal. Bona fide mistake of pleader in calculation—12 C W N 25 Col 1737 P I.

4 Courts inherent jurisdiction to set aside—9 C W N 81—32 C 253 Col 670 P I.

5 Court's inherent jurisdiction—Appeal informa pauparis 26 A 327 Col 1725 P I.

Exparte proceedings.

1 Due service of summons—Sufficient time for appearance. 1 L B R 1900—1902 P 226 Col 1449 P I.

2 Right of heirs of defendant to apply to set aside after defendant's death—36 P R 1903 Col 1460 P I.

Expediency.

1 Resjudicata—Competent Court 9 C W N 257 (P C). Col 1000 P I.

Expert.

1 With special skill employed to supply particular boilers—Duty to exercise skill without relying on others. 13 C W N 52 Col 627 P II.

Expert's evidence.

1 Expert's evidence—Interpretation of texts—Adoption—29 M 437 Col 182 P I.
2 Experts evidence—Caution against. 29 C 32 Col 181 P I.
3 *Expert's evidence—Taxation—Solicitor's costs—Work not ordinarily falling upon Solicitors—Work of meritorious character.*

K was the Solicitor for the defendant in a suit brought to obtain probate of the will of one Damji Lakhmichand. The defence set up was that the will was a forgery. Being unable to procure the services of an expert K., after special study for the purpose, himself carefully studied every letter of the alleged will and despite Counsel's opinion that he had no chance of succeeding, he eventually succeeded in satisfying the trying Judge that the will was a forgery. In his bill for attorney and client's costs K. claimed extra payment for the additional and unusual work incurred by him.

Held, in review of taxation, that K. was entitled to be separately remunerated for the special work done by him, as it was in fact a charge for work done which would not ordinarily fall upon a Solicitor in the preparation of the brief. DAHIBAI *v.* SOONDERJI. **9 B. L. R. 819 = 31 B 430.**

Expert's opinion.

1 Expert's opinion. Points necessary for —Land acquired by Government—Compensation. 32 C. 343 Col. 852 P. I.
2 Expert's opinion—Value of. 10 B. L. R. 1004. *See Col. 623 and Lunacy.*
3 Experts opinion— Potential value in fixing compensation. 10 B. L. R 675 Col. 835 P. I.
4 Expert's opinion as to value of land—Market value. 10 B. L. R. 907. *See Land Acquisition Act I of 1894 S. 23 P. II.*

Expropriletary holding.

1 *N. W. P. Land Revenue Act III of 1901 Ss. 3, 87 and 91—Proceeding commenced under a repealed Act—Act XIX of 1873, S. 77.*

The plaintiffs applied under Act XIX of 1873, when it was in force to have rent fixed on the defendant's holding. The rent was fixed after the new Act (III of 1901) came into force. Plaintiffs, thereafter, sued for arrears of rent for a period prior to the assessment.

Held, that although the application for fixing the rent was made under Act XIX of 1873, the order of the Settlement Officer, fixing the rent, must be deemed to have been made under the provisions of the Act, which was in force at the date of the assessment. S. 91 of this Act was applicable and the plaintiff was entitled to a decree. BANWARI LAL *v.* BALDEO PRASAD. **2 A. L. J. 206.**

Exproprietor

1 *Exproprietor selling site and materials—Wajib ul-arz—Common law.*

A *wajib ul-arz* provided that an ex-proprietor had a right to sell the materials of the house.

Held, that the terms implied that the site could not be sold and a purchaser from the ex-proprietor could not acquire the right to live in the house. Such was also the common law of those provinces 20 A 248 referred to. JAMNA PRASAD *v* PANNA LAL. **4 A L J 754 = A W N 1907 P 237.**

Extension of time.

1 For defoit—Restoration to file an appeal struck off for default Time limits, extention of. 1 L B R 1900-1902 P 329 Col 1302 P I.
2 *Till next Court day—Date of performance —Act due under the law or by order of Court or by agreement of parties—Court closed on last day—Extension of time.*

If the law or Court directs a thing to be done within a period fixed by it and it is impossible of performance on the last day fixed, for no fault of the party required or directed to do the act, it will be recognised as properly done, if it is done on the next day it is possible of performance.

Where by a compromise decree, a certain sum of money was to be paid to the plaintiff's pleader or deposited in Court within the 8th October and a part of the money was paid to the plaintiff's pleader in time but the balance not paid or deposited till the 10th November the first open day after the vacation which commenced on the 8th October, when it was deposited in Court.

Held, the deposit was a valid one, as the deposit could not be made on the 8th October and subsequent days through no fault of the party, *8 W R 223, 22 Mad 172, 18 Cal 631, followed.* SURENDRA NARAYAN MUSTAFI *v.* SOURAYINI DASI. **3 C L J 399 = S C 10 W Cal 585.**

Exterritorial rights

1 Exterritorial rights—Whether the value of buildings to be awarded to the owner valuation of compensation. 26 B 1 Col 857 P I.

Extinguishment of mortgage

1 Extinguishment of mortgage—Discharge of part of mortgaged property—Subsequent mortgage. 7 B L R 191 P I.

F

Fair Comment—True facts—Public papers—Libel.

1 *Privilege—Cause of action—Misjoinder —Amendment—Limitation.*

Those who write in public papers must be careful as to the language they use while commenting on the proceeding of Courts of Justice, and on matters of public interest; they should also be careful that they do not wantonly assail the character of others or impute criminality to them. Wood-

Fair Comment—True fact—Public paper-Libel.

gate *v.* Ridout, 4 F and F. 202, R. *v.* Tanfield, 42 J. J. 424, referred to. It is absolutely essential to differentiate between fair and *bona fide* comment and allegations of fact. Where a grave criminal offence is alleged as a fact regarding the public acts of a public man, nothing short of proof of its truth can avail the defendant in an action for libel: the allegations of fact must be either true or privileged. Davis *v.* Shepstone, 11 A C 187 and Hunter *v.* Sharp, 4 F and F. 983. Where a suit was instituted by six plaintiffs jointly, and five of them were held to be not entitled to proceed in the suit on the ground of misjoinder of parties and causes of action, one plaintiff only being allowed to continue in the suit:—

Held, that the suit was not barred by limitation. Sandes *v.* Wildsmith, [1893] 1 Q B 771, referred to. BARROW *v.* HEM CHUNDER LAHIRI. **12 C W N 490=35 C 495.**

Falkar.

1 Falkar rent is rent within the meaning of the Bengal Tenancy Act. 6 C L J 669 Col 148 P II.

False case.

1 *Pleadings—Suit for possession alleging tenancy—Decree on proof of title.*

The plaintiff claimed to recover possession of a cattleshed and arrears of rent, basing his claim on a contract of tenancy. The plaint alleged that the plaintiff was owner and in possession of the shed which he had built at his own expense, and the shed had been leased to the defendant who paid rent for a few months, but afterwards ceased to pay. The first Court found that there was no satisfactory proof of tenancy; but having found that the plaintiff was the owner of the shed, and as such, entitled to possession, decreed the claim for possession. The lower Appellate Court held that inasmuch as the only issue definitely raised in the case was the issue as to the tenancy, the issue as to the title could not legitimately be considered, and that inasmuch as the plaintiff had failed to prove the tenancy, the suit could not be maintained.

The question of title was raised in the pleadings, and the evidence on both sides was directed to it, though no specific issue as to title was framed.

Held, that the plaintiff was entitled to a decree on his title.—*W N All 1903 p 18, followed. W N All 1901, p 188, referred to. 15 All 186 overruled, 9 Bom H C R 6, 10 Bom 451, W N All 1884, p 285, distinguished.* BALMOKAND *v.* DALU. **25 A 498.**

False-Imprisonment.

1 Information given to the police—Prosecution after investigation—Acquittal of accused—Suit for false imprisonment against—Informent 3, C L J 659 Col 834 P II.

False-Imprisonment *(Contd.)*

2 Presumption of impartibility—Burden of proof—Right of exclusive management by descendants of one of several grantees, 5, B L R 409 Col 283 P II.

Family arrangement.

1 Family compromise to which one was no party to enforce the terms of the compromise, C W N 386 Col 310 P I.

2 *Not to partition—Consideration—Hindu Law—*

Joint owners of lands may come to an agreement as to the manner in which they will mutually enjoy the property, and an agreement between the members of a Hindu family not to come to partition may be binding on the immediate parties thereto (2 hyde 97 Fol, 28 C 769 dist)

A family arrangement may be such as the Court will uphold although there are no rights in dispute, and if sufficient motive for the arrangement is proved, the Court will not consider the *quantum* of the consideration too nicely. L R chapp Col II 294 followed.

The parties on agreeing not to sue for partition, obtained a right to take advances from family funds in excess of what might be due to them at the time, and also obtained a right to pre-empt any share which the other members of the family might wish to sell,

Held, that the arrangement was for consideration. KRISHNENDRA NATH SARKAR *v.* DEBENDRA NATH SARKAR, **12 C. W. N. 793.**

3 Partition made disqualification from inheritance—Presuption—Leprosy continued—Arrangement when biding—4 C L J 323 Col 281 P II.

4 Reversionary rights—Family arrangement-Alienations contrary to family arrangement—Right of suit—15 M L J 392 Col 426 P I.

Family Compromise.

1 District—Compromise by father on behalf of his minor son—Withdrawal of suit. 3 P R 1905 Col 1479 P I.

2 Family Compromise—Consideration—Right of plaintiff to sue on agreement entered into between others — English law—American law to be followed by Indian Courts—Consideration—Inadequacy of consideration family. 28 P L R 1905 Col 251 P I.

Family Custom—Inheritance.

1 Succession—Collaterals propinquity—6 C W N 425 Col 290 P I.

2 Marriage-Karewagoriu-Khatris-Widow—Chadar andazi—Legitimacy of issue inheritance. 4 P R 1905 Col 63 P I.

3 *See* for other cases Custom. Col 732 733 P II.

Family Disputes—Compromise.

1 Guardian and ward—Compromise of uncertain right by guardian on behalf of Minor. 15 M. L. J. 494 Col 489 P. II.

2 Doubtful rights—Parties. 5 C. W. N. 386 Col. 410 P. I.

Family Property.

1 Right of widow to dispose of family property subject to children's right of pre-emtion. 4 L. B. R. 128 Col. 256 P. II.

Fasli Jasty.

1 Right of Government--Notice previous to suing Secretary of State for India in Council or public officer. 24 M 279 Col. 1198 P. I.

Fatal Accidents Act XIII of 1855.

1 *See Act XIII of 1855 Fatal accidents. Col. 61, 62 P. I.*

Father's debt

1 Son's liability—Illegal consideration—Son's duty to pay sums cirminally misappropriated by father. 27 M 71 Col. 881 P. I.

Father's share.

1 Extent of—Decree against father for debt contracted by him. BADRI PARSHAD *v.* RAM RATTON. **1 O. C. 169.** *See Hindu Law.*

Fazuli Marriage

1 *Mohomedan Law—Shias—Puberty and discretion, evidence of—Fazuls marriage-Minor's assent.*

A suit was instituted by a husband for the recovery of the defendant, his wife. Both the parties were *Shias.*

Held, that the attainment of either puberty or discretion is not conclusively proved by the fact of a female reaching the age of nine years. If the mother of a female who has not attained puberty and discretion gives her in marriage it is a *fazuly marriage* and incomplete by reason of sufficient authority. The assent of the minor on reaching puberty and mature understanding is necessary to complete it. The attainment of discretion cannot be conclusively proved by the attainment of puberty. SAULAT ARA BEGAM *v.* FAKHR-UD-DIN KHAN. **2 O C. 91.**

Fees.

1 Advocates rights—Capacity of advocate to sue or be sued in connection with professional services. 4 L. B. R. 1907 P. 55 Col. 13 P. II.

2 Pleader's fee, how to be calculated—Market value of the suit for redemption. 6 O. C. 130 Col. 509 P. I.

3 *Pleader and Client—Pleader's fee how to be calculated in a suit for pre-emption—Oudh Civil Digest, para. 288 rule 4—Decree, amendment of Civil Procedure Code (Act XIV of 1882), S. 206.*

Having regard to rule 4 of paragraph 288 of the Oudh Civil Digest, held that in a pre-emption case, the pleader's fee should be calculated on the value of the property at the rate of 5 times the Government Revenue assessed on the land in dispute.

Held, also, that when the costs allowed in the decree were not calculated according to law, the decree was not in accordance with the judgment and the Lower Court had power to amend it under section 206, Civil Procedure Code.—RANI JAIBANS KUAR *v.* CHOURAS KUAR. **7 O C 43.**

4 Reasonable remuneration—Rate fixed by Judicial Commissioner's Court 4 O C 345 Col 410, 519 P I.

Female's Estate

1 *Transfer of Property Act (IV of 1882), Section 123—Gift made b fore the Act came into force—Female's estate.*

A gift of immovable property, made orally before the Transfer of Property Act came into force, is not invalid.

A person not born at the time of a gift made with the assent of his father, is not entitled to object to it.

Possession held for over the statutory period under an alleged title, which is found to be invalid or unfounded, avails the party holding the possession, if any question of prescription arises after the expiry of the period.

A gift made to a wife by a Hindu confers on her the limited estate of a female known to the Hindu law. KONE GOUNDAN *v.* BOLA NAICKEN. **M L J 1902 P 387.**

2 Alienation—Gift—Sale Female estate—Necessity — Res judicata suit for possession Adverse possession, 140 P L R 1902 Col 940 P I.

Fictions and metaphors in Law.

Scope of their aperation—Judicial notice of Zanzibar law where courts are established by Britain under a treaty, 26 B. 1 Col. 179 P. I.

2 Fictions when can be restored to—Tahsildar without consulting Municipal Council—Validity of grant—Appeal—Darkhast Rules. 26 M. 742 Col. 463 P. I.

Fictitious sale-deed.

1 *Fictitious sale deed—Pre-emption suit for.*

One Musammat Madha, an under-proprietor held certain groves and houses which she gave by *shankalapnama* to one Dwarka Brahman, who, afterwards, by a sale deed, transferred the same to Musammat Madha. The superior proprietor sued for pre-emption.

Held, that as the sale passed no title to the vendee no suit for pre emption lay (*Ramdin* v. *Ranglal Singh,* 17 All., 451 and *Blagan* v. *Mushtak Ahmad,* 10 All, 421, distinguished' *Mulchand* v. *Madho Ram,* 5 All., 324, referred to). IHTISHAM ALI *v.* MUSAMMAT MADHA. **3 O. C. 260.**

Fiduciary relation.

1 Not applied—Undue influence deed executed under—Fiduciary relation deed between persons standing in—Letters patent clause. 29 M. 1 Col. 435 P. II.

2 Fiduciary Relationship—Catalogue of Agency—Solicitors clerk and client profits made by agent 26 B 689 Col 2078 P I.

Filial relation—Inheritance

1 Son of divorced wife—Maintenance of father—Budhist law. 1 L B R 1900-1902 P 161 Col. 249 P II.

Final

1 Meaning of—Letters patent—Section 15—Appeal. 13 M L J 497 Col 1262 P I.

Final Decree

1 Meaning of—Kumaon, Rules 1894 Rule 17 final decree — Arbitration—Award—Compromise—A W N 1904 P 49 Col. 1694 P I.

2 Final decree—Suit for possession of an estate as barred by limitation 1 O C 205 Col: 1677 P I.

3 Or, order- Execution of decree—Final

Final decree *(Contd.)*

decree or order—Appelate court. 3 O C 50 Col. 2001 P I.

Finality of order.

1 Material irregularity—Order of sale not proclaimed by beat of drum—Inadequate price, 1 O. C. 186, Col. 1551 P I.

Final Review and Revision—

1 Meaning of—Setting aside of 30 O 619 Col 378 P II.

Financial Commissioner.

1 *Award made by Financial Commissioner in dispute regarding maintenance—Rule of the British Association—Oudh Estates Act (I of 1869), s. 33.*

A and S claimed against a Taluqdar to be entitled to shares in the Taluqa. The Financial Commissioner dismissed their claims, but suggested them to accept whatever may be awarded to them by a committee of the Taluqdars. Later on, on 9th January, 1869, the Financial Commissioner, Colonel Barrow, made, not in his official capacity, "but as supervisor of the Taluqdar's proceedings," an award directing: "A. who is childless will receive for his life a two-annas share in the Estate; S. and his heirs will receive in perpetuity a three-annas share in the same Estate. On the death of A. his share will be divided equally, one anna will revert to S. S. (the Taluqdar) and his heirs and successors." On A.'s death S. got one anna and the other one anna reverted to the Taluqdar. S. thus got possession of lands whose gross rental was equal to the profits of a four-annas share of the Estate.

S. S. and S. having died, the son of the former sued the descendants of the latter for a declaration that after the death of S. he, as Taluqdar, was entitled to 25 per cent. of the gross rental of the land in the defendant's possession as rent payable by them. Plaintiff's material allegations were that the award of 9th January, 1869, was one for maintenance and must be read subject to the rules of the British Indian Association framed in 1867. The suit was defended on the ground that the Financial Commissioner, in making the award of 9th January, 1869, acted as a private arbitrator and not in connection with the B. I. Association that the rules of that associations could not be read into the award which in effect conferred an absolute right on S. and his heirs. The Plaintiff produced a lithographed report of the B I Association for 1865-70, containing the 'rules' to prove them.

Held, that as the existence of the rules is part of the history of the Province, the report which contains them and which purports to have been published by order of the Association may properly be received as sufficient evidence of their terms.

Held also that it was not intended that all awards made by the B. I. Association should be read subject to the rules nor could the Financial Commissioners award be treated as one made by the Association and therefore also read subject to the rules

Financial Commissioner *(Contd)*

—GANGA BAKHSH *v.* DALIP SINGH, 7 O C 218.

2 Financial Commissioner Punjab—Authority of over litigation concerning government, 101, P R 1908, Col 1633 P I.

3 Financial commissioner's rulings to be in accordance with Chief Court judgments order rejecting petition under s 336 C P C Revision Punjab Court, 3 P R 1903, Col 1155 P I.

Finding of fact.

1 Not appealed against by defendants-Res-judicata 123 P L 1902, Col 2101 P I.

2 Findings of fact—Chief courts power on appeal against order of remand to go behindings of fact—25 P L R 1902 Col 1383, P I.

Finding of fact.

1 Chief court's power to co-behind—Suit by a member of a joint family against some of the members of a firm. 37 P. R. 1902 Col. 1384 P. I.

2 On allegation and evidence—Mortgage deed—Suit for cancellation of mortgage deed. 7 O. C. 287 Col. 329 P. II.

3 Substantial question of law—Appeal to. 59 P. R. 1905 Col. 1288 P. I.

Firm.

Firm—Partners—Contract—Consideration—Performance of a contract—Mortgaged property.

A firm is not necessarily bound by a contract made with one of its partners merely because it has derived benefit from the contract.

A stranger to the consideration cannot enforce performance of a contract by an action thereon in his own name although he be the party avowedly intended to be benefitted thereby. 13 R R. 347; 35 R R. 764; 56 L J. Q B. 589; 12 L. J C P. 305; 34 R. R. 408; 69 L. J. Q. B. 382; 30 L. J. Q. B. 265; 34 L. J. C. P. 292; 53 L. J. Ch. 290; 1 A. 106 referred to. SETH RAM LAL AND SETH LAKHMI CHAND *v.* SETH NARSING DASS &c. **14 C. P. L. R. 1901 P. 22.**

2 Suit on behalf of or against—Names of parties in proceeding. 4 L B R 1907 P 23 Col 2079 P I.

Fishery.

1 *Julkar—Proof—Navigable river—Survey map—Private maps.*

A person has no title to any fishery right in a navigable river, or any part thereof lying outside the boundaries of his estate unless he proves it by evidence independent of his right to his estate.

Evidence to prove the grant of an independent right of fishery in a navigable river discussed.

The presumption of law is that, in the absence of evidence to the contrary, survey maps prepared for public purposes by responsible officers of Government are entitled to more reliance than maps prepared for private purposes in a private suit. MATHURA NATH *v.* SIB CHANDRA BOSE, **12 C. W N 334.**

2 *Navigation River—Dobas left by recission*

Fishery *(Contd.)*

of river—Fishery rights — River, change of course of—Lakes or dobas — Communication with main channel.

Held, that if a river shifts its course leaving lakes, *dobas* or sheets of water in its old bed, the grantee of the exclusive right of fishery in the river retains that right over such lakes and *dobas* so long as these latter remain in communication with the main channel at all seasons of the year. W R Gap. No. p. 108 ; 21 W. R 27 ; 17 Cal 963 explained and followed. HEM CHANDRA CHOWDHURY *v.* JAGADINDRA NATH ROY. **9 C. W. N. 334.**

3 *Fishery in public navigable river—River arm ceasing to be an arm of a flowing river.*

If by a change in the course of a public navigable river, an arm of the river ceases to be an arm of the flowing river, the person who had a right of fishery in the river ceases to have any right to it: It becomes the property of the adjacent owner—21 W R 27, 32 C. 1141, W R 1864, 108, referred to. ISHAN CHANDRA DASS SARKAR *v.* UPENDRA NATH GHOSH, **12 C. W. N. 559.**

4 Right, grant of, independently of, interest—Suit for price of trees. 7 C L J 152 Col 142 P II.

5 *Right of—Change in course of river—Jalkar—Piece of water connected with the river.*

The plaintiff brought a suit claiming that he was entitled to certain jalkar rights over a long piece of water. The plaintiff had an undoubted right of fishery in the adjacent portion of the river Ganges, which was connected with the piece of water, the jalkar rights in respect of which were in dispute. It was found, that when the floods went down the channel continued for a time to be connected with the river, but the connection was liable to dry up in the hot weather.

Held, that the disputed water having been part of the bed of the river and the two being connected the plaintiff having fishery rights in the adjacent Ganges was entitled to the fishery rights in the said piece of water. JOGENDRA NARAYAN ROY *v.* CRAWFORD **2 A L J 569=32 C. 1141.**

6 *Right of—Change in course of river—Effect of—Right of Government—Title and navigable river.*

When a tidal and navigable river shifts its course, fishery rights continue to subsist in the river in its new course. Government had the right to lease fishery right in tidal and navigable rivers 10 C W N 540; 4 C L J 51 dist. AYUBALI CHOWDHURY *v* DAYA BIBI. **21 C W N 105.**

7 *Right of—*Jalkar *rights—Grant by Government. presumption of—Right of fishery by prescription—Fishing in navigable river.*

Though there may not be any express grant, a right of fishery in a navigable river running through land permanently settled with the plaintiffs may still be presumed, in their favour, as included in the settlement, from a long continued user of such right. 11 Cal. 434, referred to. SARAT CHANDRA ROY *v.* KALARAM MALO. **33 C. 1349.**

8 *Right on certain portions of land--Sale-certificate -- Transfer of title -- Registration —Transfer of Property Act (IV of 1882) S. 54 --Registration Act (III of 1877) section 17 (o) --Fishery rights.*

Sale-certificates, that are granted by the Collectors after sale of "B class" of surplus lands acquired by Government under the provisions of the Land Acquisition Act, are sufficient in themselves to validate the transfer of title from Government to the transferee without being registered. Fishery rights in water on certain portions of the land transferred to the purchaser by the sale-certificates, cannot exist separate from that land. SARAT CHANDRA ROY CHOWDHRY *v.* JATINDRA NATH MUKERJEE. **35 C. 614.**

9 Rights, whether lands within marriage of land Acquisition Act 7 C. L J. 445 Col. 834 P. I.

Fixtures.

1 Meaning of—Landlord and tenant—Additions. Removal of. 6 B L R 1073—29 B 323 Col 2026 P I.

Fluctuating body.

1 Adverse possession by—Waste land—Landlord and tenant—Encroachment by tenant—31 C 397 Col 2062 P I.

Fluctuating capacity.

1 *To hold property,*

A village community is capable of property in this country NAVROJI NANEKJI WADIA *v.* KHARSETJI MANCHERJI DASTUR, **5 B L R 745=28 B 20**

See for other facts Col 1210 P I.

2 *To hold property.*

The law of the country recognizes fluctuating communities as legal persons capable of owning property, as for instance the caste and the village. THE SECRETARY OF STATE FOR INDIA *v.* HAIBATRAO HARI. **6 B L R 43=28 B 276.**

Foil and counterfoil.

1 Pyatpaing—Certificate of report of transfer of interest in a revenue holding. 1 L. B. R. 1900-1902 P. 260 Col. 692 P. II.

Foot-race

1 Pwe—Lower Burma Village Act 513 A. —In the absence of a Notification by the Local Government under sub-section (3) of section 13 A. of the Lower Burma Village Act, 1889, a foot-race is not a *pwe* for the purposes of that section. KING EMPEROR *v.* CHAN E. **3 L. B. R. 1905 P. 93.**

Foreclosure

1 Absolute decree for--Formal order for possession. 17 C P. L. R. 1904 P. 62 Col. 669 P. I.

2 Application to re-open--Executor--Order absolute for foreclosure. 29 C. 644 Col. 1116 P.I.

3 Debt not incurred wholly for necessary purposes--Provisions not applicable to pending appeal. 150 P. L. R. 1901 Col. 944 P. I.

Foreclosure *(Contd.)*

4 Decree—Award of costs. 16 C. P. L. R. 1903 P 73 Col. 663 P. I.

5 Decree—Form of—Fresh suit—Prior and previous mortgage. 27 A. 325 (P. C.) Col. 635 P. I.

6 Decree—Application for order absolute—Notice to judgment-debtor before making order absolute—Exparte order absolute 4 O C 238 Col 1461 P I.

7 Decree—Loss of proprietary right—Occupancy right—Accrual of—Suraj Bakhsh v. Bhigwan Din. Bd. S D No. 7 of 1903. *See Occupancy right.*

8 Decree for, against father—Non-joinder of son in suit for foreclosure against father—Suit by son for redemption. Parmeshur Datt v. Debi Sahai. 6 O C 101. *See Hindu Law.*

9 Decree for, altering, before making absolute—A portion of mortgaged property can not be foreclosed 7 O C 137 Col 1092 P I.

10 Mortgage—Amount to be paid of mortgagee. 3 O C 184 Col 1816 P I.

11 *Mortgage—First and second mortgagee—Mortgagee not representative in interest of mortgagor—Second mortgagee entitled to redeem first mortgage—Effect of redemption—Decree obtained by mortgagor upon second mortgagee's right to redeem*—Res judicata—*Foreclosure.*

A village was mortgaged with possession by G. S. to B. P. in 1880, and in 1894 to S. G. to whom liberty was given to redeem the first mortgage, and a certain sum of money was left with him for that purpose. After this, the mortgagor, without making the second mortgagee a party, sued the first mortgagee for redemption and obtained a decree. S. G., the second mortgagee, then brought a suit against the mortgagor and the first mortgagee for foreclosure of the second mortgage and redemption of the first mortgage. At the time of the institution of the suit the mortgagor had not paid the money found due on the first mortgage. The District Judge dismissed the suit for redemption of the first mortgage and foreclosure of the second and passed only a money-decree against the mortgagor, being of opinion that the second mortgagee as representative in interest of the mortgagor was debarred from suing for redemption and that the mortgaged property was out of the reach of the second mortgagee and that he was bound by the decree in the suit brought by the mortgagor.

Held, that the mortgagee is not a representative in interest of the mortgagor as he does not succeed to the position of the mortgagor as regards the property. A second mortgagee is entitled to redeem the first mortgage whether or not in his mortgage deed provision is made for his doing so. All persons claiming under the mortgagor, such as purchasers, lessees and second mortgagees, have, as such, a right to redeem. The second mortgagee, therefore, was not bound by the decree between the mortgagor and the first mortgagee, simply because he claimed under the mortgagor.

Held, also, that second mortgagee was entitled to a decree for foreclosure. THAKUR SHEO GHULAM SINGH *v.* KAZI GHULAM-SARWAR. **4 O. C, 100**

12 Mortgage—Suit by lambardar against co-sharer for arrears of revenue. KEDARNATH *v.* LACHMIN KUAR. **3 O. C, 310**—*See Rent Act (XXII of 1886) S. 108.*

13 Order absolute—Application to re-open—Executor—Notice—Appeal—Second appeal. 29 C. 644 Col. 1116 P. I.

14 Order absolute—Deposit of mortgage money after time fixed by decree—Mortgagor's right to redeem. 1 O. C. 91 Col. 666 P. I.

15 Order absolute for sale or foreclosure—Order passed exparte—Powers of court to set aside. 32 C. 253 Col. 670 P. I.

16 Suit for setting aside of—Fraud—Suit for possession. 16 C. P. L. R. 1903 P. 131 Col. 1875 P. I.

Foreign Company

1 *Foreign company suing in British Court—Description of plaintiff company in plaint—Practice.*

A foreign company may sue in a British Court in its corporate name according to the law of its country, but it must prove that it is a company duly incorporated under the laws of that country. *Newby* v. *Von Oppen*, *(1872) L R 7 Q B 293* referred to. LEONG AH FOON *v.* The ITALIAN COLONIAL TRADING COMPANY. **3 L B R 1906 P 161.**

2 Foreign Court—Definition of—Presumption of jurisdiction, its rebuttal. 29 C 509 Col: 1051 P I.

3 Jurisdiction of—Definition of jurisdiction over non-resident foreigner. 28 C 641 Col : 506 P II.

Foreign Judgment.

1 Foreign judgment—Definition of—Jurisdiction over non-resident foreigner. 28 C 641 Col : 506 P II.

2 Foreign judgment—Award, suit on—Jurisdiction—31 C 274 Col : 344 P II.

3 *Foreign judgment—Where party has submitted to jurisdiction, irregularities not vitiating judgment :*

A party submitting to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment even when they are such as will, in the view of the foreign Court, render the judgment there a nullity. The judgment cannot be impeached on grounds which could have been, but were not, taken in the foreign Court *Pemberton* v. *Hughes*, (*L R, [1899] 1 Ch, 781*) referred to. GUDARU KRISTNAYYA NAIDU *v* MARADUGULA VENKATARATNAM. **2, M L T 269 = 30 M 292.**

Foreign Law

1 Foreign law--Mahomedan law--26 B I (P C) Col : 179 P I.

Foreigners

1 *Foreigners--Suit against--Jurisdiction--Letters Patent Madras Art 12--Considerations of convenience--Jurisdiction of cause of action.*

The exercise of the jurisdiction conferred by clause 12 of the Letters Patent in respect of applications for leave to see when part of the cause of action arises within jurisdiction ought to be made with great caution when the defendant is an absent foreigner. *S ciete Generale De Paris* v *Dreyfus Brothers*, (29 Ch D, 239 at 243), referred to. Courts in this country are not precluded from taking the question of convenience into consideration in dealing with applications under clause 12 for leave to sue. Part of the cause of action cannot be held to arise at a place, where payment was not originally contracted for merely because after performance of the contract and without any consideration, a promise is made to pay at such place. SESHAGIRI ROW *v.* NAWAB ASKUR JUNG AFTAL DOWLAH MUSHRAL MULK. **17 M L J 304=30 M 348.**

Foreigners divorce.

1 Suit for judicial separation by wife--Divorce--Wife's costs. 29 C 619 Col : 97 P I.

Forest Lands.

1 Forest lands--South Canara and Malabar--Government ownership. 15 M. L. J. 147--28 M 257 Col. 185 P. I.

Forest Rights.

1 Forest lease--Suit for price of trees--Suit for arrears of rent--Demand for breach of contract. 7 C L. J. 152 Col. 142 P. II.

Forever--Meaning of.

1 Grant for maintenance--Proprietor-For ever 23 A. 194 Col 536 P. II.

Forfeiture

1 Landlord and tenant--Denial of landlord's title in written statement. 28 C. 135 Col. 895 P. II.

2 Pleadings--Inconsistent--Plaintiff denying tenancy--Finding in consistent with pleadings. 9 C. W. N. 450 Col. 933 P. II.

3 Claim in a mortgage deed--Redemption suit--O us. 1 L. B. R. 1900-1902 P. 215 Col. 313 P. I.

4 Consent decree in terms of compromise--Difference between compromises embodied and not embodied in decree, 31 B. 15 Col. 1597 P. I.

5 Denial of title by tenant--Landlord and tenant--Decree of court. 3 C. L. J. 201 Col. 102 P. II.

6 Denial of title by one of several joint Lessees. 12 C. W. N. 587 Col. 727 P. I

7 *Deposit of Execution of decree--Sale--Civil Procedure Code (1882) S. 294, 307 Decree holder purchaser--Purchase money set off*

A decree holder with Court's permission purchased the property in execution of his decree, and deposited twenty five per cent of the price, but did not pay the balance within fifteen days under S 307 C. P. C. After that period he applied that the balance might be

Forfeiture *(Contd).*

set off against the amount of his decree under S. 294. C P. C. The Lower Court dismissed the application set aside the sale and forfeited the deposit.

Held, that it was not necessary that the application under s. 294 should be made within fifteen days from sale and the reasons of S. 307 does not apply to decree holder purchaser.

Held, that the application should have been allowed and the deposit not forfeited. BADAMO *v.* SARJU PRASAD. **3 O. C. 240.**

8 *Denial of landlord's title*--Raiyati *tenancies*--*Cause of action.*

A tenant's refusal, to pay rent to a person, who claims as a transferee from the original landlord, until his title is proved, is not a disclaimer which would effect a termination of the tenancy 10 C. B. N. S. 788, Appl. For a disclaimer, there must be a direct repudiation of the relation of landlord and tenant or a distinct claim to hold possession of the estate on a ground wholly inconsistent with the existence of that relation 1 M. and G. 135 and 1 M. and W. 695, followed.

A tenant's assertion that the person claiming to be his landlord is not entitled to the whole rent but must join all co-sharers in an action for rent, is not such a disclaimer as would effect a forfeiture of the tenancy.

The doctrine of forfeiture by disclaimer of landlord's title does not apply to *raiyati* tenancies governed by the Bengal Tenancy Act and the principle of estoppel cannot be applied to make the doctrine of forfeiture indirectly applicable to such tenancies. 17 C. 196 and 20 C. 101, F. 2 C. W. N. 755 and 6 C. W. N. 575, and Distd. and Doubted.

As the cause of action must be based on something which accrued antecedent to the suit, the denial, by a defendant, of his landlord's title in the written statement, would not entitle the plaintiff to a decree in that suit for ejectment on the ground of forfeiture 13 C. 96 and 10 B. and C. 816, followed MALLIKA DASI *v.* MAKHAMLAL CHOWDHURY. **2 C. L. J. 389.**

9 Equity, relief against -- Agreement to pay off decree on a certain date. 6 C. L. J. 176 Col. 308 P. I.

10 *Tenant failing to renew lease--No forfeiture, liability to pay rent--Determination of lease by lessor a condition precedent--Lease for a term T P. A. S. 111.*

If tenant fail to renew a lease for a term under the provision for renewal contained therein it does not operate as a forfeiture, determining the tenancy *ipso facto* and relieving the tenant from liability to pay rent under the lease. A lease becomes determined by forfeiture only when the lessor does some act showing his intention to determine the lease. BOURAMMIAH *v.* MALLAMMAL. **4 M. L. T 315**

11 Relief against--See Landlord and tenant forfeiture and T. P. A. Act IV of 1882 S. 114 Col. 728 P. I.

12 Relief against-- Security for perfor-

Forfeiture *(Contd.)*

mance of contract. 16 M. L. J. 37 Col. 606 P II.

13 Service Tenure—Forfeiture of, by repudiation of tenancy—Ejectment suit for—Notice, if necessary. 33 C 339 Col 931 P II.

14 *Tenant's rights---Disclaimer---Forfeiture.*

Where B did not deny that he held the land as a tenant but he denied A's title to the interest of the landlord. A's claim was that he acquired the landlord's interest at certain rent sales.

Held that such a disclaimer did not entail forfeiture of tenancy of B 10 C B N S 788 at p. 796, 1 M & G 135. 695, referred to. 11. MATHENSON *v.* JADU MAHTO. **12 C. W. N. 525.**

Forma pauperis.

1 Application to file a suit in forma pauperis 8 B L R 671--30 B 593 Col : 1349 P I.

2 Application to file a suit in forma pauperis--Suit in forma pauperis. 8 B L R 642 Col : 1349 P I.

3 Application to appeal in--Application for leave to appeal in forma pauperis dismissed as barred by limitation. 78 P R 1906 Col: 1723 P I.

4 Application for leave to sue in forma-pauperis filed within limitation period. 59 P R 1903 Col 1721 P I.

5 Application for leave to appeal in forma pauperis--Full court fee paid after expiration of limitation period fixed for appeal. 84 P R 1904 Col : 1722 P I.

6 Application for leave to sue in forma-pauperis--Dismissal of suit on merits. 13 M L J 292 Col : 1350 P I.

7 Compromise of suit in forma pauperis--Failure in the suit--Withdrawal of the suit. 31 B 10 F B Col : 1633 P I.

8 Prothontary's decision--Application to judge in chambers--Right to be heard. 32 B 163 Col 384 P II,

9 Right to be declared a pauper—Death of the applicant — Substitution. Right of the heir. 33 C. 1163 Col : 1575 P I.

10 Suit in—Application for leave to appeal in forma pauperis. *See C P C S 404 413 O. XXXIII R 3,5 to 15 Col : 1629 to 1634 P I.*

11 Suit in -Application to file a suit in forma pauperis. 8 B L R 642 Col: 1349 P I.

12 Suit institution—Pauper application dismissed--Suit filed within time granted by court. 9 B L R 204 Col 1722 P I.

Form of caveat.

1 Objection to application. 1 L B R 1900—1902 P 212 Col 526 P I.

Form of decree.

1 Form of decree in redemption suit—What judgment should contain when redemption is allowed. 1 L B R 1900—1902 P 186 Col 879 P II.

Form of proceedings.

1 Form of proceedings in case where there is contention. 1 L B R 1900—1902 P 155 Col 528 P I.

Frame of suit

1 Further appeal—Pre-emption suits—Mortgage suits. GHULAM GHAUS *v.* NABI BAKHSH **35 P L R 1903**. *See Punjab Court Act XVIII of 1884 S. 40 (1).*

2 Jurisdiction of revenue and Civil Courts – Permission to institute fresh suit. 5 O. C. 367 Col. 1590 P I.

3 Suit for arrears of rent—Decree of settlement Court--Money charged upon immoveable property. 7 O. C 208 Col 1825 P. I.

4 Joinder of claims--Suits for mesne profits subsequent to suit for recovery of land. 3 L. B. R. 1905 P. 56 Col 1401 P. I.

Fraud.

1 Fraud—Suit for pre-emption--Concealment of sale. 27 P L R. 1903 Col. 1771 P. I.

2 Fraud--Bagh-Dhaggan, town of Bhiwani, Hissar District--Physical possession. 15 P. L. R. 1902 Col. 1816 P. I.

3 Alienation by Hindu father--Fraud on sons--Sons liability. 4 B. L. R. 587 Col. 2123 P. I.

14 *Allegations must be of specific fraud--Combination of bidders---Cause of action---Pleadings.*

A fraud must be specifically pleaded, General allegations, however strongly worded, are insufficient to amount to an averment of fraud of which any Court ought to take notice 5 A. C. 685 (1880). 15 C. 533 followed A combination amongst bidders formed to bid at the auction, does not, of itself, give rise to an action at the suit of the vendor 6 C. L. J. 111, 3 Brod. & Bing. 116, 6 Car. & P. 239, *Diss.* 18 Jur. 259, referred to. LALA JYOTIPRAKAS NANDE *v.* JHOWMULL JOHURY. **13 C. W. N. 87.**

15 Arbitrator—Delay in award—Damages—Liability of—Cause of action in appeal. 26 B. 132 Col. 892 P. I.

16 Auction sale—Deficiency in area—Compensation. 29 C. 307 Col. 478 P. II.

17 Beneficial owner in a benami transaction—Right of suit against Benamidar when maintainable. 10 C. W. N. 650 Col. 21 P II.

18 Carrying into execution of purpose-No right to recover even where unlawful agreement only partly carried out. 15 M L J 478 Col. 550 P. I.

19 *Collusion--Fraud--Setting aside an adjudication order--Jurisdiction.*

An adjudication order can only be set aside on the ground that it has been obtained by a fraudulent representation of indebtedness in favour of the creditor who has obtained the order or on the ground of want of jurisdiction. RAM KAMAL SAHA *v.* BANK OF BENGAL OF AKYAB. **5 C. W. N. 91.**

20 *Colourable tramsaction to defraud a third party--Effect of decree upholding at upon subsequent suit between same parties--Pleading one's own fraud--Public policy--Estoppel--Resjudicata.*

If two parties frandulently enter into a sham transaction and such sham is kept up by one of the parties in a suit between them

Fraud *(Contd.)*

and a third party, the action of such party is fraudulent and collusive, even though, the fraudulent transaction has not benefited the other party in the suit. If a decree in the suit is passed which upholds the transaction as valid and binding, the party cannot subsequently be allowed to allege his own fraud for the purpose of escaping from the consequence of the decree thus fraudulently and collusively obtained. 10 M. 17; 18 M 378 and 20 M. 326 F; 35 C. 551 distinguished *Per Miller, J.*

Where the decree of a Court has been passed, upholding a certain transaction between the parties to a suit, neither party will be afterwards allowed to say that the decree was the result of a collusive arrangment arrived at by them in order to carry out a scheme of fraud, and that it should therefore be treated as nullity, and the state of things which existed previously to the passing of such decree be restored. *Per Abdur Rahim, J.*

The decree in the last case is regarded as a subsisting and effectual decree, so that the question covered by it is treated as *res judicata. Per Abdur Rahim, J.*

Also, where two persons have combined to defraud a third person and succeeded in their effort, without obtaining a decree of the Court, the Court will not permit one of the parties to shew that the transaction between him and the other party to the fraud was not really what it purported to be, and that it does not therefore bind him In this case the Court refuses on grounds of public policy to help a man who by his act has imposed upon another, to get rid of the consequences of that act against himself. 11 B 708, 18 M. 378 and 20 M. 326 referred to. *Per Abdur Rahim, J.*

Even where there was no actual necessity in the suit for propounding the nominal and colorable nature of the transaction, still the putting the contrivance into use, with a view to effectuate the fraud, is sufficient to estop the party from setting up the shamness of the transaction. *Per Abdur Rahim, J.*

The effect of an apparent transaction, generally,—and especially when such transaction has been confirmed by the decree of a Court,—cannot be got over by shewing that the real transaction was something different. 27 M 28 disd *Per Abdur Rahim, J* KONDETI KANNA RAO *v.* LOLLA NUKAMMA. **4 M. L. T. 331**.

21 Colourable transfer to defraud creditors—Benanic conveyances Rights of owner to repudiate 28 C 370 Col 17 P II.

22 *Co-partner's fraud—Hatchitta alterd by a partner to set up his exclusive title to debt—Subsequent suit by firm—How much claim to be allowed.*

A partner of a firm sued to recover a debt which was really due to the firm on the allegation that it was due to him alone, and his suit was dismissed on the ground that he had materially altered the *hatchitta* executed by the debtor by striking out the other partner's name without the debtor's consent.

Fraud *(Contd.)*

Held, that the other partners were not precluded from suing for the debt on behalf of the firm, making the first mentioned partner a defendant in the suit 2 R R 390 4 Term, Rep 220; 33 C. 812 Distinguished.

That it was not open to the Court in such a suit to give them a decree for such portion only of the claim as represented their share in the firm. A partner's own fraud committed not as firm's agent, is not the fraud of the firm.

Questions regarding the share of the debt to be allocated to the partners *inter se* can only be decided when the accounts of the partnership are taken. MUNSHI BASIRUDDIN MULLICK *v.* SURJA KUMAR NAIK. **12 C. W. N. 716**.

23 Decree—Suit to set aside—Burden of proof. 1 L. N. R. 20 Col. 1874 P. I.

24 *Decree—Civil Procedure Code, 1882, Sections 108 and 540—Suit to set aside ex-parte decree and sale held in execution.*

A suit to set aside an *ex-parte* decree and a sale in execution thereof as fraudulent is not unmaintainable merely because the plaintiff's application under Section 108 of the Civil Procedure Code, 1882, had been rejected by the Court that had passed the decree. RADHA RAMAN SHAHA *v.* PRAN NATH ROY **5 C W N 757 = 28 Cal. 475 (P C.)**

25 Decree—On compromise against a minor—Procedure to set aside—Review on the ground of fraud—Decree on compromise against a minor—Duty of Court passing—Compromise by guardian without leave of Court—Discovery of new and important matter or evidence. 3 C L J 119 Col 1314 P I.

26 *Decree a suit to set aside for fraud—Only relief—Jurisdiction.*

A suit to set aside decree obtained by fraud, in which no other relief whatever is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained, except under special circumstances. *Mowa Lal Thakur* v. *Bhujan Jha, 13 B L R App, 11 Abdul Mazamdar* v *Mahomed Gazi, I L R 21 Calc, 605, Pran Nath Roy* v *Mahesh Chandra Chowdhry Moitra, I L R, 24 Calc, 546, Kedar Nath Mukerjee, Prosonna Kumar Chatterjee 5 C W N 559 Behari Lal* v *Pokhe R m I L R, 25 A 48 Nistarini Dassi* v *Nundo Lall Bose I L R 26 Calc, 908, and Bibeeman z Abdool Aziz. 4 C L R 366* referred to UMRAO SING *v* HARDEO, **A W N 1907 P 112 = 4 A L J 392 = 29 A 418.**

27 *Decree of superior Court—Whether can be declared void by inferior Court—For fraud.*

A Court of inferior jurisdiction is competent to declare a decree of a superior Court to be a nullity on the ground of fraud if otherwise it has jurisdiction to entertain the suit. 10 C 612 and 11 W N 559 rel to—SARTHAKAR M MAITI *v* NUNDO RAM MAITI. **11 C W N 979**

28 Decree obtained by fraud—Court's power to treat it as null A W N 1904 P 25 Col 181 P I.

Fraud *(Contd)*

29 Decree and Execution proceedings—Irregularity cured—Improper remand. 5 C L J 328 Col 1239 P I.

30 Fraud — Decree — Suit to declare a decree to be fraudulent — Further relief. 8 C L J 485 Col. 704 P. II.

31 Decree tainted by fraud—Whole suit tainted by fraud, suit to set aside the court sale in execution on the ground of fraud after rejections of applications to set aside the decree and the sale. 6 C W N 473–29 C 395 Col. 875 P. II.

32 Fraud—Decree tainted by fraud—Claim of rent at a higher rate — Transferability of holding — Custom or usage. 8 C W N 172 Col. 158 P. II.

33 Decree by a moffussil court—Original jurisdiction of High Court to set it aside—Suit for administration accounts and cancellation of certain leases. 30 C 369 Col. 1425 P. I.

34 Fraud—As a defence—Pleading of—Estoppel-Voidable contract-Undue influence 6 B L R 592 Col. 266 P. I.

35 Evidence of fraud vitiating a voluntary conveyance — Quantum of proof—Misjoinder— Notice of assignment—Mahomedan Law — Musl aq — Assignment of undivided share 4 B L R 180 Col. 420 P. I.

36 Execution sale—Waiver — Judgment debtor foregoing right to object for irregularity and inadequacy of price not on the ground of fraud. 6 C L J 111. *See execution sale waiver.*

37 Executory contract — Fraudulent assignment. Actionable claim—Beneficial interest in moveable property—Object or consideration. 10 C W N 755 Col. 284 P. 1

38 *Fresh statutory period—Rent Act (XXII of 1886), ss 37, 48, 108, cl. (8)—Joint tenancy—Death of joint tenant Admission of heir to holding by acquiescence—Fresh statutory period*

A joint tenancy was held by two brothers K and S Prior to K.'s death, which took place in 1304 *Fasli*, the statutory period had expired. On K.'s death, his son, R., continued to cultivate with his uncle, S. jointly. The landlord issued a notice of ejectment against S. and R. for 1310 *Fasli.*

Held, that section 48 of the Oudh Rent Act did not apply, but that with reference to section 37 of the Act there had been an admission to the holding by acquiescence on the part of the landlord and that a fresh statutory period commenced from 1305 *Fasli* —RAM KUAR *v.* Lal SHEO PARTAB BAHADUR SINGH. **Bd's S D. No., 3 of 1904.**

39 Inference of withdrawal of doubtful claim — Findings of fact — Power of High Court to interfere—Guardian and minor—Gross negligence of guardian — Withdrawal of defence or suit. 5 B L R 174 Col 1250 P. I.

40 *Insanity—Commutation of insufficient case of insanity into a case of weakness——Weakness — Helplessness — Commutation of insufficient case of insanity into a case of weakness—Fraud.*

Fraud *(Contd.)*

The appellant brought two suits for the cancellation of two mortgage deeds granted to the respondent by F. S. the appellant's father, on the ground that F. S. was insane and that the deeds were obtained by fraud.

The Court of first instance dismissed one suit and partially the other. The Judicial Commissioner of Oudh dismissed both. The theory of the Court of first instance was that while F. S. was not insane he was helpless and weak-minded and the respondent had defrauded him. All the testimony which went to mental unsoundness in F. S. went to insanity in its crudest and most palpable form and there was no case of helplessness or weakness. The picture drawn of him by witnesses was not of a helpless old man, but of a raving old man.

Held, that, it is not legitimate to commute an insufficient case of insanity into a complete case of weakness, when the type of insanity connoted in the evidence is something quite different.—DURGA BAKHSH SINGH *v.* MIRZA MUHAMMAD ALI BEG. **7 O C 287.**

41 Insolvent debtor—Composition with creditors—Unscheduled debt—Liability of negotiated promissory note—Fraud — Bar to suit—Indian Insolvency—4 B L R 1907 P 101 Col 57 P I.

42 Joint suit for rent against intermediate tenant—Fraud—Effect of a decree for rent—Separate collection of rent by co-sharer landlord from under-tenants. 3 C L J 379 Col 129 P I.

43 *Judgment obtained by perjury may be set aside in a fresh suit on the ground of—Judgment obtained by perjury may be set aside on the ground of fraud.*

A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence. The law on this point is the same in India as in England.—VENKATAPPA NAICK *v.* SUBBA NAICK, **16 M L J 59=29 M 179.**

44 Knowledge of—Burden of proof—Sale fraudulently disguised as gift—Suit for pre-emption alleging date on which fraud became known a plaintiff, 27 A 540—A W N (1905), 88, Col 1815, P I.

45 Fraud—Letters of administration obtained by—Effect on such administrator, 12 C W N 802—35 C 955, Col 230 P II.

46 Loss to two innocent persons by fraud of third party—Broker—Participation in profits—Scope of authority—6 C W N 429 Col 374 P I

47 Fraud—Misrepresentation withholding of material information. 7 B L R 653 Col 1538 P I.

48 Mortgage Impeachment by subsequent auction-purchaser—Onus—Burden of Proof—Fraudulent mortgage 5 C W N 403

Fraud *(Contd.)*

Col. 298 P II.

49 Nature of—Oral evidence as to contents of documents—Fraud—Want or failure of consideration 8 B L R 217 Col 237 P I.

50 Notice—Omission to issue—Equity of redemptions - Physical possession. 1 O C 262 Col. 1771 P I.

51 Notice—Purchase of value—Equity—Undervalue 26 B 543 Col, 228 P II.

52 Of agent to both vender and purchaser Effect of fraud. SOOLEMAN SOMJEE *v.* RAHIMTULA SOMJEE. **6 B L R 800.** *See Vendor and Purchaser and Will.*

53 Occupancy holding—Repurchaser by the purchaser of in executor—Rent decree—No Fraud 12 C W N 114 Col 151 P II.

54 *Fraud—Oral sale of land followed by unregistered sale-deed.*

M instituted a suit against K for the recovery of purchase money on account of a sale, which was declared invalid in a previous suit in which M was a party. It was contended by K in defence that M was concerned in a fraud against the person in possession of the property under an oral sale from the original owner and that though the amount stated as the price was paid to him, it was merely for the purpose of the amount being passed on to the son of the original owner who executed a deed purporting to be a sale to K on the understanding that K should execute the sale deed in suit in favour of M, and it was urged that the plaintiff being in *pari delicto* to the fraud, was not entitled to the relief asked for.

Held, that inasmuch as the plaintiff did all in his power to effectuate the fraud, although he could not succeed, the purpose of the fraud must be deemed to have been carried out within the meaning of s. 84 of the Trust Act. Hence the suit should be dismissed. MUTHOO RAMAN CHETTY *v.* KRISHNA PILLAI. **15 M L J 478=29 M., 72.**

55 Party perpetuating—Can not be allowed to take advantage of it 2 C L J 599—*See Equitable Claim No.* 1.

56 *Perpetration of—Relief—Execution of decree—Sale—Purchase by one of two decree-holders—Sale set aside—Suit for confirmation of sale—Purchaser's fraud towards co-decree-holder.*

The property of the judgment debtor was sold in execution of a joint decree held by two decree-holders at the instance of one of them who purchased it. He paid no part of the sale consideration in cash but gave a receipt for the amount of the decree which was in favor of both the decree-holders. On sale being set aside the purchaser filed a suit for confirmation of sale claiming to have purchased the whole of the property for himself.

Held, that the suit was maintainable but the plaintiff was not entitled to a decree, as the relief, if granted, would have the result of making him the sole owner of the property and assisting the plaintiff in perpetrating a fraud upon his co decree holder.—20 All, 379 followed. MATHURA DAS *v.* JAMNA PRASAD. **A W N 1903 P 69=25 A 355.**

57 Petition of compromise—In connection with fraud for review of the decree 10 C W N 286 Col: 1304 P I.

58 *Plaintiffs failure to prove his case of—Whether he can be permitted to support case on different ground.*

Where a plaintiff has rested his case upon fraud, when the case of fraud has failed, he cannot be permitted to support it upon an entirely different and inconsistent ground. Although, therefore, a suit, brought as one for possession, may, in the discretion of the Court, where the circumstances of the case permit it, be converted into one for redemption, on the assumption that the mortgage was valid and binding, a plaintiff must ordinarily succeed on the case he has made in the plaint, and, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot be converted into an action to redeem. 5 C L J 527, 3 C W N 325, 14 M I A 53, 1 H L C 605, 2 Phill 310, 1 K and J 671 referred to. GHURPHEGNI *v.* PURMESHAR DAYAL DUBEY, **5 C L J 653=24 C 223.**

59 *Plaintiff pleading—Civil Court, jurisdiction of—Civil Procedure Code, 882 S. 11.*

The appellant brought a suit against the respondent for a declaration that a mortgage-deed executed by him in the latter's favour was null and void on the ground that the consideration recited therein had not in fact passed and that the deed had been executed solely with intent to defraud the appellant's minor brother.

The lower appellate Court, without going into the merits of the case, dismissed it on the ground that, in view of the statement of the appellant, who pleaded his own fraud, the suit was not maintainable.

Held, that the suit, as brought, being clearly cognisable by the Civil Courts under S. 11 of Civ. Pro. Code, the lower appellate Court ought to have decided it on the merits. THAKUR HANUMAN SINGH *v.* RADHE LAL, **8 O C 278.**

60 *Pleadings—Maxim.* In pari delicto potior est conditio possidentis—*Fraud.*

Where two persons concoct a fraud against a third party they cannot plead the fraud against the third party but are not barred from pleading it against each other. *61 P R 1895, followed.* JIWN SINGH *v.* JORA. **65 P L R 1905=25 P R 1905.**

61 *Pleadings—Fraud-Special fraud should be given Issue—Practice.*

Where fraud is set up, particulars of it must be given and it must be based upon a specification of the acts relied upon as constituting fraud.

Per Chandravarkar, J:—It is a matter of supreme importance and necessity that a case of fraud should not be the subject of

Fraud *(Contd.)*

a mere vague allegation in the plaint or written statement; but that it shall be supported by particulars; and that if that condition is not complied with, the party relying on a case of fraud, shall not be allowed to raise that case in the form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified. If this be made an invariable practice, the door will be closed to vague and indiscriminate allegations. BALAJI *v.* GANGADHAR. **10 B L R 276=32 B 255**.

62 Plea of to suit on bond—Necessity for giving full particulars. 8 O C 210 Col: 268 P I.

63 *Preference—How far necessary to constitute act of insolvency. Insolvents Act, Sections 26 and 36—Property transferred to trustees by insolvent—Vesting of property in Official Assignee.*

The insolvent having been held to have committed an act of insolvency by the execution of a deed transferring the whole of his property to trustees for the benefit of his creditors, the Official Assignee applied for an order under Sections 26 and 36 of the Insolvent Act to the trustees to deliver over the insolvent's estate to him. The Court granted the application and remarked that the order would not prevent the trustees, if so advised, from suing the Official Assignee to establish their right to the property comprised in the deed. KURSONDAS RAMJEE AND OTHERS. **4 B L R 154**.

64 Proof—Essential—Wrongly placed—Material irregularity—143 P W R 1908 Col 317 P II.

65 Property obtaining of, by abuse of influence—Administration suit—30 C 369 Col 1757 P I.

66 Puffing statements, if fraudulent—Administration bond—Sureties. 12 C W N 802—35 C 955 Col 230 P II.

67 *Rent decree—Landlord and Tenant—Mortgage by tenant—Sale of holding under a collusive decree for rent in favor of landlord—Mortgagee's line against landlord purchaser.*

The landlord in collusion with his tenant obtained a decree for rent. In execution he himself purchased the holding. The tenant had mortgaged the holding with a third party.

Held, that the lien of the mortgagee continued to subsist upon the land, and the mortgagee had the same right against the landlord as he would have against the mortgagor. RAM SARAN DAS *v.* RAM PERGASH DAS. **32 C 283**.

68 Revenue sale—When to be set aside—Fraud of co-sharer—Remedy. 32 C. 111 Col. 38 P. II.

69 Sale, Application for setting aside for fraud after confirmation maintainable. 27 A. 702 Col. 1131 P. I.

Fraud *(Contd)*

70 *Set aside sale—Respondent in England—Servic—Practice—Sale.*

On the first day of sale, the judgment-debtor's partner's bid was not accepted and, on the second day, there was some understanding between her and the decree holder not to bid against each other but that she would get the property back for the amount of the decree, and the property was purchased by the decree-holder, *held* that there was no fraud on the part of the decree holder which would justify a Court in setting aside the sale. SATISH CHANDARA MUKERJI *v.* C. A. R. PORTER. **13 C. W. N. 18**.

71 Sale—Cancellation—Joint family—Limitation. 5 C. W. N. 545-24 M. 387 (P. C.) Col. 1750 P. I.

72 Sale—Petition to cancel fraud—Second appeal. 28 C. 4 Col. 1132 P. I.

73 *Seeking to avoid contract on the ground of fraud or—Undue influence—Contract Act,—Landlord and tenant—Kabuliyat unfairly obtained—Onus—Executants—Pleadings—Presumption.*

No general presumption exists that a landlord, even an influential one, can so dominate the will of his tenants as to induce them to make unconscionable bargain in his favour.

That a kabuliyat was unfairly obtained must be proved by the person who alleges it.

It is not enough to boldly assert that, fraud or the like vitiated the contract 15 C 533 (P C) referred to. RAJA PROMADA NATH ROY BAHADUR *v* KINOO MOLLAH *alias* KALA MIA. **8 C L J 315**.

74 Silence when fraudulent—Estoppel by judgment—Purchaser previous to suit. 32 C 357 Col 238 P I.

75 Undue influence—Co-ersion. 1 O C 63 Col: 231 P I.

Fraudulent concealment.

1 Shamilat land—Property capable of physical possession. 86 P R 1902 Col 1773 P I.

Fraudulent—Execution proceedings.

1 Auction purchaser's rights—Sale in execution. 8 C W N 230. *See Execution of decree sale Bonafide purchaser.*

Fraudulent sale.

1 *By husband to wife to defraud creditors—Suit for possession on graund of foreclosure—Notice of foreclosure held invalid—Decree for possession in lieu of mortgage-money.*

Where a debtor, with a view to defraud his creditors, executed a sale deed of his property in favour of his wife, purporting to be in lieu of dower alleged as due to her.

Held, upon the circumstances of the case that it must be held as fictitious, and no effect should be given to it.

In a suit for possession as owner on the ground of foreclosure of the mortgage, if the notice of foreclosure is held as invalid and irregular, decree for possession in lieu of the mortgage money due to the plaintiff as mortgagee may be passed in his favour when the plaintiff is by the terms of his mortgage entitled to possession DEVI DAS *v* KARM. **8 P L R 1903**.

Fraud *(Contd.)*

2 Sale of property to defeat creditors. 3 L B R 1906 P 188 Col : 585 P I.

Fraudulent Transfer.

1 Fraudulent transfer—Burden of proof—5 B R 213 Col 580 P I.

2 Fraudulent transfer to defeat or deal creditors—5 B L R 255 Col 582 P I.

3 Moveable property—Validity of—Bona-fide deed in favour of creditors. 30 M 6 Col. 582 P I.

4 Party to a fraud—Plea of—Estate conveyed to a benamidar. 9 B L R 549—31 B 405 Col 17 P II.

5 Plea of benami—Benami transaction for purpose of defrauding creditors—3 L B R 1906 P 245 Col 20 P II.

6 *Of Property — Illegal intention never carried out—Right of vendor or his heirs to get back property—Trusts Act—Onus.*

Some owners of property transferred it for the illegal purpose of defeating creditors, but the purpose was never carried into execution ;

Held, that the vendor could not recover the property from the vendee in possession, without proving that the fraudulent purpose of the parties to the sale was carried out ; and that the vendor's heirs were in no better position than the vendor. The words of S. 84 of the Trusts Act, 1882, clearly indicate that it is for the plaintiffs to make out that the fraud never got beyond the state of intention, and, in the present case, the defendant having the benefit of possession the maxim "*inpari delicto potior est conditio possidentis.*" 20 M. 323, 23 C. 460, (474) referred to. RAGHO ATMARAM *v.* PURSHOTAM JAIRAM. **4 N L R 26.**

7 *Fraudulent sale to defeat creditors—Onus.*

A debtor being pressed by his creditor executed a deed of sale of certain immoveable property to his brother. Subsequently, the creditor sued the debtor, obtained a decree and sued for a declaration, that the sale was a fraudulent and collusive one, in order to defeat the plaintiff's realising his debt.

Held, the circumstances of the case showed that the debtor placed the property, by means of the sale, beyond the reach of his creditors, and that it was fraudulent.

Held, also, the burden of proving that he bought the property, in good faith and for valuable consideration lay upon him. 25 B. 202 referred to. 5 B. L. R. 142 followed. THE DWE *v.* A.L. V. R.S. ALLAGAPPA CHETTY. **4 L. B. R. 211.**

8 Suit to set aside a conveyance alleged to be fraudulent. 11 C. W. N. 889 34 C. 999 Col. 584 P. I.

Freedom of Religion Act XXI of 1850.

1 *See Act XXI of 1850 Col. 60, 61 P. I.*

2 Unchastity in mother, whether disqualifies her from inheriting—Ragunauthana whether authern in southority India. YEDAMMAL *v.* YEDANAY AGA MUDALIAR. **18 M. L. J. 70=2 M. L J 533=31 M. 100.**

1 Fresh contract—Promise without consideration—Acknowledgment on an account stated—Fresh contract—Cause of action. 1 L. B. R. 1900-1902 P. 190 Col 515 P, II.

Frontier Regulation II of 1900.

1 *Frontier Regulation II of 1900—Operation of.*

Regulation II of 1900 is not applicable to a suit pending at the time when it came into force, for there is nothing in the Regulation which is retrospective in effect.

Before Regulation II of 1900 came into force the District Court of Hazara had jurisdiction over the Tanawal and Phulera tracts of the Hazara District

The *Nawab* of Amb and the *Khan* of Phulera occupied a somewhat anomalous position before Regulation II of 1900 was passed with respect to Tanawal and Phulera tracts. There was no difficulty in suing them in the Civil Courts in the ordinary way and in getting decrees executed against them within those tracts. SAMUNDAR KHAN *v.* ATTA MOHAMMAD. **104 P L R 1904 (F B)=73 P R 1904.**

Further appeal.

1 *Suit for redemption of land assessed with land revenue—Acknowledgment.*

Plaintiffs' claim for possession, by redemption of mortgage on payment of Rs. 70 of land, the thirty times *jama* value of which appeared to be over Rs. 250, was dismissed on appeal by the Divisional Court as barred by limitation, on the ground that the plaintiffs had failed to disclose the date of the mortgage sought to be redeemed. The plaintiffs preferred a further appeal and relied on an acknowledgment made by the defendant-respondents. It was contended for the respondents that further appeal did not lie in the case, and the judgment of the Divisional Court was right.

It was urged for the appellants that further appeal lay since the decree directly involved some claim to, or question respecting, property of the value of Rs. 250 or upwards.

Held, (1) that no further appeal lay in the case—35 P L R 1903 (F B), S C 24 P R 1903 (F B), distinguished ; P R 94 of 1890; 44 of 1888 (F B) ; 132 of 1893, referred to. BHAG MAL *v.* DHOUNA. **82 P L R 1903.**

2 *Value of suit—Suit by a mortgagee for possession of land assessed to revenue.*

The value of a suit by a mortgagee for possession of land assessed to Government revenue for purposes of jurisdiction is 30 years revenue. No further appeal lies when such value is less than Rs. 250. *P R 56 of 1892 (F. B.)* is not affected by. *P. R., 24 of 1903 (F. B.), S. C. 35 P. L. R. 1903 (F. B)* ATMA RAM *v.* ATRA. **81 P L R 1904.**

3 *Punjab Court Acts (XVIII of 1884), as amended by Act XXV of 1899, S. 40—Land*

Further appeal *(Contd.)*

suit—Claim for land and house.

Upon further appeal in a suit for possession of land assessed to revenue at Rs 8-3 0 to which was added a claim for 2/3rds of a house valued at Rs 59-1 0, it was objected that the value of the suit for purposes of jurisdiction being less than Rs 250, for thirty times of the revenue on the land was Rs 245-10, no further appeal lay.

Held, that the objection was valid, the claim as to house did not affect the question of jurisdiction. FATEH SINGH *v.* CHETU. **100 P L R 1904.**

Further wages.

1 Future wages—Decree directing payment of—Intention of parties to be considered—4 M L T 330, Col: 528 P II.

G

Gambling.

1 Suit to recover money lent to enable borrower to gamble, maintainability of. U B R 1905 P 7 (Contract) Col, 280 P I.

Gambling in Litigation

1 Sale by person out of possession—Misstatement in sale-deed as to receipt of consideration money—Whether sale tainted on the ground of. 9 C W N 477 Col. 458 P II.

Gambling transaction

1 Wagering contract—Consideration for pro-note sued upon. 1 L B R 1900—1902 P 107 Col 516 P II.

Ganjam and Vizagapatam Agency Court.

1 Point not decided in prior suit—Appeal—Jurisdiction to hear merits of the case generally. M L J 1902 P 10 Col 966 P I.

2 Agency rule 20—Times no bar to an action against the trustee himself, his representatives or assigns, except an assign for valuable. 17 M L J 147 Col 1088 P I.

3 Agency rule 31—Under Act XXIV of 1839—Order in execution—Department of Agency Court—Appealability of—Liability to be reviewed by high court. Remedy open to unsuccessful party. 26. M. 266 Col. 48 P I.

4 *Agency Rules—Rule XXXI—Act XXIV of 1839, Section 4—Civil Procedure Code—Applicability of—Attachment—Grant for maintenance.*

Upon an application under rule 31 of the Agency Rules for Vizagapatam district, praying for review of the appellate judgment of the Agent to the Governor at Vizagapatam, against the proceedings of the Senior Assistant Agent, it was contended. (1) That Rule XXXI gave no general right of petitioning the Government but only prescribed the channel through which petitions that were otherwise provided for should pass; (2) that the rule was *ultra vires;* (3) that the order was not that of the Agent but of his Assistant; (4) that on the merits the Agent's order refusing to attach and sell the property (a grant for the maintenance of the judgment-debtor) in execution of the decree was not right.

Held, (1) that Rule XXXI was one of a substantive character and was not intended merely to provide for the formality to be observed in the submission of the petitions; (2) that the rule was not *ultra vires*; (3) that the order was passed under the authority of the Agent, as was expressly stated therein; and (4) that the order of the Agent was wrong and the property was not exempt from attachment under the proviso to clause 2 of Rule XXXI, by which alone the Agent was bound, the provisions of the Civil Procedure Code being not applicable to the Agency tracts. MAHARAJA OF JEYPORE *v.* NELADEVI. **13 M L J 151.**

Gaontia.

1 Bhet begari—Lamberdar—Services—Money payments. 14 C P L R 1901 P 73 Col 176 P. II.

2 *Raiyati land—Survey-number—Tenant—Sub-tenant — Servant—Rent-free land—Remuneration—Services.*

A gaontia in the Sambalpur district who cultivates raiyati land is the holder of a survey-number and a tenant holding from him is a sub-tenant.

A servant who occupies land rent-free by way of remuneration for his services is a tenant.

Lalla Lachman Singh *vs.* Hariram. (I C P L R 182) *dissented from.* 38 R R 563 23 L J Q B 372 and 24 L J Q B 54, 30 L J C P 253, 35 L J M C 74, 13 L J C P 44 *referred to.* BANDHU GANDA *v.* BALRAM GAOTIA. **15 C P L R 42.**

General Clauses Act 1868.

1 S. 2 (12)—Agent to the Governor Vizagapatam—Whether a District Judge. 18 M. L. 252 Col. 796 P. I.

2 Tree—Immoveable property—Procedure in sale of moveable and immoveable property. BALBHADDAR SINGH *v.* PARWAN SINGH. **5 O. C. 228.** *See Tree.*

General Clauses Act X of 1897.

1 *See Act X of 1897 Col. 869-871 P. I.*

2 S. 7—Mistake or fault of officials of Court—Revision. 6 O. C. 68 Col. 1354 P. I.

General Clauses Act I of 1899.

See Bengal Act I of 1899 Col 164 P II.

General Clauses Act I of 1804.

See Bombay Act I of 1904 Col 225 P. II.

General Partitioner.

1 Capacity of advocate to sue or be sued in connection with professional services. 4 L. B. R. 1907 P. 55 Col. 18 P. II.

General Relief.

1 *Mortgage—Effect of payment of prior mortgage by subsequent encumbrances as against intermediate charge—New relief claimed for the first time in appeal—General relief, prayer for.*
S. C., the proprietor of a village, mortgaged it to G. P. After that on January 21st, 1890, he sold the property to his mother, C. his wife, and his son's wife, M., but he continued to deal with the property for in March, 1890, he executed another mortgage to G. P. in substitution of the former deed. G. P. sued S C. and the three women for possession of the village and was duly placed in possession. C. and M. died and D., son of S. C., became proprietor of ⅔ of the village. In May 1893, D. mortgaged two-thirds of the village to the plaintiff. In June, 1893, D. S. C. and C. sold the village to the second defendant for Rs. 7,000, of which Rs. 3,800 were left with him wherewith to pay off G. P. In March, 1894, the 2nd defendant purchased all the rights of G. P. In October, 1895. the plaintiff instituted the present suit against D., the 2nd defendant and S. C. for recovery of his mortgage-money by sale of the property mortgaged to him.

Held, that the second defendant (vendee) having acquired the right of the 1st mortgagee was as much entitled to use it as a shield against the 2nd mortgagee as is a first mortgagee who acquires the rights of the mortgagor.

Held, further that, in a case like the present, the second mortgagee must redeem the first mortgage before he can put the property up for sale. In the present case, the plaintiff did not, in his plaint, expressly ask to be allowed to redeem the defendant's mortgage, nor was this point taken in his grounds of appeal but his pleader, in the course of his argument, asked that if the mortgaged property could not be sold subject to the first mortgage the plaintiff might be permitted to redeem the first mortgage and then put the property up for sale.

Held, that the request was reasonable and there being a prayer for general relief in the plaint, such permission might be granted to the plaintiff. GUR PARSHAD *v.* SAH BIND RABAN DAS. **3 O C, 254.**

General and Special power

1 Of attorney—Order returning an appeal for presentation to proper court—Appeal against Chief Court—Appellate Jurisdiction of. 1 L. B R. 1900 1902 P. 32 Col. 1435 P. I

Gharwara dues.

1 Suit to recover—Limitation Act 3 O C 203 Col. 1920 P I.

Ghatwal.

1 Right to grant permanent lease—How far successors bound—Suit to set aside order under section 116 of the Estates partition. 6 C W N 92 Col 1828 P I.

Ghatwali Tenure

1 In Bankura Heritability permanency - Resumption = Dismissal—Legal necessity—Document—Cancellation of 9 C W N 636 Col 1869 P I.

2 In Bankura—Heritability—Permanency

Ghatwali Tenure *(Contd.)*

—Dismissal—Discontinuance of service in effect thereof on right to resume lands—Tenure—Heritability, determination or resumption of 9 C W N 663 Col. 1927 P I.

3 Local usage and custom—Occupancy right—Ghatwali Tenure—1 C L J 138 Col: 157 P. II.

Gift.

1 *Absolute interest by Taluqdar to vest at a future time—Mahomedan Law—Oudh Estates Act (1 of 1869), ss. 8, 11, 12 & 17.*
Farzand Ali's name was entered in Lists I and V prepared under s. 8 of Act 1 of 1869 Mauza Kotwara was his estate or part of it Before his death he made a gift of a 10 annas share of the *mauza* to his second wife ".and after her death, to her children."

Held, that as Farzand Ali was a Taluqdar and grantee within the meaning of Act 1 of 1869 his power to create by gift *intervivos* what in English Law is called an estate in reminder is to be decided with reference to the provisions of that Act and not the Mahomedan Law.

Held, also, that the meaning of s. 17 of Act 1 of 1869 is that it is requisite for the validity of a gift either that possession of the property should be delivered as therein provided or the gift should be registered as therein provided; and that consequetly Farzand Ali was competent under Act 1 of 1869 to make a gift during his lifetime of an absolute interest in the *mauza* to vest at a future time.

Held also that under the gift the donee did not take an absolute interest in the 10 annas share of *mauza* Kotwara but took an interest in the share for her life only, and that on her death the absolute interest in the share vested in the donor's children by her.—RAM LAL *v.* JANI BEGAM. **2 O C, 244.**

2 Adopted son to father—Fiduciary relationship—Father and adopted son—Burden of proof of undue influence. 30 M 169 Col. 259 P I.

3 Alienation—Widow's power of—Necessity—Acquiescence of reversioner. 61 P L R 1901 Col. 2121 P I.

4 Awan of Pind Dadan Khan Tahsil of Jhelum District—Gift by father of self acquired land to daughter and her inheriting such land, distinction between, as affecting daughter's powers of disposition. 121 P R 1908 Col. 2108 P I.

5 By a parsi—Voidness of gift—Residue how to be applied. 7 B L R 324 Col 1753 P I.

6 By widow—Collaterals succession—Gardezi Sayads of Multan District—Effect of entry in wajib ul arz—Purchase of property claimed. 119 P L R 1901 Col 791 P. II.

7 Construction of—Words "always" or for "ever"—Conduct of parties—Evidence—Limited interest 33 A 324 (P. C.) Col 503 P II.

7 (a) Custom of the Punjab gift—*See Custom of the Punjab Gift Col 764 to 772 P II.*

8 Death, illness—Mushaa-deed—Possession. SALEH MUHAMMAD *v.* MUSSAMMAT ALLA WASAL. **141 P L R 1901**

Gift *(Contd.)*

See Muhammadan Law.

9 Deed—Construction of gift—*See Construction of deed of gift Col 532 to 535 P. II.*

10 Essentials of Gift to an agent—Undue influence—Transfer of possession not necessary when gift of immovable property registered. 25 A 358 Col 730 P I.

11 Evidence of—Transfer of possession—Collector's Books—Payment of kist—6 B L 983 Col 152 P I

12 Father giving land to sons—Sons deed — Sons wife and children suing father for possession—Entry in revenue register by thugyi. 14 B L R 30—4 L B R 231 Col 174 P I.

13 Immoveable property—Deed registered after the donor's death—Validity. 10 B L R 536 Col 730 P I.

13 (a). *Imperfect gift not construed as trust—Donor's Intention Act (II of 1882) Ss. 5, 6.*

A clear intention was to make a gift, but on account of some omission on the donor's part, that intention failed.

Held, that the Courts will not erect a trust on the imperfect gift 4 De G F J 274 *F* 34 Beav 623 Ditinguished.

The Courts will not convert what was meant to be out and out gift into a trust. The intention in doubtful cases may be shown in favour of the contention that, although words of present gift were used, a trust as meant by the donor or settlor having done everything in his power to divest himself of the beneficial ownership, more especially in the way of interest. In the case of an unmistakable intention of the donor to constitute himself a trustee and to create a trust, effect may be given to the true intention, although the words used indicate a present gift. The question whether the donor intended to make an out and out gift or only to create a trust, is one of fact in each case 17 Ch D 416 L R 19 Eq 233 L R 18 Eq 14 *referred to.*

For a gift the donor must intend to part entirely with the property at the moment of completing the gift. If he expresses that intention, but fails to carry it out, there will be an imperfect gift which the Courts will not convert into a trust. But where the donor or the grantor uses words of present gift, but has no intention of partying with the property, but only with the beneficial interest, it might be right to look to the real meaning rather than to the verbal form, and, if that real meaning can be positively ascertained, give effect to it.

It is clearly necessary to the creation of a trust that the author of the trust should express that intention in some words which can leave no doubt that he did mean to accept the position of a trustee. Conduct which might be deemed conclusive in England is very likely to be a treacherous and misleading guide in India where the conditions of life are often widely different from those which prevail in the west.

Reading S. 5 and 6 of the Indian Trust Act, 1882, together, the legislature seems to have meant that a specific oral declaration of trust on points (a) to (d) would be enough to create a trust without transfer where the author was himself the trustee. MANCHERSHAW S. NARIEWALA *v.* ARDESHIR S. NERIELWLLLA. 10 B L R 1209.

Gift *(Contd)*

14 Income of immoveable property, its effect—Corpus—Interpretation of will. 2 A L J 568 Col 561 P II.

15 Land, made on condition, that it would be liable to be taken back, in the event of donee transfering it whether repugnant to the original transfer. 4 A L J 708 Col. 560 P I.

16 Land, on Zemindari Tenure—Suit by a person in possession for a declaration of his title to certain immoveable property. 3 O C 55 Col: 1910 P I.

17 Necessity for delivery of possession under Mahomedan Law—Subject matter of gift remaining in Donor's hands, effect of. U B R 1907 P (Budhist Law Gift) Col. 243 P II.

18 Of debt—Right of debtor to subject that gift was invalid—Trust of immoveable property—Creation of. 75 P R 1903 Col. 544 P I.

19 Oral gift in favour of daughter of part of Taluka by Talukdar—Oral gift to land before Transfer of Property Act (IV of 1882) Presumption. ITRAJ KUAR *v.* BACHA MAHADEO KUAR. 5 O C 345

See Oudh Estates Act (I of 1869) S 13 (1) 22.

20 *Person Designata—Will—Construction—Muhammadan Law—Charitable bequest—Life estate—Gift to a class.*

Where the will provided that a certain property was given by the testator to his third daughter, appointed her mother as a trustee and directed that the rents of the property after payment of assessment and other proper charges should be paid to the said daughter during her lifetime for household expenses and on failure of her descendants after her death a fourth part should be spent in charity and the remaining three fourths should be distributed according to the Muhammadan Shea Law to the full brothers and sisters of the said daughter and after their decease to their descendants.

Held, that the daughter only took a life estate and the one-fourth given in charity failed and would form part of the residue and in the remaining three-fourths the brothers and sisters would take absolute interests.

The testator gave a certain house to his three daughters on the condition that they would not sell or mortgage the house but the rent thereof should always be paid to them in equal shares. One of them predeceased the testator.

Held, that the gift could not be treated as a class-gift SALLAY MOHAMED JAFFAR *v.* LADY JANBAI. 3 B. L. R. 785.

21 *Possession—Oral—Hindu Law—Customary Law—Revocation—Equity and good*

Gift *(Contd.)*

conscience.

On the 6th March, 1896 one K. L. presented petitions dated the 28th February, 1896, before the Naib Tehsildar in which he stated that he had gifted certain property situate in two villages to two of his nephews and given possession to them K. L. was examined and he repeated the contents of the petitions stating however that he had put the donees in possession on that day and prayed for mutation of names in their favour. On the 19th March, 1896, he sent a petition in which he stated that the previous applications had been made on the understanding that he was to be paid Rs. 32,000 cash and that not having been paid that sum he wished to revoke the gift under which he had not yet delivered possession. By his subsequent conduct till his death on the 13th April 1896, the donor showed that he treated the property as his own and the gift as invalid. It was found that possession had not been passed to the donees.

Held, that the primary rule of decision in a case of gift in the Panjab is a custom, and according to it possession is ordinarily necessary to complete a gift. Under Hindu Law if the donor has done all he can to perfect his contemplated gift he cannot be compelled to do more.

As the donor had not done all that he could do to perfect the gift and had not actually given possession the gift was not complete.

Held, also, that it would have been contrary to equity and good conscience to have given the effect of a gift to the statement of an old man stricken with mortal disease, who so soon withdrew it and who died a little more than a month after *I L. R. XI Cal.* 121, *at p.* 135 *(P. C.) followed.* CHAUDHRI LILA KISHEN *v.* CHAUDHRI HOHA RAM. **P. L. R. 64 of 1901.**

22 *Registered deed of gift—Possession, delivery of—Transfer of Property Act (IV of 1882. s. 123)*

Possession of certain lands was claimed by C. D under a registered deed of gift executed by N. N. pleaded that no title was transferred to C. D. by the gift as it was not followed immediately by possession.

Held, that s. 123 of the Transfer of Property Act did not make delivery of possession a condition precedent to the passing of title under a properly attested and registered deed of gift signed by the donor, *Dharmi Das* v. *Nistarini Dasi*, 14 Cal., 446; *Bai Rambai* v. *Bai Mani*, 23 Bom., 234, followed. NONDU *v.* CHANDI DUTT. **5 O. C. 89.**

23 *Registration of deed—Effect of—Transfer of title though not of possession—Derogation from grant.*

The execution and registration of a deed of gift completes the donee's title, and if the donor remains in possession it must be held that his possession thenceforth was that of the donee. 1903 A. W. N. 70 referred to. RAJ KUNWAR *v.* RAM BHAROSE. **1 A. L. J. 625.**

24 Residence of donor in property given away—Validity of. KANDATH VEETTIL BANA *v.* MUSSALIAM VEETTIL PAKRU KUTTI. **2 M. L. T. 180=30 M. 305.** *See Mahomedan Law—Gift.*

25 Residue to such charities as the trustees may think deserving whether valid. 8 B. L. R. 322 Col. 78 P. I.

26 Sikh Jat in favour of issue from a Mahomedan woman—Validity. KHUSAL SINGH *v.* JAIMAL. **130 P. L. R. 1908.** *See Mahomedan Law—Legitimacy.*

27 To a class—*See Will and Hindu Law—Gift.*

28 To idol not in existence—Administration suit—Revisioner's right to maintain suit. ROJOMOYEE DASSEE *v.* TROYLUKHO MOHINEY DASSEE. **6 C. W. N. 267=29 C. 260.** *See Hindu Law Reversioners.*

29 To an undivided family as such—Validity of—Property inherited from collaterals—Ancestral property. 4 B. L. R. 257 Col. 2166 P. I.

30 Transfer of property in lieu of dower-debt is a sale, not gift. 13 C. W. N 160. *See Col. 511 P. II.*

31 Unregistered instrument—Invalid—Donee's possession when adverse—Pleading. 4 M. L. T. 327 Col. 1972 P. I.

32 Will—Power to make under customary Law—Power to make will. 11 P. L. R. 1903 Col. 989 P. I.

33 Will—Suit to set aside alienation by collateral—Collateral not joining made pro-forma defendant—Estoppel 79 P. R. 1905 Col 989 P. I.

34 With invalid condition—Surplus proceeds to be taken as remuneration for services. SUGUN BALKRISHNA *v.* KAZI HUSSEN. **27 B. 500 AT 514.** *See Mahomedan Law Grant.*

Good faith.

1 Fraudulent conveyance—Transfer to one creditor. 27 B 322 Col. 579 P I.

2 Good faith, in prosecuting a suit causes of action—Suit founded on separate causes of action—Extension of period of limitation. 4 O C 293 Col. 1767 P I.

3 Meaning of—Application to set aside sale under S. 310 A after application under S 311 withdrawn—Jurisdiction to set aside. 5 O C 137 Col 1516 P I.

4 Meaning of in the case of a person taking a negotiable instrument practice-Will-Testator — Income given for life but property liable to be devised by the donee. 8 B L R 921 Col 531 P I.

5 *Pre-emption—Purchase money actually paid—Good faith—Market value.*

Held, that market value is no test of what should be paid by the pre-emptors until the price mentioned in the sale deed is shown not to have been fixed in good faith. The price actually paid by the vendees may be far above

Good faith *(Contd.)*

the real market-value and no objection can be taken by a pre-emptor to a price actually and genuinely paid on the ground that it is a fancy price.—*P L R 75 of 1901 ; S C 123 P L R, 1901*, referred to. NANAK CHAND *v.* RAM CHAND. **99 P L R 1902.**

6 Proof of—Where one party stands in fiduciary relationship to another—Undue influence. 12 C W N 1102 Col 623 P II.

7 Test of—Under S. 53 T P A Bona-fide. 7 B L R 477 Col 581 P I.

8 *Trust—Property—Notice—Good faith—Trusts Act* (*II of 1882*), *S. 3*—Saugat—*Public place of worship.*

B. D. became *mahant* of the Nanak Shahi *Sangat* on the death of Balak Das, and came into possession of the *Sangat*, shares in Kamal Sarai, and the whole of Karwar Rolah and *chak* Kharak Sen. He subsequently purchased shares in Kamal Saræ. He executed and registered a deed in 1891 in which deed he admitted that the *Sangat* and other properties were trust property. In 1892 he sold lands in *chak* Kharak Sen and all the shares in Kamal Saræ.

Held, that the facts that the *Sangat* was a public place of worship and ancient religious institution, and that B. D. succeeded to it by virtue of his office as *mahant*, established that the *Sangat* was a trust property.

Held, also, that the facts that grant was made to a *mahant* of the *Sangat*, and the village Karwar Kolah had passed from *mahant* to *mahant* for the last 153 years or so, raised a strong presumption that the village Karwar Kolah was trust property. Besides the presumption that the village was trust property there was also the admission made by B. D. before he made the transfer sought to be set aside that the village was trust property; that when B. D. succeeded to Karwar Kolah as a trustee, he must have succeeded to *chak* Kharak Sen and the part of Kamal Saræ which were not purchased by him as a trustee, for he succeeded to *chak* Kharak Sen and the part of Kamal Saræ which were not purchased by him by virtue of his office as *mahant*. As to the part of Kamal Saræ which B. D. purchased, there was a strong presumption that he purchased the same out of money which came into his hands as *mahant*, for he had no private property; that B. D. admitted that the whole of this property was trust property. *Chak* Kharak Sen and the entire share in Kamal Saræ were, therefore, also trust property at the time when B. D. made an admission as to it.

Held, further, that the transferees were bound to make inquiry as to the authority of B. D, to transfer, for the position of B. D. as one of a sect of *fakirs* who presumably had no property was calculated to put them upon inquiry, that their conduct clearly amounted to gross negligence in that they made no inquiry into the point as to whether B. D. held the property as the *mahant* of the *Sangat* or as his private property.

Held, therefore, that the transferees did not purchase in good faith without notice of the trust.—GANGA DAS *v.* BASANT DAS. **2 O C 319.**

9 Want of—Sufficient cause, meaning of —Negligence, inaction, want of good faith —Appeal filed beyond time—4 O C 372 Col 1466 P I.

10 Exclusion of certain time in calculating period of limitation prescribed for a suit—Due diligence and good faith—Want of in prosecuting a case—4 O C 281, Col 1767, P I.

Goods.

1 Delivery of within reasonable time—Measure of—Suit for remote and indirect damage—5 O C 328 Col 840 P II.

2 Lost in transit—Liability of Railway administration—Risk note by consignor—Liability of Railway, 5 O C 153, Col 823, P I.

Good will

1 *Sale of good will—Seller not entitled to solicit old customers—Newspaper.*

Where a person sells his good will in a business the vender after sale is not entitled to solicit his old customers to the prejudice of the purchaser. Hence where the proprietor of a newspaper sells all his rights in it to another he is not entitled to solicit the old customers of the paper when it was under his control.—DAMODAR LAXMAN LELE *v.* KASHINATH WAMAN LELE. **9 B L R 312.**

2 Survival of—Trust Act. 3 B L R 606, Col 229 P I.

3 Whether of a partnership forms assets of the partnership—Suit for accounts and profits of business by heirs of deceased partner—Minority—Effect of—Dissolution of partnership business—Unrealised assets outstanding at the time of suit. 9 C W N 537 Col 1749 P I.

Gordon settlement.

1 Effect of—On adoption by vatandar—Consent of kinsmen and government. 27 B 75 Col 2050 P I.

Goshain.

1 *Hindu Law—Grihast Goshains—Succession—Custom—Adoption of chela by widow of deceased Goshain.*

The plaintiff set up a custom as prevalent amongst the Grihast Goshains of Hardwar and other places adjacent in the United Provinces whereby the widow of a deceased Goshain was entitled with the concurrence of the elders of the sect to adopt a chela and successor to her deceased husband.

Held on the evidence that such custom was not established. Ramalakshmi Ammal *v.* Sivanantha Perumal Sethurayar, 14 Moo. I A 570, Khuggender Narain Chowdhry *v.* Sharupgir Oghorenath, I L R 4 Calc. 543, and Govind Doss *v.* Ramsahoy Jemadar, 1

Goshain *(Contd)*

Fulton 217, referred to.

Semble that the sect of Grihast Goshains living mostly in these provinces at Har dwar, Dehra Dun and other adjacent places, are subject generally to the ordinary rules of Hindu law. Collector of Dacca *v.* Jagat Chunder Goswami. I L R 28 Calc. 608 referred to. CHHAJJU GIR *v.* DIWAN, 3 A L J 717=A W N 1906 P 289=29 A 109.

Government

1 *Pre-emption—Wajib-ul-arz—Government acquiring land permanently—Sale.*

When the Government has acquired land permanently, it does not become a co-sharer in the village to which the land originally appertained and the provisions contained in the *wajib-ul-arz* which deal with sales by co sharers in the village are not applicable. The Collector of Futtehpore *v.* Syad Yad Ali (N W P H C R 1866, p 88) and Sheodut Ram Tewari *v.* Ramadharee (N-W P H C R 1869, part II, p 35) not applicable.—GAYA SINGH *v.* RAJA RAM SINGH, A W N 1905, p 259=2 A L J 787.

2 Authority of Financial Commissioner Punjab, over litigation in which is concerned government. 104 P. R. 1908 Col. 1633 P. I:

3 Contract with—Government settlement—Obligation of under-tenant—Rate of rent. GHOUR CHANDRA SAHA *v.* MANI MOHAN SEN 32 C. 463. *See Landlord and Tenant.*

Government's Control.

1 Over Irrigation Works — Control and conservation of — Functions and duties of. 28 M. 539 Col. 638 P. II.

2 Court-fees payable to—Withdrawal of pauper suit with permission to bring fresh suit. 29 B 102 Col. 1591 P I.

3 Government—Kist whether payable by mortgagor or mortgagee—Bond to pay S. 76—Transfer of Property Act—Contract to the contrary. 18 M L J 31 Col. 552 P. II.

4 Government—Liability of—For acts of its officers—Second appeal—Government, suit against. 1 C L J 355—9 C W N 495 Col. 59 P. I.

5 Order—Release of confiscated property by Government — Construction of order of release — Limitation for suit for possession after release. 24 A 1—28, 1 A 169 Col. 2150 P. I.

6 Position of—In land acquisition proceedings—Evidence on which award as to compensation may be leased. 1 C L J 227 Col. 841 P. I.

7 Power of dismissal and censure over its officers—Suit against government—Notice—Crown irresponsibility of, for the negligence of its servants—Plaint—Cause of action, statement of—Privileged communication — Publication—Evidence Act (1 of 1872) S. 123 and 124—Master and servant—Wrong by servant—Cause of service — Corporation—Principal and agent — Reference to a third Judge—Statutory body—Liability of the crown. 6

Government's Control *(Contd)*

B L R 133 Col. 47 P. I.

8 Power over its officers—Control of—Government as to dismissal, reduction, etc., of public servants—Act of state — Suit for libel—Privileged communication. 5 B L R 30 Col. 43, P. I.

9 Right of—In the conservation and control of works of irrigation. AMBALAVANA PANDARA SAUNADHI *v.* THE SECRETARY OF STATE FOR INDIA. 15 M L J 251. *See Madras Compulsory Labour Act (I of 1851).*

10 Rights of — Settlement of Estate—A Talukdar settled with on terms imposing a trust on him—Second summary settlement 1858—Confiscation, effect of—Right of the Government. 2 O. C. 199—26 I. A. 229 Col. 665 P. I.

11 Right of—To acquire land necessary for convenient use of a house—Government desiring to acquire a portion only of property the owner wishing that the whole or none should be acquired. 9 O C 311 Col. 864 P. I.

12 Right to distribute water for irrigation works—Right of government to contract—Injunction against government. Torts—Trespass—Continuing injury—15 M L J 32—28 M 72 Col 1806 P I.

13 Suit against—Traffic Superintendent of State Railway bad—Suit against government—Secretary of State to be sued in suit against State Railway. 4 O C 133 Col 1196 P I.

14 Suit by—Power-of-attorney to institute suit not necessary. 160 P L R 1905 Col. 1203 P I.

15 Suit joining the Secretary of State as a co-plaintiff by the assignees from the Government, a decree can be given only in favour of the assignees. 28 M 505 Col 1979 P I.

Government Officers.

1 Suit for damages for breach of contract against Secretary of State—Suit in consequence of some act done by one as a Government Officer Small Cause Court suit, Second appeal. 5 O C 403 Col 1262 P I.

Government promissory notes.

1 Transfer of interest in applicability of act 9 O C 174 Col 537 P I

2 *Special tenancies under Act XVI of 1887—Succession to.*

Tenancies created by Act III of 1893 are in matters of succession, governed by the rules contained in the Tenancy Act (XVI of 1887),

Where a tenant placed in possession of the land in suit died without heirs limited by S 59 of the Tenancy Act, the local Government was held to be justified in treating the grant to him as having lapsed. SAHIBZADA *v.* JAWAYA. 14 P R 1908.

Governor General.

1 Power of to declare place of business. 5 C W N 257, Col: 758 P I.

2 Previous consent of—For a suit against a sovereign prince, necessity of. 2 C L J 163 Col: 1202 P I.

Grama Natham

1 Free-hold in—In whom vests, trespass on—Remedy—RAMAYA *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **14 M L J 37 = 27 M 386 (F B).**—*See Madras Regulation XXVI of 1802.*

2 *Right of Revenue authorities to grant portions of grama natham—Common Law of the country—User of the site by villagers.*

By the common Law of the country, the control of "Grama Natham" vests in the Revenue authorities, who grant portions of it at their discretion to persons who apply for it for building purposes. Till its such grant to some definite person, it is usual for the villagers to make use of it in any way that suits them best. They throw rubbish on it, graze their cattle on it, use it as a latrine and the like, and they are rarely interfered with. But it is always understood, that this use is permissive on the part of the Government, and that the Government has the right at any time to appropriate it for any special public purpose or grant it to an individual for building purposes. THE COLLECTOR OF THE GODAVERI DISTRICT *v.* JANNAVULA PEDDA RENGAYYA. **4 M L T 440.**

Grand children.

1 Representing deceased parents—Budhist Law—Inheritence. 1 L B R 1900-1902 P 198, Col: 247 P II.

Grandsons.

1 *Grandsons—Succession* pet capita—*Reversioners—Widow, property acquired by—Presumption regarding moveable property acquired by* Hindu *widow.*

R. S., the last male owner of the estate in suit, died leaving his widow to succeed him. He also left 2 daughters. The widow died in March, 1895. In August, 1895, mutation of names in respect of the aforesaid estate was effected in favour of D B S and S B S sons of one of the daughters of R. S. in the lifetime of their mother, and they were put in possession. Thereupon, R. S.'s father's brother's grandsons sued D B S and S B S claiming to succeed as reversioners to the estate left by R S, both immoveable and moveable, alleging that by custom they were entitled to succeed on the death of the widow, daughters and daughter's sons being excluded from inheritance.

Held, that R. S.'s uncle's grandsons took *per capita* and were accordingly entitled to succeed to their proportionate shares in the estate of R. S. On the authority of Dewan Ran Bijas Bahadur Singh *v.* Indarpal Singh (26 Col. 871) there was no presumption that property acquired by a *Hindu* widow is acquired from the proceeds of her husbands estate in her hands.

Held that therefore the plaintiffs-respondents should have actually proved that the moveable property in suit was acquired by the widow from the profits of her deceased husband's estate, and as a matter of fact this not having been done, the moveable property in question was held to be not part of her husband's estate. DAN BAHADUR SINGH *v.* MAHESH BAKHSH SINGH. **3 O C 89.**

Grant.

1 Grant consideration—Minerals—Interpretation of grant—Reservation of minerals—Right of grantor to have egress and ingress and to work mines. 1 C L J 526 Col: 551 P II.

2 Construction—Always or for ever perpetual—Grant—Limited interest—Award. 5 C. W. N. 1901 P. 569—23 A. 324 Col. 503, P.II.

3 Grant—Construction of doubtful Grant—Unequal bargain—Undue influence. F. W. HIGGINS *v.* NOBIN CHANDER SEN. **11 C. W. N. 809** *See Lease,*

4 Grant—Construction of—Duration—Grant by a Zemindar. 25 A. 1 Col. 369 P, I.

5 Construction—Hill tracts retained by Government parlakimidi Zemindari—Maliahs—Forfeiture. 9 C W N 553 Col. 238 P I.

6 Construction Jala—Meaning of artificial channel—Customary supply of labour—Irrigation works—Control and conservancy—Government, right of—Madras Compulsory Labour Act. (I of 1885) 15 M. L. J. 251—28 M. 539.

7 Construction—Land in Cantonment—Resumption of land—Notice—Condition precedent—Compensation—Payment of. 7. B. L R 735 Col. 476 P II.

8 Dispute as to right to occupy land not covered by a grant or lease or in respect of which no declaration has been made. 1 L B R. 1900-1902 P. 16, Col. 1442 P. I.

9 Maintenance grants, construction of—Duration of—Indefinite as to duration. 6 C W N I Col. 534 P II.

10 Maintenance grant—Construction of—Use of the words and proprietor and for ever—Grant for life not intended thereby. 23 A 194 Col 586 P II.

14 Maintenance grant, duration of Khorposh grant incidents of custom family, territorial bow to prove mines—Holder of maintenance grant, not entitled to open and work new mines, 1 C L J 517 Col 732 P II.

15 Effect of—Special usages, proof of presumption—Life tenants-Right to work mines—Custom—Maintenance grant in Dhalbhum estate—Mines new and open, distinction between—Reversioner's right to restrain life tenant from working mines subsistence of tenancy—Lessee's Right—Onus of Proof of reservation of rights in the grantor—Damages. 2 C L J 20 Col. 731 P II.

16 Endowments for religious purposes and personal grants—Applicability of S. 4 of Pensions Act—Grants for charitable purpose—Suit to set aside order imposing full assessment-Jurisdiction 17 M. L. J. 549—3 M. L. T. 104 Col. 140 P. I.

17 *A widow entitled to only maintenance cannot contest grant to Thakurs—Maintenance limited by will—Concubines, living qy thesame house—Residence.*

Grant *(Contd.)*

A testator left a widow and an adopted son.

Held, that the widow could ask for a construction of the will only in so far as it affected her claim to maintenance and not of the whole will 11 C. 942, 4 C. W. N. 602 referred to, and could not question the validity of the will relating to the establishment and maintenance of certain Thakurs.

A widow cannot be deprived of her right to maintenance by any provision in a Dayabhaga will.

Per Caspersz, J.—The amount of maintenance fixed by the testator, when it is not a nominal amount and not contrary to any provision of Hindu Law, cannot be varied by the Court.

Per Coxe, J.—The husband has no right to reduce the amount of a chaste widow's maintenance below the proper provision, which has to be calculated on (1) the value of the estate, (2) the position and status of the deceased husband and the widow. Great weight should, however, be attached to a statement in the husband's will as to the amount, not as a legal limitation to the widow's right but as evidence of what in the husband's estimate a lady in the position of his widow should need. But a husband may, within limits, lay down that his widow shall forfeit her maintenance if she does not live in the family house.

Per Caspersz, J.—A Hindu widow is not obliged to live a life of ascetism. She is bound to perform various religious social and domestic ceremonies. She is not entitled to a bare subsistence or a starving allowance.

Under the will the widow was to receive Rs. 125 a month as maintenance, provided she lived either in his house at Madhupur or his house at Benares and it was found that testator's concubines lived in the Benares house and the Madhupur house was uninhabitable, and the widow proposed to live with the adopted son in Calcutta.

Held, (*per Curiam*) that she had just cause for refusing to live in the Madhupur or Benares house, and a sum of Rs. 320 a month was a proper allowance for her maintenance under the circumstances and the said amount should be made a charge upon the estate.

Semble. Gifts to idols which are to be established after the testator's death are bad in law. 2 C. W. N. 295-25 C. 405, 6 C. W. N. 267-29 C. 260 (273), 7 C. W. N. 121, 30 C. 521, 7 C. L. R. 278 relied on. PROMOTHA NATH ROY *v.* NAGENDRABALA CHAUDHRANI. **12 C. W. N. 808=8 C. L. J. 489.**

18 Favourable rate of rent—Resumption grant at favourable rate of rent-Conversion of rent—Free grant into perpetual lease—Ejectment of grant-holder by notice under Rent Act—Possession, suit for. 4 O. C. 264 Col. 644 P. II.

19 For maintenance—Duration of injunction—Lease—Coal surface—Rights—Subsoil rights—Mineral right—Landlord and tenant—Transfer of property. 9 C W. N. 1073-15 M. L. J. 379, Col. 449 P. I.

20 *Grant by Government of the revenue of a village as a unit of assessment—Cultivation by grantee of uncultivated or unassessed land—Grantee can do so and profit thereby.*

Held, that when Government grants the revenue of a village considered as a unit of assessment, and in course of time the grantee is able to bring under cultivation land which had previously been uncultivated or even unassessed, it is open to him under the grant to do so and to profit by the new cultivation. BALVANT RAMCHANDRA *v.* SECRETARY OF STATE. **10 B L R 531.**

21 In favour of temple—Perpetuity—Presumption—Annuity granted to defray temple—Expenses—Charge upon village out of profits of which it was to be realised—Construction of document. 4 O C 61, Col 2170

22 Interest created not inalienable where tenure has been created by a deed which makes it resumable on the failure of the heirs of the grantee—Registration—Omission to apply for — Forfeiture—Alienation — Resumable tenure. 1 C L J 557 Col 413 P II.

23 Interpretation of—Reservation of minerals—Right of grantor to have egress and ingress and to work mines 1 C L J 526 Col. 551 P. II.

24 Khorposh or maintenance grant in Dhalbhoom Estate — Nature and rights of such grant—Mines new and open—Distinction between reversioner right to restrain life tenant from working mines—Subsistence of tenancy. 2 C L J 20 Col. 731 P. II.

25 Law of Oudh—Re-grant—Construction—Ambiguity—Occupant-Release of confiscated property by government—Construction of order of release—Limitation for suit for possession after release. 24 A I—28 I A 169 Col 2150 P I.

26 Lease—Grant as a Zamindari village—Form of suit—Jurisdiction of Civil and Revenue courts—Oudh Rent Act—Limitation Act 11 art 91—120, 6 C W N 849—29 I A 203—25 A I Col 421 P I.

27 Limitation Act—Knowledge of the agent is the knowledge of his principal. 3 O C 55 Col 1910 P I.

28 Maintenance grant—Khorposh grant — Injunction lease— Coal —Surface rights—Subsoil rights- Mineral right—Landlord and tenant—Transfer of property. 9 C W N 1073 Col 449 P I.

29 *Custom—Alienation—Babuana property —Maintenance. Grant of land in lieu of—Family Custom—Durbhanga Raj.*

Babuana property granted by the Maharaja of Durbhanga to the junior male members of the Raj family to be enjoyed by them in lieu of money maintenance, subject to the proprietary rights of the grantor Maharaja and to his ultimate claim as reversioner on extinction of the grantee's descendants in the male line, is alienable and liable to sale in execution of decrees

Grant *(Contd.)*

against the grantees and his descendants. RAMESHWAR SINGH *v.* JIBENDAR SINGH. **9 W N Cal 567=32 C 683.**

30 Oudh Estates-Talukdari estate-Grant-Entry of name in list. 1 O C. 36. *See Oudh Estate Act (1 of 1869) S. 2, 3, 7, 8.*

31 *Rent free grant under judicial decision—Resumption—Revenue Act (XVII of 1876), S. 52 and 55 (a).*

The appellant's father granted certain lands free of rent to the respondent's father who died in 1888. After his death the appellant ejected the respondents from the lands. The respondents instituted a suit against the appellant in a Civil Court to recover possession of the lands. The suit was finally decreed in second appeal by the Judicial Commissioner, holding that the grant was a heritable one. The appellant then applied under section 53, Oudh Land Revenue Act, to have it declared that the grant was liable to resumption. The District Judge dismissed the application on the ground that the grant was "held rent-free under a judicial decision" within the meaning of clause (*a*) of section 55 of the Act. The judicial decision to which the District Judge referred was the decision of the Judicial Commissioner above mentioned.

Held, that land cannot be said to be held rent-free under a judicial decision unless it is by virtue of such decision that the tenure is rent free. In the present case the tenure was rent-free, not by virtue of the decision referred to but by the virtue of the grant.

Held, therefore, that the lands were not held rent-free under a Judicial decision, within the meaning of section 55, clause (*a*), Oudh Land Revenue Act and that the provisions of sections 52 and 53 of the Act were applicable to the grant. AMIR HASAN KHAN *v.* GOPAL RAM. **4 O. C., 252.**

32 Resjudicata—Decision in suit for resumption of grant. 5 O. C. 97. *See Oudh Land Revenue Act XXII of 1876 S. 53 and Resjudicata.*

33 *Resumption—Grant —Under-proprietary tenure—Revenue Act (XVII of 1876), ss. 25 and 53.*

The plaintiff's father executed in favour of the defendant's father an instrument whereby he leased to him in perpetuity one of the villages of his *taluka*, in lieu of '*guru-dachchina.*' The lessor stipulated in the lease that the lessee should pay to him the Government Revenue of the village, and should be entitled to enjoy the rest of the profits; and that he and his descendants would not take back the village. The plaintiff applied for a declaration under section 53, Act XVII of 1876, that the grant of the village was liable to resumption. The defendant contended that the instrument created an under-preprietary tenure and that the grant was therefore not liable to resumption.

Following the Select Case, No. 263, *held* that the grant of the village was one within the meaning of section 52, Oudh Land Revenue Act.

Held, also, that the grant was virtually the grant of an under proprietary right in the village at a favourable rate of rent and, as such, was liable to resumption. SARABJIT SINGH *v* BADRI NATH. **8 O C 268.**

34 Revenue free—Proprietor, meaning of —Resumption 3 O C 325 Col 556 P II.

35 Royal share of the revenue given in commutation of a cash payable as a palanquine allowance must be construed strictly in favour of the crown and prima facie a grant only of the revenue 7 B L R 497—29 B 480. *See for other facts Cols : 111, 141, 832, 865, 1828 P I and 202, 560, 723 P II.*

36 Sale of the village in question under the provisions of Act XI of 1859. Suit by purchaser for recovery of possession or for assessment of rent and mesne profits—Right created under grant an encumbrance. 35 C 931 Col : 47 P II.

37 *Surface rights—Grant of—Landlord and tenant—Mineral rights. Reservation by lessor of—Lessee entitled to work the underground minerals.*

When the surface land is granted and the minerals are excepted or when minerals are granted and the surface land is excepted such powers as are necessary to get the minerals are granted or reserved as the case may be as a necessary incident of the grant.

The reservation of the mineral rights or the grant of such rights apart from the surface rights must be taken to carry as incident to it the power not only to go upon the land and work the minerals known to be underground but to go on the land and conduct the ordinary preliminary operations by boring or otherwise to ascertain (when it is not known) if there are minerals under-ground.

A lessee of underground rights is entitled to exercise all the rights which a proprietor of the minerals may reasonably exercise upon the surface for the purpose of conveniently and economically winning the minerals. KUMAR RAMESSUR MALIA *v.* RAM NATH BHATTACHARJEE. **10 C. W. N 17.**

38 Status of — Muafidar of resumble grant. 6 O C 110 Col 1570 P I.

39 To Inamdar-Grant of share of revenue or soil—Burden of proof—7 B L R 439 Col 939 P II.

40 Trust—Grant—Faith. 2 O C 319. *See Faith No 8.*

41 Of village by Government to members of joint family—Joint tenants—Tenants in Common. 27 A 310 Col 535 P II.

Grant by Government.

1 *Possessory title, nature of.*

L. died leaving a widow and an only minor son. The widow was recorded as the owner of half of the property left by *L.* and obtained possession. The son was recorded as the owner of the other half. The widow retained possession for many years. She granted her possessory title by

Grant by Government *(Contd.)*

a registered deed of gift to one *R.*, her step daughter's son, but she still remained in possession Subsequently she sold her possessory title to the present defendant. At the suit of *R.* to recover possession

Held, that the possession which the widow of *L.* had of the property was a possession good against all the world but the true owner, and she was in possession of an estate which she might dispose of in any way as if she had an absolute indefeasible title to it.

That having once disposed of the whole of that estate by gift to the plaintiff it was no longer in her power in derogation of the gift to sell the same property to the defendants. *24 All 157 followed. W N All 1903 p 70 referred to.* PAHLWAN SINGH *v.* RAM BHAROSE. **1 C L J 625.**

2 *Construction of document—Intention—Conduct of parties—Grant—Partition.*

Under a compromise the Zamindari of Nidadavolu was sold to liquidate the debts of the Zamindar, and it was purchased by Government. In 1844 in satisfaction of arrears of maintenance and of all future payments *S.* and *V.*, the representatives of a younger branch of the Zamindar's family, were placed by Government in possession of certain villages. On the death of widow of *S.* a dispute arose between her daughter's son and persons who claimed under *V.* or the Zamindar as to whether *S.* had acquired an absolute title to the villages in question.

Held, that the origin of the title to the villages was in a grant from the Government and not from the Zamindar, who at the time of the transaction had no estate of which he could make a grant.

That taking into consideration subsequent partition proceedings in which the villages concerned were included and the history of the case, no doubt was left that absolute title passed to *S.* and *V.* by the grant, and that by partition the title was perfected. RAJA RAJAJEE BAHADUR GARU *v.* RAJA PARTHASARADHI APPA ROW. **M L J 1903 P 125, 8 C W N 105 =26 M 202, 30 I A 14 P C.**

3 Inam—*Succession*—Inam *title—Interpretation of—Regulation XXV of 1802.*

In this case the *inam* was granted originally for the support of a spiritual office in a village, the right to appoint to the office being vested in the Brahmin community. The title deed was issued in 1865 in the name of *R.*, holder of the office, which in terms declared that the *inam* was the absolute property of *R.* which he might hold or dispose of as he thought fit. On an alienation by the son of *R* the plaintiff, who had succeeded to the office, objected.

Held, that the alienation was void and the plaintiff, as the present holder of the office, was entitled to hold and enjoy the office with its emolument, *viz, the inam* and cash allowance so long as he was the holder of the office. The terms of the *inam* deed could not alter the nature of the *inam* and must be construed as intended to operate only as between *R.* and the Government which could have resumed it under Regulation XXV of 1802. PAKKIAM PILLAY *v.* SEETHARAMA VADHYAR. **14 M L J 134.**

4 *Saranjam—Jaghir—Grant. Impartibility of.*

A *Saranjam* or *Jaghir* is *prima facie*, and in the absence of express words or necessary implication to the contrary, a grant of the royal share of the revenue only, and not of the soil, for life only, resumable at pleasure of Government and ordinarily impartible.

The grant may be in such terms as to render the estate hereditary and alienable. The meaning and effect of the grant is to be gathered from the surrounding circumstances and the object with which the grant was made.

The High Court remanded the plaintiff's case for inquiry as to the nature and terms of the grant, and to the rules, if any, applicable to the estate in suit, in order to ascertain whether the plaintiffs or any of them could claim, either as owners by virtue of the terms of the grant, or by authoritative relaxation of the ordinary rule as to the impartibility of *Saranjams*, a share as of right in the *Saranjam* in question. RAMKRISHNARAO *v.* NANARAO. **5 B. L. R. 983.**

5 Mitta—Revenue sale for arrears—Purchase by Government—Implied grant of customary supply of water—Easement of necessity. 14 M. L. J. 350 Col. 920 P. II,

5 (a)—Taluk in Oudh—Sanad—New grant to successor—Crown's power to regrant in times of peace creating new line of succession—Validity. RAJ INDER BAHADUR SINGH *v.* RANI RAGHUBANS KUNWAR. **27 A. 634 P. C.** *See Oudh Estates Act I of 1869 S 22.*

6 By way of endowment to religious institution—Personal law. 2 O. C. 295 Col. 592 P. II.

Grantee

1 Ejectment by notice of—Conversion of rent free grant into one at a favourable rate of rent. 4 O C 264. *See Conversion Col 643 P II.*

2 *Entitled to notice of Zamindar's intention to dispossess him and to compensation for improvement—Old grant not sufficient reason for resuming it in part only—Revenue Act (XVII of 1876), S 53*

Held, that under the provisions of section 53, Oudh Land Revenue Act, the antiquity of a grant held at the pleasure of the grantor is not sufficient ground for holding it to be resumable in part only. The grantee of such a grant is only entitled to receive reasonable notice of the zamindar's intention to dispossess him and reasonable compensation for recent improvements, if any, effected by him on the holding—ALI

Grantee *(Contd.)*

ABBAS *v.* BALGOVIND, 6 O C 282.

3 *Grant for maintenance—Heritability—Presumption.*

A grant for maintenance, *prima facie* ceases with the life of the grantor, and is resumable on the death of the grantee. But this presumption is rebuttable, and where it is proved that a grant has been enjoyed by successive generations, the inference may justly be drawn that the original grant was intended to be a grant in perpetuity. *5 M I A 82, 5 Cal., 113; 27 Cal 156; 22 W R, 225; 4 Mad., 371 applied.* RAM CHANDRA GOSWAMI *v.* JOGENDRA NATH BANERJEE. 4 O L J 399.

4 Long possession—Resumption—Grant by way of endowment to religious institution—Personal Law—Assessment of rent on rent-free grant. 2 O C 295 Col : 592 P II.

Grantor.

1 Grant for maintenance ceases with life of. 4 O L J 399. *See Grantee No. 3.*

Gross negligence

1 Withdrawal from suit by guardian ad litem—Power of High Court to interfere. 5 B. L. R. 174 Col. 1250 P. I.

Ground of appeal.

1 Review of judgment, on grounds abandoned in appeal. 3 O C 279 Col : 1306 P I.

Ground of second appeal.

1 Courts power to give and apportion cost—Discretion. 6 O C 39 Col : 1243 P I.

Grounds on which compromise.

1 Made on behalf of minor can be set aside—Compromise entered into by next friend or guardian of a minor without leave of court. 2 O C 45 Col : 1624 P I.

Grove.

1 Cultivator's rights—Wajib ul arz—Judicial notice. 1 O C 231 Col : 725 P II.

2 Right of pre-emtion in a grove when a seller has neither a proprietary nor under proprietary interest in the land thereof—RAMESHUR BAKSH *v.* BAKHTA. 10 C. 284. *See Pre emption.*

3 Zamindar's right of, to groves belonging to absconding tenants—Wajib-ul-arz—Landlord and Tenant—Escheat—1 O. C. 42 Col: 949 P II.

Grove land.

1 *Rent for, let by grove-holder for cultivation—Rent Act (XXII of 1886), ss. 108, cl. (2) and 127—Suit for rent—Landlord's consent. Land held without.*

The appellant being the mortgagee in possession of the interests of a grove-holder let some of the land for purposes of cultivation. He was consequently sued by the respondent, the *zamindar*, for rent under ss. 127 and 108 cl. 2, Oudh Rent Act, 1886.

Held, that the holder of a grove whose rights extend only to the trees cannot be said to be in possession of the land occupied without the consent of the landlord if he cultivates the land, and that therefore the appellant was not liable to pay rent for the land under the provisions of Secs. 127 and 108 cl. (2) of the Oudh Rent Act. BISHESHUR PARSHAD *v.* RAJA SHEOPAL SINGH. 5 O C 162.

Guardian.

1. Alienation by.
2. Appointment of, under Act VIII of 1890
3. Appointment under Hindu Law.
4. Attorney.
5. Authority of.
6. Bond by guardian.
7. Certified guardian.
8. Cessation of powers of.
9. Compromise by.
10. Consideration for appointment.
11. Contracts by.
12. Decree against a minor represented by a—
13. De facto.
14. Discharge of.
15. Dispute as to who should be appointed
16. Gross negligence.
17. Joint Hindu family.
18. Lease by.
19. Leaving suit exparte.
20. Letter of administration.
21. Mahomedan mother.
22. Minor,
23. Mortgage.
24. Mother of minor.
25. Negligence.
26. Payment by.
27. Powers of.
28. Promise to pay.
29. Question whether sale by.
30. Removal of.
31. Sale by.
32. Suit by.
33. Testamentary.

(1) ALIENATION BY.

1 *Defacto gurdian of Mahomedan minor—Limitation Act IX of 1908, Act 45—Suit for possession of immoveable property.*

An alienation by a *de facto* gurdian, who is not legal guardian of the minor and is not authorised by custom to transfer his ward's property, is void, and the suit brought by the minor, after attaining majority, for possession of immoveable property, against the transferee from such gurdian, is not governed by Art. 44 of the second schedule of the Limitation Act; for it is not necessary for the minor to have the alienation set aside. SARDAR SHAH *v.* HAJI. 182 P L R 1908.

2 Guardian of property belonging to a minor—Transfer by one who is not guardian—Void or voidable. 11 O. C. 1 Col. 1838 P. I.

3 *By remote guardian of a Mahomen Minor—Co-heir and in possession of the estate—Alienation to discharge debt.*

The Mahomedan Law recognizes two classes of guardians, near and remote. The former are the father, grand-father and their executors, and the latter are the other male agnates. The near guardians alone have authority to sell immoveable properties,

Guardian *(Contd.)*

An uncle is a remote guardian, and has no authority to sell the land of his minor nephew. 20 B. 199, 18 A. 373, 29 C. 473 referred to.

Such a sale may be treated by the nephew as a nullity, and he can recover the property sold.

If the gaurdian is also a co-heir and in possession of the whole estate he represents the whole body of heirs as against the creditors of the estate and can make a valid alienation for the purpose of discharging debts of the deceased. In such a case he makes the alienation not *qua* guardian, but *qua* representative of the estate. 34 C. 65, 30 C. 539 referred to.

If plaintiff seeks no equitable relief, the maxim he who seeks equity must do equity has no application. 20 B. 199 referred to. AMAN WD. MAHOMED *v.* VARO WD. MALUK. **1 S. L. R. 221.**

4 Alienation of minor's property by defacto guardian—Minor's liability extends only to the benefit he derives therefrom. 136 P. W. R. 1908 Col. 779 P. II.

(2) APPOINTMENT UNDER ACT VIII OF 1890.

5 Guardian appointed under—Right to withdraw—Discharge of guardian. 67 P. W. R. 1908 Col 1479 P. I. *See Act VIII of 1908.*

(3) APPOINTMENT UNDER HINDU LAW.

6 Appointment of—Minors of Hindu joint family—Karta's power to charge family property. 25 A. 407 (P. C.) Col. 2130 P. I.

7 Appointment of—Minors of a Hindu joint family—Condition of guardian of property. 7 B L R 809—30 B 152 Col: 316 P I.

8 Appointment of guardian of minor—Joint family—Hindu Law. 4 O C 269 Col. 811 P I.

9 Appointment of Record of evidence at the hearing of the application for appointment of guardian. 9 C W N 104 Col: 807 P I.

10 Appointment of—Possession of mother as guardian of her minor son after death of last male owner, nature of. 17 M L J 14—30 M 145 Col. 2068 P I.

11 Appointment of—Oral evidence of compromise by guardian of a minor. 2 O C 67 Col: 1355 P I.

12 Appointment of—Joint Hindu family—Gurdian of minor members property cannot be appointed by Court.

A court is not competent to appoint a guardian of a minor member's share in the property of a joint Hindu family—The minor's remedy is by partition and after partition a guardian can be appointed. MURLIDHAR *v* HARI LAL. **165 P L R 1906.**

13 *Appointment of—Of a minor who is member of a joint family.*

Held, by the Full Bench that the High Court under its general jurisdiction and apart from the Guardian and Wards Act (VIII of 1890) can appoint a guardian of the property of an infant who is a member of a joint Hindu family and when that property is an undivided share in the family property. *In re* MANILAL HARGOVAN. **3 B L R 411=25 B 353.**

14 *Appointment of—Joint Hindu family—Minor co-parceners—Guardian of the family property appointed by the Court—Guardianship ceases when one of the co-parceners attains majority—Guardianship goes to the adult co-parcener*

Where a joint Hindu family consists of co-parceners who are all minors, the co-parceners forming one group, the Court has jurisdiction to appoint a guardian of the property of that group as a whole. But when subsequently, one of that group arrives as at the age of majority, the guardianship of the person appointed by the Court ceases, and the Court is bound to hand over the joint family property to the adult co-parceners, notwithstanding the fact that other co-parceners are minors. Virupakshappa *v.* Nilgangava (1894) 19 Bom. 309, applied. Bindaji *v.* Mathurabai (1905) 30 Bom. 152, followed. RAMCHANDRA *v.* KRISHNARAO **10 B L R 279=32 B 259.**

(4) ATTORNEY.

15 Change of attorney by next friend of minor—Costs 28 C 264—*See Col: 388 P II.*

(5) AUTHORITY.

16 To agree to arbitration on behalf of a minor—Consent by guardian to refer matter in issue to arbitration 28 A 35 Col: 1207 P I.

(6) BOND BY GUARDIAN.

17 Liability of minor necessaries—Bond to keep alive debt one for necessaries when binds minors estate—Limitation, personal liability 12 C W N 256 Col 231 P II.

18 *Guardian and Minor—Minor bound by bond of guardian for existing liability binding on minor—Civil Procedure Code, S. 622—Material irregularity.*

A bond executed by the guardian of a minor as such but which contains only a personal covenant by the guardian to pay and does not charge the minor's estate will nevertheless be binding on the minor, if it is executed for a pre-existing debt which is binding on him. A mistaken view of law by the lower Court is no ground for the interference of the High Court under section 622 of the Code of Civil Procedure. But where the case has not been properly heard by the lower Court and the mistake of law was probably the result of such defective trial, the High Court will interfere on the ground that the lower Court had acted with material irregularity within the meaning of section. DURAISAMI REDDI *v.* MUTHIAL REDDI **31 M 458.**

(7) CERTIFIED GUARDIAN.

19 Certified guardian can compromise a suit without obtaining D. T. sanction as such an act is not contemplated in. 8 C L J 266 Col 812 P I.

20 Certified guardian—Discharge of debt—Managing member of Hindu joint family—Joint right to sue for tort—Joint creditors or claimants. 6 C L J 383 Col 1751 P I.

21 Appointment of guardian—Certificate

Guardian *(Contd)*

of guardianship—Minority period—Act XX of 1864 (Bombay) 31 B 80 Col 339 P I.

22 Minor's suit to set aside a decree passed against him—Guardian ad-litem—Appointment of conditions necessary for—Proper representation of minor in a suit to be done with great care—Affidavit that the guardian has no interest adverse to the minor. 10 O C 321 Col. 1618 P. I.

(8) CESSATION OF POWERS OF.

23 *Guardian's powers cease when minor comes of age—Jurisdiction to order expenditure after such cessassion—Appeal—Revision.*

By S. 4 (2) (c) of Act VIII of 1890, the powers of a guardian cease from the date on which the minor comes of age, and after that period, the Court has no jurisdiction to make an order, allowing the guardian to spend the property of the ward, for the marriage of the ward's sister, however proper the expense might be in the interests of the girl. No appeal lies against such an order, but the Court may treat the appeal as a revision petition under S. 622, Civ. Pro. Code. SEETHARAMA BAGAYATHAR *v.* Y. BALARAMA BHAGAYATHAR. **17 M L J 199.**

(9) COMPROMISE BY.

24 Review — Application to have award filed—Decree not in terms of award—Application to pass a decree in terms of award. 5 O C 27 Col. 1315 P. I.

(10) CONSIDERATION FOR APPOINTMENT.

25 Appointment of guardian—Guardian of the person of minor—Hindu Law. 32 B. 50 Col. 810 P. I.

26 Continuance of a married woman—(mother) as guardian notwithstanding S. 457 C. P. C.—Validity of. 8 P R 1908 Col. 1618 P. I.

(11) CONTRACT BY.

27 Contract by minor—Estoppel against minor—False and fraudulent misrepresentation by minor—Principles of liability. 5 A L J 674 Col. 622 P. II.

28 Contract made on minor's behalf by, whether minor can sue to set aside. 2 N L R 146 Col 609 P. II.

29 Contract of sale and purchase—Minor—Contract by guardian — Specific performance—Personal liability. 34 C 163 Col 609 P. II.

30 Contract respecting minor's estate made by his natural guardian not void but voidable. 7 O C 181 Col. 613 P II.

31 Contract—Specific performance—Contract to sell by guardian with permission of judge. 29 A. 213 Col. 609 P I.

(12) DECREE AGAINST A MINOR REPRESENTED.

32 Decree against a property represented minor when binding—Next friend—Fitness of guardian ad litem. 11 O C 319 Col. 1615 P. I.

(13) DE-FACTO.

33 Powers of—Alienation—Minor's benefit—Misjoinder of cause of action. 3 B L R 658 P II.

(14) DISCHARGE OF.

34 Guardian of property of minors constituting a whole joint family—Majority, attainment by one. 7 B L R 809 Col: 816 P I.

(15) DISPUTE AS TO WHO SHOULD BE APPOINTED.

35 Rival applicant—Power to arbitration. 5 A L J 101 Col: 809 P I.

(16) GROSS NEGLIGENCE.

36 Not mere withdrawal from suit-Power of High Court to interfere—Findings of fact. 5 B L R 174 Col: 1250 P I.

(17) JOINT HINDU FAMILY.

37 Right of mother to be guardian of minor—Suit for possession by a minor to recover property alienated by his mother acting as his guardian without necessity. 10 O C 367 Col: 1838 P I.

38 Secretary, power to demand from manager - Manager of a joint Hindu family certifying payment of a decree in favour of himself and minor members. 11 O C 246 Col 1496 P I.

(18) LEASE BY.

39 Lease executed by guardian on behalf of minor—Suit by minor to set aside the lease—Negligence. 2 O C 233 Col 481 P II.

(19) LEAVING SUIT EX-PARTE.

40 Decree—Reasonable cause to set aside decree. 5 C W N 58 Col: 1459 P I.

(20) LETTERS OF ADMINISTRATION.

41 *Probate and Administration Act (V of 1881) Ss. 13 and 33—Letters of administration can not be granted to minors under their father's guardianship.*

Under Act V of 1881, Letters of Administration cannot be granted to minors under the guardianship of their father. JAI LAL SINGH *v.* HARI SINGH. **A W N (1908) 257.**

(21) MAHOMEDAN MOTHER.

42 Right of, to guardianship of minor's property—Power to make contract or refer to arbitration on minor's behalf. 1 S L R 160 Col: 1625 P. I.

43 *Guardian of property—Mother's power to sell her minor children's estate—Alienation by de facto guardian for the benefit of the minor.*

Although under the Mahomedan law a mother is not the legal guardian of the property of her minor children, yet, when she, acting as the *de facto* guardian, purports to deal with the property, the transaction, if it is for the benefit of the minor, ought to stand, in the absence of fraud or any other element of that nature. Mafazzal Hosain *v.* Basid Sheikh, I L R 34 Calc 36, 4 C L J 485, 11 C W N 71. Hasan Ali *v* Mehdi Husain, I L R, A 533 and Majidan *v.* Ram Narain, I L R 26 All 22 approved. Moyna Bibi *v.* Banku Behari Biswas, I L R 29 Calc 473. Bhutnath Dey *v.* Ahmad Hosain, I L R 11 Calc 417 and Hurbai *v.* Hiraji Byramji Shanja, I L R 20 Bom 116, referred to. RAM CHARAN SANYAL *v.* ANUKUL CHANDRA ACHARJYA. **4 C L J 578—11 C W N 160=34 C 65.**

Guardian *(Contd.)*

(22)—MINOR.

44 *Minor of Aliyasanthana family.*

The mitakshara principle, that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the joint property of Mitakshara family, applies to an Aliyasanthana family, where the only right of the infan is a right to be maintained in the family house 19 C 301, 35 C 561, 25 A 407 followed. KAJIKAR LAKSHMI *v.* MARU DEVI. **4 M L T 462.**

45 *Minor's property—Change of investment—Court's discretion in sanctioning the change—Guardian's duty to preserve and not to add to minor's property.*

Guardians are in a fiduciary position and the Court should ordinarily be guided by the rules embodied in the Trusts Act, 1882, in sanctioning changes in the investment of the minor's property.

A trustee is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may and frequently do select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust and avoid all investments which are attended with hazard.

The duty of guardians is primarily to preserve and not to add to the property of the minor. *In re* CASSUM ALI JAVERBHAI PIRBHAI. **8 B L R 883=30 B 591.**

(23) MORTGAGE BY.

46 Proof of mortgagee's belief in the existence of a reasonably credited necessity 2 M. L. T. 343 Col. 532 P. I.

47 *Mortgage by guardian—Interest payable—Benefit—Loan raised to save ancestral property—Legal necessity—Compound interest.*

The natural guardians of infant co-sharers can join with the male members of the family to raise a loan to save the family properties even though the power of the guardians of the infants is a limited and qualified one. The loan in such a case is an absolute necessity and not a merely voluntary act of speculation, and the mortgage of the infant's properties is binding upon the shares of the infants. 6 M. I. A. 393 referred to ; 20 W R. 38 dist. The creditor must shew that the rate of interest charged was one of necessity or of clear expediency for the benefit of the infant's estate, and in the absence of proof of such necessity or expediency, nothing more than the ordinary rate of interest upon loans on good security can be allowed. 12 I. A. 43; 11 C. 379, 18 I. A. 1 and 18 C. 311 referred to and foll. In so far as the shares of the mortgagors other than the infants are concerned, interest must be allowed at the contract rate. 31 C. 223 referred to. ABHIRAM PAL *v.* MUKUNDA LAL DUTT. **5 C. L. J. 542.**

48 Mortgage of minor's property to secure a loan sanctioned by Court—Duty of Court to specify the rate of interest. A. W. N. 1908 P. 75 Col. 813 P. I.

(24) MOTHER OF MINOR.

49 Mahomedan Law—Purchase without notice—Agreement by guardian on behalf of minor. 3 B L. R. 658 Col. 229 P. II.

50 Mother of minor allowed by Court to act for her son—No formal order to that effect on record—Presumption of her appointment by Court as guardian. 8 C. L. J. 31 Col. 1613 P. I.

(25) NEGLIGENCE OF.

51 *Decree against—When liable to be set aside—Negligence—New next friend to make the application.*

It is not the duty of a guardian *ad litem* to contest every claim against the minor. Gross negligence or fraud will be a good ground for setting aside a decree for fraud. It is not every kind of negligence or any amount of it which would render proceedings, otherwise regular and proper liable to be opened up. The negligence must be such as leads to the loss of a right, which, if the suit had been conducted or resisted with due care, must have been successfully asserted. It should be alleged and proved that an available ground of defence was not put forward at the hearing by the omission of the guardian to appear at the trial. The application should be made by a new next friend. 14 M I A 393 at 399; 18 Eq. 573; 22 C 8; 5 C W N 58 ref. to. 6 C L R 69 dist, 12 C 69; 2 C 283 at 286 ref. to.—PARMESWARI PERSHAD NARAYAN SINGH *v.* SHEO DUTT RAI. **6 C L J 448.**

(26) PAYMENT BY.

52 *Allocation of debt.*

A guardian and his ward, each owed certain sums of money to a creditor. The guardian made a payment to the creditor and did not claim to set off this amount in the minor's suit in mesne profits against her.

Held, the payments should be allocated to that portion of the debt for which the guardian was liable. AMBUGATYANNI *v.* SAMINATHA IYER. **3 M L T 321.**

(27) POWERS OF

53 Power of certified guardian to enter into a contract on behalf of the ward—Failure to obtain sanction of District Judge, effect of. 10 C W N 763 Col : 608 P II.

54 Power of Hindu father to appoint a guardian for his minor son under a will. 8 B L R 522 Col : 1612 P I.

55 Power of Karta—Joint family—Minor's interest—Appointment of guardian of property of minor member. 25 A 307 (P C) Col. 2130 P I.

56 Power of—Discretion to appeal—Power of stranger to intermeddle. 2 A. L. J. 489—*See Guardian ad litem No 2.*

57 Power of lunatics to contract without permission from Court 3 A L J 686—*See Col: 66 P I.*

(28) PROMISE TO PAY.

58 *Money made by, on behalf of minor*

Guardian *(Contd.)*

—Promise to pay money made by guardian on behalf of—Personal liability of minor for money borrowed for his use by guardian.

On 3rd February, 1896, mother of G a minor, executed a simple bond in favor of M whereby the mother both for herself and as guardian of G promised to pay Rs. 298 with interest within one year. The bond was registered. M instituted a suit on 24th April, 1902, against both G and his mother. The Lower Courts found that M made enquiries as to the necessity for a loan, that there was urgent necessity and that the money was applied solely for the relief of G. They passed a decree against both mother and son. On second appeal by G alone—

Held, that as it is settled law that although a guardian may under certain circumstances sell or charge his ward's property he cannot bind his ward personally by a covenant or promise to pay money or damages, the suit against G was barred by limitation as the bond was not binding upon him.—GAYA PRASAD *v.* MUSAMMAT MAHARAJ KUAR, **7 O C 46**.

(29) QUESTION WHETHER SALE BY

59 *Guardian of property—Mother's power to sell her minor children's estate —Alienation for benefit of the minor.*

Although according to Mahomedan law the mother of a minor is not guardian of his property yet, if she deals with the minor's estate, her acts, if they are for the benefit of the minor, should be upheld. Moyna Bibi v. Banku Behari Biswas, I L R 29 Calc. 473, referred to and distinguished. MAFAZZAL HOSAIN *v.* BASIDSHEIKH. **4 C L J 485 =11 C W N 71=34 C 36**.

30—REMOVAL OF.

60 Certificated guardain—Effect on attainment of majority by minor-Suit instituted without next friend, effect of-Irregularity. 11 O C 159 Col 1613 P I.

(31) SALE BY.

61 De-facto guardian of Muhomedan minor—Effect on the minor—Good faith—Mistake of law. 17 M L J 9 Col 569 P I.

32—SUIT BY.

62 Next friend—Notice to certified guardian—No fomal leave granted to next friend to sue—Presumption. 5 A L J 633 Col 1612 P I.

63 Suit by managing member of mitakshara—Joint family debt—Reprenting minor —Co-parcener as next friend—Withdrawal of decretal money from court—Next friend if must furnish security. 12 C W N 598 Col 1619 P I.

64 Suit by minor to set aside decree passed against him — Want of proper representation or gross negligence of guardian ad-litem to be proved. 10 O C 321 Col 1618 P I.

65 *Minor—Account, suit for—Guardian's power to bind minor—Advances made to guarrdian for minor's benefit — Principal and Agent—Advances made by Agent to guardian of Pricipal.*

A guardian cannot bind his minor ward by a personal covenant. But where a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking the account that the agent has made advances to the guardian and the advances have been applied for the benefit of the minor, the agent ought to be allowed those advances in takt ing the accounts. Waghela Rajsanji *v.* Shekh Masludin, I L R 11 B 551, distinguished. SURENDRA NATH SARKAR *v.* ATUL CHANDRA ROY. **34 C 892**.

66 Suit for money advanced to minor—Registration of bond executed by guardian —Necessaries supplied to minor. 10 O C 38 Col 321 P I.

67 Suit for money spent by—Suit by dismissed guardian against minor for money spent by him for minor's use. 141 P L R 1903 Col 779 P I.

68 Suit for possession of property mortgaged and sold during—Minority minor—Limitation. 11 O C 346 Col 1824 P I.

69 *Compromise decree—Guardian—Practice —Suit to set aside compromise decree on ground other than fraud—Right of suit—Compromise filed without consent of guardian —Sanction of Court.*

A suit was instituted for a declaration that a compromise decree made against the plaintiffs in a previous suit, when they were minors, was void on the ground that the petition of compromise had been put in by the pleader engaged by their guardian in the suit against the express wishes of the latter.

Held, that the suit would lie and that the plaintiffs were entitled to show by evidence that the compromise was filed without the consent of their guardian and was therefore not binding upon them, although they had set up a case of fraud *qua* the decree and had failed to prove it.

Held, further, that in order to make the decree binding on the minors it was not enough to show that the sanction of the Court to the compromise was obtained. Where a decree is passed upon adjudication, no separate suit would lie to set aside the decree except on the ground of fraud, but where the decree is passed simply upon a compromise, a suit should lie to set aside the decree upon grounds other than that of fraud. Aushootose Chandra *v.* Taraprasanna Roy, I. L. R. 10 Calc. 612, Lalji Sahu *v.* The Collector of Tirhut, 6 B. L. R 648, 15 W. R. P. C. 23. Mewalall Thakoor *v.* Bhujhun Jha, 13 B L R, App. 11; 22 W. R. 213. Ramgopal Majumdar *v.* Prasanna Kumar Samad, 2 C. L. J. 508 Barhamdeo Prasad *v.* Banarsi Prasad, 3 C. L J. 119, and Manohar Lall *v.* Jadunath Singh, I. L. R. 28 All. 585, referred to. SURENDRA NATH GHOSE *v.* HEMANGINI DASI. **34 C. 83**.

70 Surety of guardian—Liability—Guardians and Wards Act (VIII of 1890) S. 35—

Guardian *(Contd.)*

Assignment of bond—Mistake and misrepresentation if avoid—Bond—Minor estopped. 12 C. W. N. 481 Col. 354 P. I.

(33) TESTAMENTARY:

71 Testamentary guardian—Appointment by Court—His liability to furnish security.—*See Guardian and Wards Act S. 34, 7, 28 No 5.*

1 Appeal Guardian ad-litem—Guardian Ad-litem not made a party by appellant. 1907 A W N 290 Col.1615 P I.

2 *Appointment continues until revoked——Duty—Natural father's declining to appeal—Interference.*

Where a guardian ad-litem is appointed as a fit and proper person by the Court he continues as guardian so long as the lis subsists, whether in the Court of first instance or in the Court of appeal, unless and until the appointment is revoked by the Court.

He may quite do his duty to the minor by not filing an appeal, and the inference to be drawn from the natural father's, who is also guardian ad litem, declining to file an appeal is that the guardian ad-litem does not think it advisable in the interest of the the minor to carry on the litigation any further. 14 A 35 ; 22 M 187 referred to. *In the matter of the application of* SUKHDEO RAI. **2 A L J 489.**

3 Appointed without his previous consent mere irregularity. 14 M L J 342 Col: 1506 P I.

4 Appointment of—Conditions necessary for proper representation of minor in a suit to be done with great care—Affidavit that the guardian has no interest adverse to the minors. 10 O C 321 Col 1618 P I.

5 *Appointment of—Ad litem enures for the whole of the lis till revoked by Court—Removal of guardian, application for, to be made by next friend.*

A guardian ad-litem being once appointed, his appointment enures for the whole of the lis in the course of which it has been made unless and until it is revoked by the Court (14 A 35 and 22 M 187 followed.)

An application to remove a guardian should be made on behalf of the minor by some person named as next friend or guardian *pro hac vice.* MT KISNI *v.* GHULAJI TELI. **1 N L R 128.**

6 Ad-litem——Appointment of—How long subsists—Property not taken charge of—Court of Wards—Guardian. 5 C L J 434 Col 69 P II.

7 Guardian and Ward—Guardian ad-litem not properly appointed— Proceedings null and void. A W N 1905 P 229—2 A L J 615 Col 1614 P I.

8 Decree passed by Munsiff exercising jurisdiction as small cause court—Transfer to regular side of court for execution—Necessity of application for transfer—Appeal against orders made after transfer. 3 P L R 1905 Col. 772 P I.

9 Compromise by guardian ad-litem without leave of Court—Validity of—Suit to recover possession of property from defendant who obtained it under compromise decree

Guardian *(Contd.)*

8 O C 191 Col 1620 P I.

10 Ad-litem—Courts power to appoint—Effect of appointment. MUZAFFAR ALI KHAN *v.* PARBATI. **A W N (1907) 221 =4 A L J 521=29 A 640.**

See Mahomedan Law (Succession).

11 Guardian and Ward—Nazir appointed guardian by court—Power to remove guardian—6 B L R 544 Col 1617 P I.

12 *Duty of Court—Civil Procedure Code S. 444—Guardian ad litem—Duty of Court as regards his appointment.*

Where the defendant or respondent to a suit or appeal is a minor it is the duty of the court not only to appoint a guardian, but to satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor. The duty of the Court is not a mere matter of form. Mussammat Bibi Walian *v.* Banke Behari Parshad Singh, I L R 21 Bom. 281, distinguished. RAMCHANDRA DAS *v.* JOTI PRASAD, **A W N 1907 P 225=29 A 675.**

13 Ad-litem—Married woman appointed for her minor sons—Validity—6 C L J 36 Col 1618 P I.

14 Ad litem—Married woman's competency to be her right enter into a compromise on behalf of an infant defendant—Validity of compromise. 16 M L J 14 Col 1618 P I.

15 Ad litem—Power of High Court as an appellate Court to make an interlocutory order appointing guardian—Procedure if to be regulated only by the code and onus of Proof 3 C L J 29 Col 1278 P I.

16 Ad-litem—Reference to arbitration by, of minor, without courts sanction—Validity of—Appointment how long subsists—Property not taken charge of—Court of Wards—Guardian. 5 C L J 434 Col 69 P II.

17 Ad-litem—Whether married woman to be appointed as of her minor son while her husband is alive. 4 A L J 698 Col 1626 P I.

18 *Guardian ad-litem when cannot be served—Procedure.*

If a guardian *ad litem* being absent from the country cannot be served with a notice, he is useless, and the Court should proceed to appoint another guardian. If a Court-sale takes place with such a guardian for the minor, the minor should be considered to have been un-represented when the sale took place. The sale should, consequently, be set aside 32 C 296 ref. ABSA BEENI *v.* MAIDINSA ROWTHER. **17 M L J 179.**

19 Guardian—Ad-litem—Compromise on behalf of minor made without leave of court voidable at the instance of minor when such compromise can be set aside in whole or in part at the instance of minor, 6 O C 175 Col 1623 P I.

20 Guardian ad-litem—Application for leave to appeal by next friend of minor

Guardian *(Contd).*

in presence of—Minor next friend of—4 O C 98 Col 1626 P I.

21 Guardian and minor—Perchase of property at court—Auction by guardian without permission of court. 6 O C 252 Col 549 P I.

Guardian and ward.

1 Acknowledgment—Part payment of debt—Limitation—3 B L R 817 Col 1785 P I.

2 Acknowledgment—Payment of interest or part—Payment of principal—Hindu Law—Decree against father—Suit against son after father's death. 27 M 243 Col 1843 P I.

3 Power to acknowledge debt or revive liability (Hindu Law). *See also 27 M 243 under Art 52, 26 M 330 Col 1785 P I,*

4 Acknowledgment—Limitation Act Ss. 19 and 20 to acknowledge debt or to make a part payment—Guardian and minor—Payment of interest by guardian. A W N 1904 P 137 Col 1785 P I.

5 Alienation by de-facto guardian—Necessity—Acquiescence—Testamentary guardian—Alienation of ward's property by de-facto guardian for minor's benefit. 13 M L J 223 Col 2127 P I.

6 Compromise by guardian on behalf of his minor ward—Decree against the minor—Suit to set aside the decree on the ground of fraud. Maintainability of. 3 C L J 119 Col 1314 P I.

7 Compromise by father on behalf of his minor son—Withdrawal of suit without sanction of Court—Muhammadan Law. 87 P L R 1905—3 P R 1905 Col. 1479 P I.

8 Compromise by guardian-Validity of. 3 B L R 887 Col : 1622 P I.

9 Compromise by guardian—Validity of. 15 M L J 494 and 14 M L J 442 Col 489 490 P. II.

10 Contract for sale by guardian of minor—Subsequent sale to third party—Sanction of District Judge. 10 C W N 763 Col 609 P II.

11 *Defalcation by guardian of joint property—Hindu Law—Joint family—Guardian and minor—Minor not liable for defalcation of his guardian.*

Where in a suit for partition the Court burdened the minor plaintiff's share with the liabilities of the plaintiff's guardian on the ground that the guardian had committed defalcations in respect of the joint property of the parties to the suit.

Held, that the judgment of the Court was wrong. If the guardian had committed defalcations the plaintiff could not be held responsible for it because it was a tort committed by the guardian in his personal capacity and not on behalf and for the benefit of the plaintiff. SONU VISHRAM *v.* DHONDU VISHRAM. **6 B L R 122 =28 B 330.**

12 District Judge's incompetency to supersede his predecessor's order appointing guardian. 150 P W R 1908. *See Guardian and Wards Act VIII of 1890 S. 25 No 4 P II.*

13 *Joint Hindu family—Guardian and Ward—Appointment of guardian of minor members' property.*

A guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in joint family property. This principle does not apply where all the co-parceners are minors and a guardian of the property is appointed for the whole number. *1 Bom. L R 822 referred to.* BINDAJEE LAXUMAN *v.* MATHURA BAI. **7 B L R 809 =30 B 152.**

14 *Jurisdiction of Court—Suit for a declaration as to the plaintiff's right to marry his minor cousions as against the mother's right.*

Held, that a suit by the plaintiffs for a declaration of their right to betroth and marry their minor causins, and for an injunction to the mother of the minors not to marry or betroth them without the consent of the plaintiffs, is not barred by the provisions of the Guardians and Wards Act. *Mussammat* UTTAM DEVI *v.* MAYA RAM. **10 P R 1904.**

15 Lease by guardian in excess of his powers—Sale by minor on attaining majority 28 A. 30 Col. 814 P. I.

16 Mahomedan mothers powers to mortgage minor daughter's property. 29 C 473 Col. 133 P. I.

17 Minor—Guardian ad litem—Not properly represented—Decree by defendant. 28 A. 137 Col. 1614 P. I.

18 Mother and uncle—Preference. U. B. R. 1908. 2 quarte P. I. *See guardian and Wards Act VIII of 1890 S. 17 No 3 P. II.*

19 Mortgage by guardian—Guardian also personally liable—Guardian's right to claim possession until liability discharged. 15 M L J 233 Col. 2128 P. I,

20 Mortgage by Hindu guardian—Duty for creditor to make enquiries as to the necessity for the loan. 26 B 433 Col. 563, 652, 2128 P. I.

21 Mortgage by natural guardian—Certificated guardian—Mortgage without sanction of Court. A W N 1905 P. 193—25 A 59.

22 Order absolute for sale — Guardian dean—Effect of non-service of notice. 2 A L J 640—28 A 193 Col. 673 P. I.

23 Powers and duties of guardian—Sale of minor's property by brother—Liability of minor for refund of purchase money. 33 P. R. 1904. *See Col. 256, 418 P. I.*

24 Powers and duties of guardian—Suit for possession of property—Mortgaged during plaintiffs' minority by his guardian. 23 P. R. 1904 Col. 1861 P. I.

25 Relation between guardian and ward, whether that of an agent to a principal—Whether resembles that of trustee to cesti que trust — Power of guardian to acknowledge debt due from minor. 5 A L J 375—A

Guardian and ward *(Contd.)*

W N 1908 P. 175—4 M L T 49—30 A 422 Col. 1779 P. I.

26 Right of guardianship—Hindu Law—Competition between out casted mother and paternal grand father in caste. A W N 1905 P. 205 Col. 60 P. I.

27 Sale by de facto guardian—Power of Muhammadan de facto guardian to sell his ward's property. 26 A 22 Col. 2136 P. I.

28 Sale by Hindu mother—Capacity to ward's immoveable properties — No legal necessity. 32 C. 832 Col. 403 P. I.

29 *Scope of authority of guardian—Mahomedan Law—Partition of father's estate between brother and minor sister—Sister represented by husband—Debt owing by husband set up against amount due to his wife—Subsequent suit for entire share—Scope of guardianship—Validity of guardian's act.*

Plaintiff's husband had, on the occasion of her marriage, sent her father Rs. 938 for her benefit, which sum was entered in the father's accounts to plaintiff's credit. The father died, and plaintiff's brother, the defendant, entered the same amount to her credit. A partition then took place between plaintiff and her brother, in which plaintiff, being a minor, was represented by her husband. It was found that the husband owed the estate Rs. 1,700 whilst the estate owed him Rs. 400, and the net sum due by him was, with the plaintiff's consent, set off against the sum due by the estate to the plaintiff, and the balance still due by the husband was allotted to plaintiff as a portion of her share in the estate. On a suit being filed by the plaintiff (after attaining her majority) for the Rs. 938

Held, that it was beyond the scope of her husband's duty, though he might have been plaintiff's guardian during her minority, to set off a debt due to her from the estate against the debt due by himself to it, and that the defendant could not rely on that transaction as binding on the plaintiff. Nor did it make any difference that the plaintiff, while a minor, assented thereto. The transaction was really in the nature of a contract and the fact that the minor was privy to it could not bind her. HAYATH BIHIMA-SHAHEBA *v.* SYAHSA MEYA. **27 M 10.**

30 Testamentary—Removal of—Old age—Effect of—Restoration of property to former guardian. 4 B L R 799 Col. 815 P. I.

31 The kurta of a Joint Hindu family, who is also the certified guardian of a minor member of it can make a mortgage on the joint family property so as to bind his minor ward as well. RAM AYTAAR SINGH *v.* CHOWDHURI NARSING NARAIN SINGH. **3 C L J 12.** *See Hindu Law (Joint family).*

32 Withdrawal from suit—Minor—Next friend. 29 C. 735 Col. 1623 P. I.

Guardian and Wards Act XL of 1858.

1 S. 3.—Appointment of guardian ad-litem other than the certified guardian—Effect—7 C L J 270 Col 1019 P II.

Guardian and ward Act XL of 1858 *(Contd.)*

Guardian and Wards Act VIII of 1890.

1 *See Act VIII of 1890 (Guardian and Wards Act). Col 805 to 818 P I.*

2 S. 4—Guardian of an infant—Order. 3 C L J 29 Col 1278 P I.

3 *S. 17—Guardianship of property of minors—Mother and paternal uncle—Preference.*

Held,—that where the only candidates for the guardianship of the property of a minor are the mother and a paternal uncle, there appears to be no authority, under the Mahomedan law, for preferring the uncle.

Wilson's Digest of Anglo-Mahomedan Law, paragraph 112 Tagore Law Lectures, 1873 page 476 and note. 29 A 10 U B R 1892—96 P 540 referred to. MAZAKERIA *v.* HABUN. **U B R 1908.** *2nd quarter P I Guardian and Wards.*

4 *Ss. 25,39,47—Gaurdian and Ward—District Judge's incompetency to supersede his predecessor's order appointing guardian—Removal of guardian—Maintenance—Marriage—Appeal.*

On 9th June, 1905 E (District Judge) appointed D to be guardian of both persons and property of three minor daughters of G, nephew of D, and rejected the claim of Z and another.

On 11th October 1907 E's successor A granted D's application to arrange for the marriage of the eldest girl R.

On 18th December, 1907, A superseded the arrangement.

On 23rd December, 1907, D again applied for assistance of the Court to enable him to regain control of R.

On 24th January, 1908, A without assigning any good reason, passed an order to the effect that D's guardianship of R should be superseded in favour of Z and D should pay 1/3 share of profits of Gulam Qadir's land to N, son of Z, for maintenance of R.

Held, that the order of 18th December 1907 is an arbitrary one and that of 24th January, 1908, is extraordinary and indefeasible.

A District Judge *suo moto* has neither power to remove a guardian nor to appoint a person whose claim has already been rejected by his predecessor.

Held, also, that, where a duly constituted guardian is willing to maintain, the Court has no power to pay out of the Ward's property maintenance charges to a person who on his own account chooses to support the minor.

Held, further, that, without assigning very good reasons, the District Judge is not justified in refusing help for restoring the minor to the control of the guardian. DULLA *v.* ALAHDI. **150 P W R 1908.**

Guardian and wards Act VIII of 1890 *(Contd.)*

5 *Ss. 44, 7 (3) 28—Appointment of testamentary guardian by Court—His liability to furnish security.*

A guardian under a will, who has also applied for and accepted the position of a guardian under the Act, may be called upon to furnish security under S. 34 of the Act. SUKH DIAL *v.* KARAM CHAND. **99 P R 1908.**

6 S. 47 and 48—Compromise by certificated guardian of minor adopted son—Suit by such guardian to contest adoption. 7 C W N 419, 30 C 613 Col 1613 P I.

Guardianship.

1 *Guardian and Ward—Adoptive mother, Competency to be appointed guardian.*

The adoptive mother of minor is not disqualified from being appointed his guardian, though she may be only about 18 years of age.—3 *Bom.*, 2 *referred to.* RANGUBAI *v.* GOPAL DHONDU. **5 B L R 524.**

2 Guardianship — (Hindu Law). Step mother whether can be guardian of step sons—Validity of alienation made by stepmother during guardianship - Remarriage of mother effect of on her status of guardianship—4 N L R 29 Col 2133 P I.

3 Convert father—Hindu son—To Mohmedanism—Validity of such adoption. 25 B 551 Col. 645 P. I.

4 Guardianship—(Mahomadan Law)—Of property of Minors—Mother and paternal uncle-U. B. R. (1908) 2nd quarter guardian and Wards Act VIII of 1890 S. 17 No. 3 P. II.

5 Not one of the private civil rights of only private person—Dispute as to right to be minors guardian—Not to be submitted to arbitration. 5 A. L. J. 101 Col. 809 P. I.

6 *Of wife, by husband—Custom for wife to remain with parents till majority—Hindu Law.*

Under Hindu Law the husband is the legal guardian of the wife from the moment of marriage whether the mariage is consummated or not but according to general practice of the Hindu community in the Madras Presidency, the husband is not entitled to the custody of his wife, as against her parents, when she has not yet attained her maturity. Sudder Decisions 1858, p. 154, *followed.* ARUMUGA MUDALI *v.* VIRARAGHAVA MUDALI. **M. L. J. 1901, p. 69=24 M. 755.**

Gujrat Talukdars Settlement Act VI of 1888.

1 *See Bombay Act VI of 1888 Col. 222 P. II.*

2 *Partition suit—Parties—All interested persons should be made parties—Gujrat Talukdars' Act (Bom., Act VI of 1888) Section 12.*

It is a general rule that all persons interested ought to be made parties to a suit, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested. It is in obedience to this rule that in partition suits all known co-sharers must be before the Court. This rule governs partition proceedings under the Gujrat Talukdars' Act, and any known co-sharers that are not made parties to such proceedings are not bound by them.

The phrase "known co-sharers" in section 12 of the Gujrat Talukdars' Act covers all who are known to hove an interest in the property and is not limited to those co-sharers whose names are recorded under the Act. CHUDASAMA SURSANGJI *v.* PARTAPSANG KHENYARJI. **5 B. L. R. 937=28 B. 209.**

GURU.

1 Property left by—Trust for religious purposes—Succession to property of Hindu religious mendicant who is not a hermit or ascetic'. 3 O. C. 281 Col. 902 P. II.

Guzara Land.

1 Suit for possession-Estate for life—Grant of maintenance in perpetuity. 7 O. C. 90 Col. 554 P. II.

H.

Hackney Carriage Act.

1 *See Bombay Act VI of 1863 Col 188 P II.*

Hak-buha.

1 *Punjab Tenancy Act XVI of 1887 S. 4, cl. (12), S. 77 (3) (j)—Haqq-buha—Village cess—Jurisdiction of Civil and Revenue Courts.*

Under S 4 (12) the Customary dues of the nature of *Haqq-buha*, levied by the proprietary body of a village from non-proprietary residents, fall within the definition of village cess. 49 P R 1891; 11 P R 1890 (Rev.) referred to. Suits for the recovery of these due are therefore cognizable by the Revenue Courts under S. 77 (3) (j) of the Act. SHAHYA *v.* KARM KHAN, **95 P R 1907 (Footnote), p 453.**

2 Suit for declaration that plaintiffs, who are occupancy tenants, are not liable to pay haqbua. GAMU *v.* KARIM KHAN, **33 P R 1908=171 P L R 1908.**

See Jurisdiction of Civil and Revenue Courts.

Hak-i-chaharum.

1 Acquisition of site and buildings occupaid by tenants—Compensation to zemindars and tenants. A W N 1903 P 5 Col 864 P I.

2 *Landholder and tenant—Haq-i-chaharum.*

In the case of a customary right to receive *haq-i-chaharum* where it does not appear that the Zamindar's right to a share of the purchase-money is limited to a right

Hak-i-chaharum *(Contd.)*

to claim it from the vendor, the right can be enforced against the vendee also. *W N P H C R 1867, F B 63, referred to.* DHANDAI BIBI *v.* ABDUR RAHMAN. **W N A 1901, p 61.**

3 Execution of sale—Zamindar's right to. 1 O. C. 2.—*See Col. 1036 P. II.*

4 *Haq i-chaharum, vendee to pay—Wajib-ul-arz.*

Held, that, unless the right of the landlord is limited by the *wajib ul-arz* to a right to claim *haq-i-chaharum* from the vendor, the right can be enforced against the vendee also. S. C. No. 147, N. W. P. H. C. (F. B.) Rulings 1867, 63, A. W. N. (10), 61, S. C. A. No. 215 of 1897, *not followed.* UTRI DIN *v.* MUNSHI PRAG NARAIN. **11 O. C 64.**

Hak-i-Jethausi.

1 Oral evidence—Custom—Partition. 1 O. C. 301. *See Col. 219 P. I.*

Hak-i-Juri.

1 *Custom*—Ala *and* adna maliks—*Land submerged—Re-appearance*—Haq Juri—Wajib-ul-arz—*Muradpur Village, Alipur* Tahsil, *Muzaffargarh District.*

The plaintiffs, *adna maliks* in the village of Muradpur, *Tahsil* Alipur, Muzaffargarh District, sued the defendants (*ala maliks*) for a declaration of *adna milkiyat* rights in certain land which had been thrown up by the river Chenab before the suit.

The *Wajib ul-arz* provided—"If the land belonging to the *adna malik* is washed away at the time of its being thrown up it becomes the property of *ala malik*. The *adna maliks* retain no right in the land. The *adna maliks* after paying *haq juri* to the *ala maliks* will be entitled to get possession. Without paying *juri* they will have no right. If the *ala maliks* intentionally refuse to take *juri*, the *adna maliks* are not entitled to take possession. The arrangement as to *juri* is to depend upon the value of the land and the status of the *adna malik*. But it should not be less than Re.1 per *bigha* or more than Rs. 2 per *bigha.*

It was contended for the defendants that the plaintiffs had no right to recover possession and claimed *juri*, in case the plaintiffs suit was decreed.

Held, that the plaintiffs were entitled to be declared *adna maliks* of the land in suit, but their right was dependent on the payment to the defendants of Haq juri. It lay upon the *adna maliks* to show that they were not bound to pay *haq juri*, but they had failed to do so. As to the rate, defendants had not shown that they were entitled to more than the minimum entered in the *Wajib-ul-arz*, namely, Re. 1 per *bigha* FAKIR AHMAD SHAH *v.* KHUDA BAKHSH. **33 P. R. 1903.**

Hak-i-Sukhadi and Rejgi.

1 Notification of Bombay Government—Interest. 7 B. L. R. 798 Col. 51 P. I.

Half brother.

1 *See Hindu Law—Inheritance and succession, Mahomedan Law-Inheritance-Custom of the Punjab Inheritance and Succession; and Oudh Estates Act I, 1869 S. 13, 14, 15, and 22.*

Hamesha.

1 Conduct of parties—Construction of—Always and for ever—Perpetual grant. 23 A. 204 (P. C.) Col. 503 P. II.

Hand writing.

1 *See Evidence Act I. of 1872 S. 47 and 73 Col. 182 and Limitation Act IX of 1908 S. 20.*

Hard and inequitable condition.

1 Condition in a mortgage deed amounting to—Right to redeem. 6 O. C. 167 Col. 346 P. I.

Hat.

1 Suit to recover possession of a hat—Delivery of possession. 29 C. 614 Col. 392 P. I.

2 Improvement effected by co-owners of a hat to save the hat from forfeiture. 32 C. 374 Col. 328 P. I.

Hatchita

1 Acknowledgement—Material alteration in a hatchita—Alteration with regard to interest. 9 C. W. N. 695 Col. 34 P. I.

2 Acknowledgement—"Signing"—Limitation Act S. 19—Likhtam Khode. 31 C. 1043 Col. 1774 P. I.

Havala

1 Conveyance—Letters by a debtor authorising payment to his creditor of money due to him (the debtor) by a third person. 4 B. L R. 951 = 27 B. 150 Col. 889 P. I.

Hearsay evidence

1 Document thirty years old—Presumption—Discretion—Title of plaintiff—Findings of fact. 7 O. C. 290 = 26 A. 581 Col. 148 P. I.

2 Family custom—Hindu Law—Primogeniture—Evidence. 23 A. 37 (P. C.) Col. 732 P. II.

3 Executed by Indian Ladies—Construction of document—Appointment to heir to Taluqdari estate by Hindu Widow. 2 O. C. 372 Col. 913 P. II.

4 *See for other cases Act I of 1872 Evidence Act S. 32 Col 163 to 171 P. I.* and Col. 988 to 991 P. II.

Heir.

1 *See Hindu Law; Mahomedan Law and Custom, Punjab.*

2 Liability for debts and rent. *See Hindu Law debts.*

Hereditary Claim

1 *Punjab Land Revenue Act (XVII of 1887) Rules under—Rule No. 167 (1)*—Inamdar—Zaildar. *Appointment of—Hereditary claim.*

The words in Land Revenue Rule No. 167 (1) "regard shall not be had to any alleged hereditary claim" are not to be so construed as to prevent in evenly balanced cases, considerable weight being attached to the circumstance that one of the claimants is the son of the deceased office-holder. The object of these words is to secure to the local officers great and very necessary freedom in making appointments of *Zaildar* and *Inamdars.* The words mean that there is absolutely no obligation to appoint a relative, but they do not mean that if so near a relative as

Hereditary Claim *(Contd.)*

a son is amongst the claimants, the fact of such relationship should count for nothing at all. It is one point, and not a conclusive point, in favour of a candidate, but it may turn the balance in a doubtful case. SURAIN SINGH *v.* JAGAT SINGH. **5 P. R. 1902 Revenue=71 P. L. R. 1903.**

Hereditary Office.

1 *Adverse possession—Limitation Act IX of 1908 Art. 124—Claim to hereditary office—Adverse possession.*

The plaintiff's right to recover an hereditary office would not be barred under Art 124. unless the defendant is found to have been in possession of it adversely to the plaintiff for twelve years ; and the fact that the plaintiff did not have possession of the office at any time within twelve years previous to the suit would not be sufficient in itself to bar his claim—9 B H C R 260 Distinguished. REGUNATHA CHARIAR *v.* THIRUVENGADA RAMANUJA CHARIAR. **4 M L T 466.**

2 *Bathing ghat—Managership of a bathing ghat :—*

The office of managership of a bathing ghat is not a hereditary one passing like the office of mahant of a Mutt from Guru to Chela. BASDEO SAHAI *v.* DAMODARANUND. **1 A L J 44.**

3 Of Karnam and shroff—Form of suit—SADASIVA PILLAI *v.* KALAPPA MUDALIAR. **24 M 39.**

See General Clauses Act (Madras) 1891 S 8.

4 Limitation—Claim for recovery of—Succession by Hindu widow to trusteeship of temple. 28 M 197 Col : 1927 P I.

5 Limitation—Resjudicata—Party to suit Hindu idols. 6 C W N 178 Col : 985 P I.

Hereditary Offices Act (Bombay Act III of 1874.)

1 *See Bombay Act III of 1874 Col : 195 196 P II.*

Hereditary Trustees.

1 *Adverse possession—Limitation Act XV of 1877 S. 28, sch. II, arts. 124, 127, 142—Religious Endowments Act—Trustees of temple—Hereditary trustees—Management by rotation—Discontinuance of possession of trust properties of junior branch of trustees—Continuous possession by members of senior branch—Extinction of rights of junior branch in favour of senior branch.*

On the death of the last sole trustee of a public religious institution, the trusteeship of which was hereditary in his family, without beneficial interest in the trust property or income, the office devolved by inheritance on his male descendants by his two wives. Until 1881, the management was conducted by the two branches respectively in rotation, each acting for a year. Since 1882, the members of the junior branch had discontinued possession of the immovable properties belonging to the trust as also performance of the duties usually appertaining to the office of trustee, and the members of the senior branch had been, in turn, successively in possession of the

Hereditary Trustees. *(Contd.)*

properties and had performed the duties, to the exclusion of and adversely to the members of the junior branch, and the High Court found that there had been an ouster of the members of the junior branch for about 19 years prior to the present suit, and that the members of the senior branch had been in turn successively in possession of the properties and had performed the duties of the office of trustee, to the exclusion of and adversely to the members of the junior branch. Plaintiff, a son of the last sole trustee by his senior wife, now sued a grandson of the last sole trustee, whose father was also a son by the senior wife, to enforce his turn of management of the institution. Since 1882, plaintiff had been managing, not only during the years of his own turn, but also during the years of the turns of the members of the junior branch, who, plaintiff alleged, had transferred their turns to him. It was contended for the defendant that inasmuch as the plaintiff had not himself been in continuous possession for 12 years, and the possession of the defendant and of the other two members of the senior branch during the 19 years had not been adverse to the members of the junior branch, the rights of the latter could not be barred under Article 124.

Held, that the right of the members of the junior branch, as co-trustees had been extinguished, whether the appropriate article be 127, 142 or 124 Each of the members of the senior branch must be deemed in law, to have held and discharged the duties of the office on behalf of himself and the other members of the senior branch, to the exclusion of the junior branch. Consequently, the office and the properties had been for more than 12 years held and possessed by the members of the senior branch as a whole body, adversely to the members of the juniour branch, as a body, and the rights of the latter had been, by the operation of S. 28 of the Limitation Act, extinguished, not in favour of the plaintiff individually but in favour of the members of the senior branch as a body. The defendant could not, therefore, plead, in bar of the plaintiff's claim, that the junior branch, or one of its members, and not the plaintiff, was entitled to succeed him in the turn of management. A right to manage by rotation by each of several co trustees in turn is not one that can, as between the trustees themselves, be acquired merely by the operation of the law of limitation. But *held* that plaintiff was entitled to the relief sought for, upon the basis of the scheme of management, under which management by rotation was provided for. A scheme of management which has been framed and acted upon by the trustees cannot be revoked at the will and pleasure of any of them. It is competent for co-trustees to settle a scheme of management by each of the co-trustees in rotation,

Hereditary Trustees. *(Contd)*

at any rate where no emoluments be attached and the office is an hereditary one. Where emoluments are attached and the office is hereditary, the emoluments will be subject to partition, in the strict sense of the term, like any other family property. But whatever may be the number of co-trustees, the office is a joint one and the co-trustees all form, as it were, but one collective trustee, and therefore must execute the duties of the office in their joint capacity. Management by members of undivided families discussed. It would be competent for a Court, in the exercise of its equitable jurisdiction, to settle a scheme for the management of a public religious or charitable trust by the various co-trustees in rotation. Sri Raman Lalji Maharaj *v.* Sri Gopal Lalji Maharaj. (I L R 19 All 428), discussed.—RAMANATHAN CHETTY *v.* MURUGAPPA CHETTY. **M L J 1903 P 341**=**27 M 192**.

2 Adoption —Right of adopted son—Consequential relief not claimed. 15 M L J 456 Col 433 P II.

3 *See Hindu Law—Religious endowments.*

Hereditary village officers Act.

1 *See Madras Act III of 1895.*

Heritable and non transferable lease.

1 *See Oudh Rent Act XXII of 1886 S. 41,52.*

Hermit.

1 Capacity of mahant to acquire property —Ratification of register—Property held by head of mutt. 26 M 79 Col 744 P I.

Hiba-bil-ewaz.

1 *Pre-emption—Oudh Laws Act XVIII of 1876.*

Hiba-bil ewaz—The plaintiff sued for pre-emption of certain property, alleged to have been sold by one C. N. to the defendant, R. N., by a deed, dated 29th August, 1890. The defence was that the transaction was a *hiba bil ewaz* and that no right of pre-emption attached to an exchange.

Held, that a *hiba-bil-ewaz* purporting to be an exchange is not a sale as meant in Act XVIII of 1876 and confers no right of preemption. RAJ KISHORE *v.* RAGHU NATH PARSAD. **4 O. C. 196**.

2 *Pre-emption—Hiba-bil-ewaz-Mahomedan Law of pre-emption—Sale and price—Meaning of—Oudh Laws Act (XVIII of 1876), S. 3, 9.*

In a pre-emption suit in Oudh, to which the parties were Mahomedans, *held*, that the statutory right of pre-emption provided by Act XVIII, 1876, was conferred on all classes of the community alike, and its language must be construed in a uniform manner without regard to the personal laws or usages of the persons concerned.

Held, also, that in the chapters and sections of the Oudh Laws Act "price" means "money."

Held, further, that a '*Hiba-bil ewaz*' is not a sale within the meaning of section 9, Act XVIII, 1876, and that it confers no right of pre-emption under chapter 11 of the Act. ABID ALI *v.* MUSAMMAT ARAB-UN-NISA. **1 O. C. 75**.

3 Copy of Koran is a valid *Hiba-bil-ewaz*—Consideration, what is sufficient. 13 C. W. N. 160 *See Col. 511 P. II.*

High Court.

(*a*) General.
(*b*) Bombay High Court Rules.
(*c*) Calcutta High Court Rules.
(*d*) Madras High Court Rules.
(*e*) N. W. P. High Court Rules.

(*a*) GENERAL.

1 Concurrent jurisdiction of High Courts in India—Adjudication by different courts. 31 C. 761 Col. 12 P. II.

2 Decision of High Court binding on Lower Court—Probate, revocation of. 31 C 628 Col. 523 P. I.

3 Disciplinary jurisdiction—Professional conduct—Pleader making use in later proceeding, against A of infomation obtained by him in an earlier case in which A was his client. 26 B 423 Col. 503 P. I.

4 Jurisdiction-Administration suit-Fraudulent decrees and deeds—Setting aside of. 33 C 180 Col. 2036 P. II.

5 Jurisdiction—Suit to set aside decree obtained by fraud. 30 C 369 Col. 1757 P. II.

6 *Jurisdiction—Bench taking up cases of the Presidency group—Jurisdiction over Presidency Small Cause Court, Calcutta.*

The Bench of the Calcutta High Court taking cases of the Presidency Group has no jurisdiction to set aside the decree of the Calcutta Court of Small Causes, which is not within the jurisdiction of the Bench. SHAMSHER MUNDUL *v.* GANENDRA NARAIN MITTER. **29 C 498**.

7 Jurisdiction—"District Court" includes High Court in its original jurisdiction. 12 C W N 446 Col. 792 P. I.

8 Jurisdiction—Right of evidence — Insolvency appeal in the High Court—Procedure of Insolvency Commissioner. MANGIAH CHETTY *v.* RAMIAH CHETTY. **18 M L J 565**.—*See Vakil.*

9 *Powers to award expenses to a witness—High Court—Rule 196—Witness—Application in Chambers — Expenses for attendance in Court.*

A witness who attends the Court on a subpœna is entitled to demand at any time his reasonable expenses of such attendance from the party issuing the subpœna even though he only gives evidence as a witness for a party to the suit other than the party summoning him. *In re* BULLOCK. **6 B L R 1025**=**28 B 647**.

10 Power to ascertain value for appeal to Privy Council—Application for leave—Value of subject matter in dispute. 9 C W N 370 Col. 1298 P. I.

11 *Appellate Court can extend time for payment, where appeal dismissed for limitation—Delay in filing second appeal.*

Even in cases in which appeals are dismissed on the ground of limitation in presen-

High Court *(Contd.)*

tation of the same, the High Court has power to extend the time for payment. 18 M. 214 and 22 M. 293, and 31 M. 28 followed. YENKATAPATHY AIYER *v.* THIRUPATHI GOUNDAN, **4 M. L. T. 341.**

12 Power to interfere with jurisdiction—Order passed in exercise of power to punish contempt of court. 27 A. 380 Col. 904 P. I.

13 Power to interfere with findings of Lower court. 27 A. 356 Col. 3 P. I.

14 Power to interfere with finding of fact in second appeal. 9 C. W. N. 154 Col. 1251 P. I.

15 Power to interfere with ultra vires—Commission of persons not exempted by, C. P. C. 3 M. L. J. 246 Col. 465 P. II.

16 Power to interfere with reversioner—Order declaring certain persons to be touts. Kedar Nath in the matter of the petition of. A. W. N. 1908 P. 279. *See Legal Practitioners Act XVII of 1879 S. 36.*

17 Power to interfere with reversioner—Order in matter relating to execution of decree. 3 L. B. R. 1906 P. 131 Col. 1095 P. I.

18 Power to interfere with reversioner—Power to revise proceedings in the Bombay Court to small causes. 31 B 138 Col. 1342 P. I.

19 Power to interfere with review—Suit with reference to money deposited in court 9 C. W. N. 492 Col. 1340 P. I.

20 Power to interfere with reveiw-Amendment of decree by Original Court after confirmation on appeal. 9 C. W. N. 6 05 Col. 1264 P. I.

21 *Power to stay criminal proceedings ordered by civil Court, S. 15, Charter Act, Ss. 28 29, Letters Patent—S. 476, Cr. P. C.*

The power of general superintendence given by S. 15 is not limited by any other provisions of law, and it includes the power to point out to the subordinate Courts, the inexpediency of trying a case when it is likely to interfere with the due course of justice. The power of superintendence (S. 15) and transfer (S. 29) implies the power to send for the records in any case in the lower Courts which must necessarily stay further proceedings in that case. Therefore, the High Court has the power to stay proceedings (ordered by a Civil Court) in Criminal Courts till the appeal from that Court is disposed. 34 C. 848 Expl. B. L. R (F. B.) 426 not Expld. The fact that the Court may not have the power to set aside the order under S. 476, Cr. P. C. is in itself no reason for holding the other way. IN RE L. JOGIAH. **4 M. L. T. 186.**

22 Power to stay proceedings—Documents not stated in list accompanying plaint—Discretion of Court. 12 C. W. N. 312 Col. 1471 P. I.

23 Power to appoint guardian of minor who is member of a joint family. 3 B L R 411 - 25 B 353. *See Guardian No. 13.*

24 Power to transfer from small cause Court to High Court—Jurisdiction—Letters patent. 7 B L R 143 Col 1061 P I.

25 *Summary jurisdiction—Costs—Solicitor's costs—Lien—Compromise of suit—High Court, Jurisdiction of.*

The High Court has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs, and in enforcing it, the Court must be guided by the principles of English Law.

Although the High Court possesses a summary jurisdiction to enforce the solicitor's lien upon the fruits of his exertion, it will not do so when the circumstances would make it unfair to any of the parties, or would compel the Court to go into complicated questions of fact, especially when charges of fraud or collusion are made, or where a solicitor has deliberately taken additional fresh security for the purpose of securing his costs, and has not relied on his lien under the summary jurisdiction. *In the matter of* COSTS DUE TO MESSRS TYAPJI & Co, **7 B L R 547.**

(b) Bombay High Court rules.

1 *Dismissal of third party—Third party notice—High Court Rules, Chapter VIII—Summons for directions—Claim of Indemnity—Embarrassing pleading—Refusal to give directions, effect of.*

In deciding whether the Court should give directions on a summons for directions, the Court has to see that nothing is done which would put the plaintiffs to additional expense or difficulty, and also to see that they are not embarrassed by the introduction of third parties in their suit.

In giving leave to serve notice of claim for contribution or indemnity on a third party the Court will not consider whether the claim is a valid one but only whether the claim is bona fide and whether, if established, it will result in contribution or indemnity.

Carshore *v.* North Eastern Railway Company (1885) 29 Ch. D 344, followed,

The effect of a refusal by the Judge to give directions is to dismiss the third party from the action.

Baxter *v.* France No 2 [1895] 1 Q B 591, referred to. SIVLAL *v.* SHRIKISSENDAS AND MITCHELL. **31 B 465.**

2 Power of High Court in framing rules under S. 652 C P C—Presentation of memoranda of appeals, application and appeals in execution proceedings—Accompaniments extraneous, 32 B 14—9 B L R 1138 Col 1671 P I.

3 Power to revise proceedings in the Bombay Court of Small Causes—Practice—Presidency Small Cause Courts Act (XV of 1882) section 9—Charter Act—8 B L R 969 —31 B 138 Col 1342 P I

4 Power of superintendence over Aden Courts—Charter Act section 15—Transfer of case—3 C L J 5—8 B L R 4 Col 189 P II.

5 *Power to transfer suit—Letters Patent, Article 13—Act II of 1864—Civil Court of the Resident at Aden—Superintendence of High Court.*

The Civil Court of the Resident at Aden, as constituted by Act II of 1864, is

High Court *(Contd.)*

subject to the superintendence of the High Court of Bombay within the meaning of clause 13 of the Letters Patent, and the High Court has power to remove a suit from the Court of the Resident and to try and determine the suit transferred. ABDUL KARIM FATEH MAHOMED *v.* THE MUNICIPAL OFFICER ADEN. **5 B L R 562 =27 B 575.**

6 Rules 17, 18 and 25—Power of High Court in framing rules under S 652 C P C—Presentation of memoranda of appeals—Application and appeals in execution proceedings. 9 B L R 1138 Col 1671 P I.

7 *Rule 80 Civil Cir Art 179, Sch. II—Application for execution—Copy of the decree—Application made 'in accordance with law'—Construction of rule*

An application for execution though unaccompanied by a copy of the decree, as required by Rule 80 of the High Court Circulars is an application 'in accordance with law,' under article 179, Sch. II of the Act.

The proper view to take of Rule 80 is not that it prescribes the essentials, which an application for execution must contain, and which are necessary to constitute the application itself an application in accordance with Law, but that it requires something further besides the application itself, an accompaniment extraneous to the application, as a condition precedent to further action by the Court executing the decree 5 B L R 394 not followed; 28 M 557 followed.

The Limitation Act, as an enactment of restrictive character, must be strictly construed 1 B 19 followed. RAMACHANDRA SADASHIV *v.* LAXMAN SADASHIV. **8 B L R 892=31 B 162.**

8 Rule 80 (A) 1—Pauper, petition to sue as prothonotarys decision—Application to judge in chambers—Right to be heard. 32 B 163—9 B L R 475 Col 384 P II.

9 Rules 111, 112—Suit set down for hearing before date fixed in summons. C P Code S 68, 69, 96, 100, 101, 112 and 113 High Court Rules Nos 111 and 112 Col 1048 P II,

10 Rule 122—Arrest before Judgment—Damages for wrongful arrest—Damages for arrest cannot be tried by counter claim practice. 10 B L R 1002 Col 1222 P I.

11 Rules 544—High Court Rules (original side) 80 (a 1)—Pauper petition to sue as prothonotary's decision—Application to judge in chambers. 9 B L R 475 Col 384 P II.

12 *Rule 131—Third party notice—Application to be before filing written statement—Practice and Procedure.*

An application for a third party notice, under Rule 131 of the Bombay High Court Rules, must be made before the written statement is filed, unless special leave has been obtained from the Court. NIPPON MENKWA KABYSHIKA KAISHA *v.* GURMUKRAI SUKHANAND AND Co. **10 B. L. R. 1024.**

High Court *(Contd.)*

13 Rule 131—Attorney and client—High Court (Bombay) Rule 541—Taxation—Bill of costs. 10 B. L. R. 76 Col. 674 P. II.

14 Rule 577—Practice - Costs of third counsel in a defended long cause—Party and party costs—Attorney and client costs—Practice governing the allowing of costs—Taxing master's decision—Review by the chamber judge—High Court Rules and forms. 9 B. L. R. 983 Col. 68, P. II.

15 Rule 859—Recovery of solicitor's costs under Rule 859 of the High Court Rules—No limitation. 9 B. L. R 508 Col. 1986 P. I.

(C) Calcutta High Court Rules.

1 Rule 70—New trial—Civil Procedure Code (Act XIV of 1882) Section 108—Rehearing of suit—Decree exparte

2 Rules made by the High Court—Rule 70, 3 C. L. J. 199 Col 753 P. I.

3 *Rules 111 to 118 and 122—Attorney—Attorney's final examination for admission of—Rules and Orders of the High Court, Rules 116, 117, 118 and 132—Board of Examiners—Jurisdiction—Certificate—Solicitors Act, 1877 (40 and 41 Vict. ch. 25) s. 9—Special Bench.*

An application by a candidate against the refusal of the Board of Examiners for the Attorneyship Examination to grant him a certificate of his having passed a Final Examination, should be made to a Special Bench constituted by the Chief Justice. The application refused on the merits of the case.

Per Woodroffe J By rule 116 of the Rules and Orders of this Court, discretion has been delegated to the Board of Examiners without any express reservation as made by s. 9 of the English Solicitors Act of 1877. The Court will not interfere with the exercise by the Examiners of the discretion confided in them, unless the Examiners refuse to exercise that discretion, or do not exercise that discretion honestly and conscientiously. IN THE MATTER OF PURNO CHUNDER DUTT. **4 M. L. J. 157=35 C. 915=12 C. W N. 83.**

4 *Rules 515 A and 515 B—Letters Patent Calcutta Cl. 12—Rules and Order of the High Court—Rules 519 A and 515 B—Grant of leave under cl. 12 of the Charter by Registrar or Master, if ultra vires.*

The Court's obiter.—Rule 515 A. so far as it authorises the granting of leave under cl. 12 of the Charter by the Master and Registrar, is ultra vires. BRIJ COOMAREE *v.* ALMA CHAND. **11 C W N 663.**

5 *Rule 515 A (10)—Registrar, power of, to dismiss a suit for want of prosecution.*

In a case where a registrar had made a peremptory order that the plaintiff should file her affidavit of documents within a certain time and in default the suit stand dismissed for want of prosecution.

Held—That the effect of the Registrar's order was to fix a date peremptorily within which the affidavit must be filed

High Court *(Contd.)*

and that in default the suit is liable to be dismissed on an application made to the Court. If by the new Rule 515 A (10) it is intended to give the Registrar power to pass a decree, the Rule is *ultra vires.* The Court alone can pass an order dismissing a suit and an appeal lies from such an order. 19 B. 307 foll—KAMALAKHY DOSSEE *v.* JOTENDRA MOHUN BANERJI. **6 C L J 374.**

6 Rule 748—Presumption of indentiy—Power of attorney executed before and affidavit of identity. 9 C W N 986 Col 191 P I.

7 Rule 859--Art 181--Art 178--Recovery of solicitor's costs under Rule 859 of the High Court Rules—No limitation. 9 B. L. R. 508—32 B. 1 Col. 1986 P. I.

(d) Madras High Court Rules.

1 Rule 2—Suit by a Member of Malabar Tarwad to set aside contract made during his minority by adult members of the Tarwad—Nature of suit—Rule No. 2 of High Court Rules (Madras). 1 M. L. T. 412—30 M. 18 Col. 103 P. I.

2 Rule 31—Agency Rules for Ganjam and Vizagapatam—Rule XXXI—Appeal against order in execution passed by the Agent—Decree. 26 M. 266 Col 48 P. I.

3 *Rule 105--Practice--Procedure--Appeals, filing of--Two appeals to lower Court and one decree--One appeal to High Court--Decree, form of High Court Rules (Madras) Rule 105.*

Where from a decree in a suit there have been two appeals to the lower appellate court, but only one decree was passed, it is enough if one appeal is preferred to the second appellate court; and even if two appeals are preferred the proper course will be to pass only a single decree. GANGULAKURTI SANYASI LINGAM *v.* NIDUGONDA GAVARAMMA. **16 M. L. J 411.**

4 Rules 154, 155 of the Madras High Court (original side) Application to set aside dismissal for default. 17 M. L. J. 215 Col. 1980 P. I.

5 Rule 533—Advocates right of to appear and plead when instructed by vakils—Rules of the original side of the Madras High Court. 3 M L T 322 Col 2074 P I.

(e)--N W P High Court Rules.

1 Rules 2,180,182,183,197 — Advocate—Misconduct--Publication of articles in a newspaper by the Advocate defaming Judges 3 A L J 592—A W N 1906 P 226. *See Letter's Patent (N W P).*

2 Rules 197—Powers of enrolment of advocates—Suspension without trial—Disciplinary authority of High Court. In the mather of S. B. Sarbadhicary, 9 B L R 9—29 A 95 (P C). *See Letter's Patent (N W P).*

High Court's charter Act (24 and 25 Vict. ch 104.

1 *See Charter Act (24 and 25 vict ch 104) Col. 404 to 407 P II.*

High way

1 Acquisition of right of way by public—Penal assesment—Right of Government to levy—MADATHAPU RAMAYA *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **27 M. 386.** *See Madras Regulation XXVI of 1802.*

2 Dedication of—Dedicator of a road to public—His rights—Representatives of a community. 31 C. 839 Col. 928 P. I:

3 *Obstruction to—Necessity of special damage--Plaintiff owner of soil of highway.*

A person cannot generally maintain an action against another for obstruction to a highway unless some special damage has accrued to him. 7. C. P. L. R. 97 and 9 M. 463 referred to This rule, however, has no application where the plaintiff is the owner of the soil of the highway. His ownership is subject to the right of the public to use the highway. But any use of the soil of the highway other than the legitimate use of it for the purposes of highway is a trespass upon the soil, for which the owner can sue, even without proof of special damage. 31 C. 839 and 10 A. 553 referred to. BHUKAN LAL *v.* MIRRA AND JAGIA RAOT. **2 N. L R 110.**

4 *Obstruction—Special damage—Public thoroughfare.*

The plaintiff sued for an injunction restraining the defendants from offering obstruction to his carrying *taboot* during the Muharrum and for damages which he had sustained in consequence of the obstruction which had been offered to him. The Sudordinate Judge rejected the claim on two grounds: 1st on the ground that the defendants were entitled to *Man-pans* from the plaintiffs, and second, that the plaintiff had sustained no loss by the obstruction.

Held, that the first ground for the dismissal was wrong, if the defendants had any right to *Man-pans* they ought to have asserted it in a Court of law but that could give them no right to prevent the plaintiff from using the public road, but the suit was rightly dismissed on the second ground.

In such a suit the plaintiff to succeed must prove either that there has been an interference with his public right which involves interference with some private right of his or that if no private right of the plaintiff has been interfered with he has suffured some damage peculiar to himsolf from the interference with his public right. KASHIM SAHEB FAKIR SAHIB *v* AYAPPA. **5 B L R 646.**

5 Ownership of soil—Vesting of street in a Municipality. 25 M 635 Col: 1975 P I.

6 Right to use for processions—Light to use public road. 26 M 376 Col. 928 P I.

Hills.

1 Adverse possession of—Against Government—Burden of proof—Inamdar. 28 M 69 Col: 2055 P I.

2 Quarrying--Co-sharer's right to sue for accounts. 32 C 837 Col: 914 P I.

Hill Tracts.

1 Forfeiture of Zamindari with Hill tracts

—Adverse possession — Government suit against a CWN 553 G 238 P I.

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